4

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

FEBRUARY 16 TO MAY 6, 1898

JOHN A. BROOKS
STATE REPORTER

VOL. 116
FIRST EDITION

012-131/01

CHICAGO
CALLAGHAN & CO.
1899

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Rec. Dec. 4, 1899

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

SUPREME COURT.

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F. H. CHAMBERS AND WILLIAM W. CHAPIN.

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—— —— § 33	583
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—— —— § 70	57, 292, 585
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—— —— § 99	125, 591, 594, 595
—— —— § 104	289, 292
—— Act 235 (Local), chap. 9, § 1	595
—— —— —— chap. 13 § 2	594
1895, Act 3, chap. 5, § 4	495
—— —— —— § 5	500
—— —— chap. 11, § 11	499
—— Act 63	362
—— Act 110	571
—— Act 180	12
—— Act 215, chap. 8, § 20	410, 411
—— —— chap. 22, § 1	409–411
—— Act 288 (Local), chap. 8, §§ 2, 3	434
—— Act 466 (Local), chap. 10, § 4	630
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JANUARY TERM, 1898.*

PEOPLE *v.* SCHOTTEY.

INTOXICATING LIQUORS—SUNDAY CLOSING.

A saloon is open, within the contemplation of 3 How. Stat. § 2283*e*, requiring saloons to be kept closed during Sunday, where a door leading from the saloon into a hallway is left open, and people are allowed to enter the hallway, which does not connect with any room other than the saloon.

Exceptions before judgment from superior court of Grand Rapids; Burlingame, J. Submitted January 28, 1898. Decided February 16, 1898.

John Schottey was convicted of violating the liquor law. Conviction affirmed.

Dunham & Thornton, for appellant.

Fred A. Maynard, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney (*Rodgers, McDonald & Corwin*, of counsel), for the people.

LONG, J. The respondent was convicted on a jury trial in the superior court of Grand Rapids upon the charge of having kept his saloon open on Sunday, the 1st day of August, 1897. The cause comes into this court upon exceptions before sentence. The assignments of error are all based upon portions of the charge of the court.

It appears that the saloon of the respondent is a building about 25 by 40 feet. In the front part is the saloon. Back of this are the living rooms. There is a front door to the saloon, opening out upon the street, and at the rear is a door opening into the living rooms. On the north side of the saloon is a hallway about 5 feet wide by 16 feet

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long, with a front door to the street and a side door opening into the saloon. There is no way of getting from this hallway into the living rooms except through the saloon. The people introduced as a witness Mr. Hale, a police officer of the city, who testified that on the morning in question he saw the respondent, with three others, go into this hallway, the side entrance to the saloon; he followed, stepped into the hallway, and saw the three men there, with the door of the saloon wide open, and the respondent's bartender near the bar; that the respondent said he was not there for any business, but that the men were there to inquire about some men from Jackson. The respondent testified that the men came into the hallway, but did not go into the saloon; that one asked for tobacco, and he stepped into the saloon, got it, and gave it to him. He further testified that the bartender passed through the saloon that day, though the bartender himself denied that he was there on the occasion testified to by Mr. Hale.

In view of the testimony of the respondent, it is unnecessary to discuss the questions raised upon the charge. Upon that testimony it appears that the saloon was not closed, within the meaning of section 2283*e*, 3 How. Stat.; and the court might very properly have directed a verdict of guilty. *People* v. *Richmond*, 59 Mich. 570; *People* v. *Kirsch*, 67 Mich. 539; *People* v. *Lyng*, 74 Mich. 579; *People* v. *Ackerman*, 80 Mich. 592; *People* v. *Neumann*, 85 Mich. 98; *People* v. *Repke*, 103 Mich. 459; *People* v. *Hawkins*, 106 Mich. 479. In the last case it was said:

"It is settled by former adjudications that it is the duty of the jury to take the law from the court, and that, where there is no conflict in the evidence, and the defendant in open court admits facts legally constituting an offense, the court may so state, and even go so far as to direct a verdict. In this case the defendant had practically sworn to his own guilt."

So in the present case the respondent admitted that the saloon was open on the occasion when these men were in

the hallway, and that the bartender passed through the saloon on that day.

But it is contended by the learned counsel for the respondent that the facts shown do not warrant the conclusion that the saloon was open for the purpose of doing business, and that the respondent and his family had the right to go into the saloon, or pass through it; and also that the bartender was a member of respondent's family. The situation of the rooms in this building is very peculiar. This hallway has no opening, aside from the outside entrance, except into the saloon. In order to go into the living rooms in the rear it is necessary to pass through the saloon, and in passing from the living rooms to the front of the building it is necessary to go into the saloon. Both this side entrance from the hallway and the door to the living rooms were open on that day. The statute means that saloons shall be kept closed the first day of the week, and compliance with it means that all the doors and openings shall be kept closed, whether in the front or rear. It is apparent that this hallway was made the runway from the street into the living rooms by passing through the saloon. It was immaterial whether any liquors were sold there that day or not. As was said by Mr. Justice MORSE in *People* v. *Cummerford*, 58 Mich. 331:

"When the statute requires the doors to be closed, it means that no one shall be inside, or get inside thereafter, before lawful hours, at least with the consent of the defendant or his authorized agents. We had supposed the meaning of the term 'closed door,' under the statute, had been fully heretofore set forth by this court in the cases of *Kurtz* v. *People*, 33 Mich. 282, *People* v. *Waldvogel*, 49 Mich. 337, *People* v. *Blake*, 52 Mich. 566, and others. It is not alone the intent or purpose for which the saloon is kept open that is offensive to the law, but also the opportunity furnished persons to obtain liquors at the hours and on the days prohibited by the statute."

The object of the statute was to cut off all subterfuges or excuses for the violation of the statutory inhibition, and

the keepers of such places must keep them closed at their peril. *People* v. *Higgins*, 56 Mich. 159. There was a front door to this saloon, opening from the street. To go into the saloon, the hallway was not necessary. The hallway did not lead into the living rooms, but into the saloon. It was into this hallway the young men were taken on the morning in question. Confessedly, that door was open, and the door from it into the saloon was open. This was a plain violation of the act.

The conviction must be affirmed, and the court below directed to proceed to judgment.

The other Justices concurred.

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TRITT *v.* HOOVER.

BOUNDARIES — GOVERNMENT SURVEY — DISPUTE — PAROL ADJUSTMENT.

The rule that a boundary line, long treated and acquiesced in as the true line, becomes the legal boundary of the premises, regardless of the result of new surveys, is applicable to a case where the owners of premises divided by a township line, agreeing that the government surveyed line was crooked and incorrect, established by parol, and marked by a fence, a different line, in which they acquiesced for upwards of 30 years.[1]

Error to Cass; Coolidge, J. Submitted February 1, 1898. Decided February 16, 1898.

Ejectment by Peter A. Tritt against Michael W. Hoover. From a judgment for plaintiff, defendant brings error. Affirmed.

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[1] On the question of adverse possession due to ignorance or mistake as to boundaries, the authorities are collected in a note to *Preble* v. *Maine Cent. R. Co.*, (Me.) 21 L. R. A. 829.

John R. Carr and *Edward Bacon*, for appellant.

Harsen D. Smith, for appellee.

LONG, J. This is an action of ejectment for a strip of land about 8 feet wide by 40 rods long, between the two farms of the parties. Each claims the land. It appears that in 1830 William Garwood and Lewis Edwards, Sr., became the owners of adjoining farms in Cass county. The Edwards farm was immediately north of the Garwood farm, and in the town of Pokagon, while the Garwood farm was in Howard township; the two farms being divided by the township line. For many years there was no division fence between them, but some time prior to 1840 a lane was laid out, east and west, between the farms, supposed to be near the township line. This lane was used in common by the parties. About the year 1840, Edwards and Garwood decided to establish a division line, so that a line fence might be erected. Mr. Edwards claimed that the survey made by the government surveyor was run too far north, and was crooked. For the purpose of ascertaining the true line, the parties employed Mr. Woolman, a surveyor, to run out the line. This survey was made, and stakes placed along the line. The matter thus rested until 1852, no division fence having been erected in the meantime. In 1852 Mr. Edwards was about to go to Oregon, when Garwood asked him to stake out the line before he went away. This Edwards did, and he and Garwood divided the line, and each erected his portion of the division fence. This fence, as agreed upon by the parties, remained there over 30 years; each occupying the lands up to the fence thus established.

In 1867 Beeson and Wood became the owners of the Garwood farm, and claim that, in order to ascertain the true line, they caused a survey to be made by Mr. Banks, who located the corner of the section about 8 feet north of the division fence erected by Edwards and Garwood. Mr. Beeson claims that he called the attention of Mr. Edwards to this new corner found by Banks, and

that Edwards then told him it certainly must be the line, and it was all right. The defendant thereafter, through *mesne* conveyances, became the owner of the premises formerly owned by Garwood. In 1883 the plaintiff purchased the Edwards farm of the heirs of Lewis Edwards; and he claims that the line as marked and established by Edwards and Garwood in 1852, and upon which the fence was built, is the true line. In 1887 the defendant, without any notice to the plaintiff, caused this fence to be set over upon the land claimed by plaintiff about 8 feet, for the distance of 40 rods. The plaintiff put it back again where it originally stood, when the defendant again moved it over where he claimed the true line was located.

On the trial, Mr. Beeson was called as a witness, and testified that, after the survey by Mr. Banks, in 1867, he had a talk with Mr. Edwards, the then owner of the premises, but now deceased, in which it was agreed between them that, when the fence needed repairing, they would set it over on the line surveyed by Mr. Banks. Plaintiff introduced testimony tending to show that Mr. Edwards had departed this life, but that, soon after the Banks survey, he stated that he and Garwood had established the line, and that he had never consented, and never would consent, to its being moved. The jury found a verdict in favor of the plaintiff, and defendant brings error.

It is the contention of the defendant that the court erred:

1. In refusing to direct a verdict in favor of defendant.
2. In disregarding the application of the statute of frauds.
3. In charging the jury so that they might find for the plaintiff because of some parol agreement for establishing the line between Garwood and Edwards, although there was no dispute or doubt as to the location of the United States survey.
4. In charging so that they might find that plaintiff was entitled to recover without the aid of the statute of limitations.
5. In charging so that they might find plaintiff was

entitled to recover because of title acquired by adverse possession.

6. In charging so that they might disregard the evidence on the part of defendant as to the transaction of 1867, although the jury might believe this evidence to be true.

The court charged the jury, substantially, that if the agreement was entered into between Garwood and Edwards as claimed by plaintiff, the fence built as claimed, and the parties occupied up to the fence as claimed, Mr. Edwards acquired title by acquiescence before the year 1867; that the material fact in the case was whether the acts of Mr. Edwards, and the transaction between him and Mr. Beeson in 1867, estopped Mr. Edwards and his grantees from making any claim to this land; and that if they found there was an agreement, definite and fixed, at that time, that Edwards was to surrender this piece of land to Mr. Beeson, or an agreement by which he was to surrender the possession, and it was a definite and well-understood agreement, then the adverse possession of Mr. Edwards ceased, and his title by acquiescence was abandoned; that, if something further remained to be done to make it a definite agreement, then there was no surrender of possession, nor was there any act which created an estoppel. It appears that this fence remained there some 20 years after this agreement was claimed to have been made.

The claim of defendant is that there was no testimony showing, or tending to show, that the line established by Garwood and Edwards was on the original government surveyed line; that there was no evidence that the government surveyed line was in dispute between the parties, or that there was any uncertainty about the true location of that line. We think this contention cannot be sustained. It appears that one Brookfield made the original United States survey. The testimony shows that Mr. Edwards claimed that the Brookfield line had been run too far north, and that it was a crooked line, and the parties acquiesced in the idea that the Brookfield line was too far north, and

was crooked, and they entered into an agreement, not only to make it a straight line, but to put it where it should be according to the rights of the parties. The fence, as we have said, was built in 1852, and remained there for over 30 years before any one attempted to move it. It has been repeatedly held by this court that a boundary line, long treated and acquiesced in as the true line, ought not to be disturbed on new surveys, and that 15 years' recognition and acquiescence are ample for this purpose. *Smith* v. *Hamilton*, 20 Mich. 438 (4 Am. Rep. 398); *Joyce* v. *Williams*, 26 Mich. 332; *Stewart* v. *Carleton*, 31 Mich. 270. In *Dupont* v. *Starring*, 42 Mich. 492, it did not appear that any dispute, or even uncertainty, existed before the owners agreed upon the true line. In *White* v. *Peabody*, 106 Mich. 148, it was said:

"The rule is well settled in this State that when parties, by mutual agreement, and for that express purpose, meet, and fix a boundary line, and thereafter acquiesce in the line so established, such line will be considered the true line, although the period of acquiescence fall short of the time fixed by the statute of limitations for gaining title by adverse possession."

The court below was therefore not in error in submitting the question to the jury as to the arrangement between Garwood and Edwards in 1852, and it would have been error to direct the verdict in favor of the defendant.

The defendant has no cause to complain of the charge of the court in reference to the claimed agreement between Beeson and Edwards in 1867. The fence had been erected upon a line agreed to between the parties upon a claim made by Mr. Edwards that the original line was too far north. Mr. Garwood acquiesced in that claim. The rule is well settled that, before the possession has ripened into an actual title, the continuity of possession may be broken in several ways: By an entry of the legal owner; by abandonment of the possession by the occupant; by a subsequent recognition of the owner's title, or an acknowl-

edgment, made before the statute has run in his favor, that he has and claims no title to the lands occupied. 2 Wood, Lim. § 270. The court left the question to the jury to determine whether Edwards made an agreement as claimed with Mr. Beeson. The jury having found against that contention, the question must be regarded as settled.

The judgment is affirmed.

The other Justices concurred.

SANDS v. MANISTEE CIRCUIT JUDGE.

TRESPASS—JUDGMENT—COSTS.

The defendant in an action for trespass to lands, brought in the circuit court, is entitled to costs, where the title is not put in issue by the pleadings, or contested upon the trial, and the verdict is less than $100.

Mandamus by Louis Sands to compel James B. McMahon, circuit judge of Manistee county, to set aside a judgment for costs against relator, as defendant in an action for trespass. Submitted February 1, 1898. Writ granted February 16, 1898.

Glassmire & Erb, for relator.

George L. Hilliker, for respondent.

PER CURIAM. Frederick Schulke brought suit against the relator in the circuit court in an action of trespass on the case for overflowing his lands, and recovered a verdict of six cents damages. Upon the trial title was conceded in the plaintiff. The court awarded costs to the plaintiff on the ground that title to land was in issue, and based his decision upon *Thorn* v. *Maurer*, 85 Mich 569. In

Ostrom v. *Potter*, 104 Mich. 115, this question received a careful examination in an opinion by Mr. Justice LONG, and it was there held that the plea of the general issue did not put in issue the title to lands in an action of trespass. In *Thorn* v. *Maurer*, the title in plaintiff was disputed, as appears from the record, which we have examined. The defendant requested the court to instruct the jury that plaintiff had not established such a title as to enable him to maintain the suit. In *Druse* v. *Wheeler*, 22 Mich. 439, the defendant gave notice of title with his plea. The rule established in this case is this: That where the title is not put in issue by the pleadings, or contested upon the trial, costs will not be allowed to plaintiff where the verdict is less than $100, but the defendant will recover costs.

The writ will issue.

YOUNG *v.* KENT CIRCUIT JUDGE.

1. DEPOSITIONS—STATUTES—STAYING SUIT.

   The court should not stay the further prosecution of a suit by a nonresident until he shall appear before a notary of the State of his residence, in pursuance of a notice to take his deposition, given under Act No. 180, Pub. Acts 1895, where he is in the State for the purpose of attending the trial, and offers to testify as a witness, and to produce all books and papers in his possession relating to the subject in litigation.

2. SAME—PREPARATION FOR TRIAL.

   Where the plaintiff in a civil action notifies defendant of his willingness to appear as a witness at the trial of the cause, and to produce all books and papers in his possession relating to the subject in litigation, he cannot be compelled to submit to the taking of his deposition under Act No. 180, Pub. Acts 1895, merely to enable the defendant to inquire into the truth of his testimony before the case is brought on for trial.

Mandamus by Owen Young to compel Allen C. Adsit, circuit judge of Kent county, to set aside an order staying the prosecution of a suit at law. Submitted February 1, 1898. Writ granted February 16, 1898.

Taggart, Ganson & Taggart, for relator.

Crane, Norris & Stevens, for respondent.

GRANT, C. J. Relator resides in North Dakota, and is plaintiff in a suit pending in the circuit court for the county of Kent. The suit is brought upon a promissory note, transferred to the relator by the payee before due. The case was noticed for trial last December. Plaintiff came from North Dakota to attend, and he, through his counsel, urged the case for trial. The defendant's counsel objected, and the trial was postponed two weeks. Again plaintiff insisted upon trial, and at the request of the defendant the trial was again postponed. On December 9th plaintiff served a written notice upon the attorneys for the defendant, as follows:

"*Gentlemen*: As you have expressed a desire to have me as one of your witnesses on the trial of the above claim, I hereby notify you that you can now subpœna me at 379 Fountain street, in the city of Grand Rapids, and I will obey the requirements of any subpœna legally issued and served. Yours, etc.,

"OWEN YOUNG."

On January 10, 1898, the attorneys for plaintiff served upon the attorneys for defendant the following notice:

"The attorneys and counsel for plaintiff and appellant offer, as they have before offered, and as plaintiff has offered, to produce plaintiff as a witness at the trial of said cause, with whatever books, papers, or memorandum that he may have relating to or bearing upon the questions in issue, which defendant and appellee may give notice to have produced upon the trial of said cause."

Defendant's counsel had given notice to take plaintiff's deposition in North Dakota on December 9th. Plaintiff

swears that he left North Dakota to come to Grand Rapids to attend the trial, being unaware of the steps taken to secure his deposition. A subpœna was duly served upon plaintiff, calling him to appear before the notary in North Dakota for examination on December 21st, and notice thereof served on his attorneys on December 15th. He declined to appear before said notary, or to produce the books and documents called for. Thereupon the circuit court, upon petition of the defendant, entered an order perpetually staying the further prosecution of the suit until plaintiff appeared before the notary in North Dakota, and gave his testimony.

The notice to take this deposition was given under Act No. 180, Pub. Acts 1895. This act authorizes the taking of depositions of witnesses generally. It includes the parties to the suit, and under it either is entitled in good faith to take the deposition of the party residing outside the State. *Kidder* v. *Blaisdell*, 45 Me. 461; *Hart* v. *Eastman*, 7 Minn. 74; *Abshire* v. *Mather*, 27 Ind. 381; *Ex parte Priest*, 76 Mo. 229. It is apparent from the affidavits made by the attorneys for the defendant that they are not aware what they can prove by the plaintiff. One of the affidavits expressly states that it is "important that plaintiff's testimony be taken before the trial of the said cause, in order that the truth of his testimony in respect to the facts and circumstances stated by him may be inquired into between the time of the giving of said testimony and the trial of said cause." We do not think the defendant made such a case as authorized the entry of the order staying the trial of the cause. 1 Thomp. Trials, § 753. Defendant's attorneys were proceeding in good faith to secure plaintiff's deposition; but when the plaintiff was present, ready and willing to be examined upon the trial, and tendered himself as a witness, we do not think they were entitled to his deposition. The order must be set aside. If plaintiff refuses hereafter to appear as a witness, the court may then make such order as may be necessary. We are not to be understood as holding that

the defendant may be deprived of the testimony of the plaintiff. We simply hold that he is not entitled to it when the party offers himself as a witness in court, and the purpose of taking his deposition is to discover whether there is any defense, and to prepare for trial. The defendant has taken the deposition of the payee. The writ will issue as prayed.

The other Justices concurred.

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FULLER v. EHLE.

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APPEAL—FINDINGS OF FACT—EVIDENCE—REVIEW.

The findings of the court in a case tried without a jury will not be disturbed on appeal if there is evidence fairly tending to establish them.

Error to Kent; Grove, J. Submitted February 2, 1898. Decided February 16, 1898.

Assumpsit by William Fuller against Lyman W. Ehle for professional services. From a judgment for plaintiff, defendant brings error. Affirmed.

Newnham & Fyfe, for appellant.

R. M. Ferguson, for appellee.

MOORE, J. This case was commenced in justice's court, and was appealed to the circuit court, where it was tried before the circuit judge, who rendered a judgment in favor of plaintiff for $36.45, from which judgment defendant appeals.

The circuit judge made a finding of facts in substance as follows: That the plaintiff was a physician living at

Grand Rapids, and was called by the attending physician to go to Dorr Center to assist in performing a surgical operation upon the person of Birney Ehle, who had just passed his majority, and was then at the home of defendant, who is his father; that after the operation was performed, and before he left the house, the plaintiff was paid $15 for his services by the defendant, who then informed him that, if he desired his services further, he would notify him; that later the attending physician telephoned the plaintiff that the young man again needed his attention, and to come; that plaintiff at once responded to the message, when another operation was performed, at which time defendant paid plaintiff in part for his services, and agreed to pay the balance later; that, about a year later, defendant again promised to pay plaintiff the balance due him. It was for this balance that judgment was rendered. It was the claim of the defendant that the services were rendered for the son, and not for the defendant, and that the young man should pay the doctor. The testimony in relation to the hiring was conflicting. It was for the trial judge to determine the weight of the testimony, and we cannot disturb his findings if there is evidence fairly tending to establish them. The record discloses that there was such testimony.

The judgment is affirmed.

The other Justices concurred.

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QUICK *v.* RAYMOND.

1. MORTGAGES — FORECLOSURE — SATISFACTION OF DECREE—DEFICIENCY.

   At the request of the administrator of a mortgagor's estate, the mortgagee, who had secured a decree in foreclosure proceedings, consented to postpone the sale as long as the administrator should keep the yearly interest paid and take good care of the premises. Two years later, the administrator found himself unable to pay the interest, and an arrangement was made whereby the heirs of the mortgagor quitclaimed the premises to the mortgagee, and the latter leased the same to the administrator under an agreement that the estate should be entitled to a deed upon payment of the amount due under the decree, with interest, taxes, and insurance. A year later, the administrator, being unable to make the payment, voluntarily surrendered possession to the mortgagee. Upon the final account of the administrator, the amounts paid as interest money were disallowed, and these payments were thereafter recovered back in an action instituted on behalf of the estate. Subsequently the heirs of the mortgagor filed a bill in equity to declare the foreclosure decree satisfied by reason of their quitclaim to the mortgagee. *Held*, that complainants' contention was inequitable; that the mortgagee, having been obliged to refund the interest money, the payment of which by the administrator was an essential part of the transaction, should be permitted to pursue his remedy under his decree, and to enforce against the estate a claim for a deficiency arising after sale.

2. SAME—MERGER.

   It is the rule in equity that a mortgage is not merged by a purchase by the mortgagee of the equity of redemption where the interest of the mortgagee requires the titles to be kept separate.

Appeal from Jackson; Peck, J. Submitted February 4, 1898. Decided February 16, 1898.

Bill by Lucy Quick and others against Jane E. Raymond, executrix of the last will and testament of Mahlon

H. Raymond, deceased, to declare a foreclosure decree satisfied, and to enjoin further proceedings thereunder. From a decree dismissing the bill, complainants appeal. Affirmed.

Grove H. Wolcott, for complainants.

Melville McGee (*Charles A. Blair*, of counsel), for defendant.

LONG, J. The following statement of facts, set out in the brief of defendant's counsel, is substantially correct:

"Isaac C. Quick, in his lifetime, gave to Dr. Raymond his promissory note for $4,000, payable in two years, with interest at 6 per cent. To secure the payment thereof, Quick and his wife gave Raymond a mortgage upon certain lands. Afterwards Quick died, and, as nothing had been paid on the note and mortgage, Raymond commenced a foreclosure in chancery. The bill for the foreclosure of the mortgage was taken as confessed by all the defendants, and on or about the 17th of January, 1893, a decree was entered for the sale of the mortgaged premises at any time after the 30th of January, 1893. The amount found to be due on the 5th of January, 1893, was $4,711.35. No question is made as to the proceedings, or the amount found to be due.

"At the request of Augustus O. Quick (the then administrator of the estate of Isaac C. Quick), Raymond consented to postpone the sale under the decree, only upon the condition, however, that Quick should pay the interest and costs, and secure the payment of the next year's interest by a chattel mortgage on all the wheat and rye then growing upon the place; and, in order that Raymond should not be delayed in getting possession of the place in case Quick failed to pay the interest and costs by the 1st of April, 1893, Raymond required that the complainants should execute a quitclaim deed of the premises, and leave it in one McGee's hands, to be delivered to him if they failed to pay. The interest and costs were paid April 1, 1893, and McGee delivered the quitclaim deed back to Quick, and he burned it. In making this arrangement, Quick acted in good faith, believing that by so doing he would be able to pay all the debts of the estate, and save the farm for the heirs. Raymond, on his part, in postpon-

ing making sale of the premises and allowing Quick further time, acted in good faith, and consented to postpone the sale as long as Quick kept the yearly interest on $4,000 paid, and did not allow the farm to run down.

"Raymond allowed the Quicks to go on for nearly two years longer, and until January 25, 1895. Then, Quick being unable to pay the yearly interest on the $4,000, and at Quick's request, they executed and delivered to Dr. Raymond their quitclaim deed. Quick was still confident that he could pay Raymond the amount of the decree and interest, and Raymond agreed to lease him the place for another year, and if Quick would, during the year, pay or secure to be paid the amount of the decree, with interest, taxes, and insurance, then Raymond would deed the place back. Quick had possession of the place until the spring of 1896, when, being unable to pay Raymond, he voluntarily left the place, and gave up the possession to him. Before the lease expired, and in December, 1895, Raymond told Quick that he would take $4,100, and deed back the farm, and give him until the following March to pay it; thus throwing off several hundred dollars from the amount actually due him.

"Some time in the spring or early summer of 1896, it seems that Mr. Wolcott, complainants' solicitor, was employed by Quick or by the creditors of the Quick estate. He prepared Quick's final account as administrator of the estate of Isaac C. Quick, deceased, appeared before the judge of probate on the hearing, and secured the disallowance of about $1,200 of Quick's credits; but, notwithstanding such disallowance, the judge of probate found only $47.07 in Quick's hands which had not been administered properly, besides some farming tools. Quick resigned, and John W. Miner was appointed administrator *de bonis non* of the estate of Isaac C. Quick, deceased. Complainants' solicitor thereupon filed the bill in this case to enjoin the sale, and declare the decree satisfied. The circuit judge refused to grant an injunction, and on the final hearing dismissed the bill. Raymond went on, and sold the premises under his decree, and bid them in for $4,000, leaving a deficiency of $896.64. Complainants' solicitor afterwards brought suit in the name of John W. Miner, administrator *de bonis non*, against Raymond, to recover back the money paid by Quick to Raymond for interest money due him under the decree,[1] and recovered

[1] See *Miner* v. *Raymond*, 113 Mich. 28.

a judgment against him for about $750, which has been filed as a claim against his estate, he being now deceased. Having failed to get an injunction to restrain the sale under the decree, complainants' solicitor now asks a decree declaring that the acceptance of the deed by Raymond from the Quick heirs in January, 1895, paid and satisfied the decree. The court below, after hearing all the testimony, refused to make such a decree, and dismissed complainants' bill, with costs. Complainants appeal."

It is complainants' claim, substantially, that, when Dr. Raymond took the quitclaim deed from Mr. Quick, his mortgage became merged in the greater title, and he cannot, under the circumstances here stated, now assert his mortgage claim, make sale thereunder, and bid the property in for less than the amount due on the mortgage, thereby putting him in the position where he may now present a claim for such deficiency against the estate of Isaac C. Quick, or set the same off against the judgment obtained by the administrator *de bonis non*. We think this contention cannot be sustained in the law, and that it would be inequitable to permit it. When the deed was taken by Dr. Raymond, a large payment had been made on the mortgage by the then administrator of the estate. This amount was recovered back by the administrator *de bonis non;* and Dr. Raymond, or his executrix, is now seeking only to be placed in the same position as before that recovery. It is equitable that this estate should be so placed. The proofs do not establish the fact that any agreement was made by Raymond to accept this deed of January 14, 1895, in full payment and satisfaction of his decree. The rule in equity is that a mortgage is not merged by a purchase by the mortgagee of the entire interest in the equity of redemption where the interests of the mortgagee require the titles to be kept separate; and the intent to keep them separate will be presumed when it is to the interest of the mortgagee so to keep them. *Cooper* v. *Bigly*, 13 Mich. 478. The rule is this:

"At law, when a greater and lesser, or a legal and equitable, estate coincide in the same person, the lesser or

the equitable estate is immediately merged and annihilated. But this rule is not inflexible in equity; whether or not a merger takes place depending upon the intention of the parties and a variety of other circumstances. Notwithstanding the technical rule of law, equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intention of the parties; and, in the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent will ordinarily be implied." 15 Am. & Eng. Enc. Law, 314, and cases there cited.

See, also, *Cook* v. *Foster*, 96 Mich. 613; *Gibbs* v. *Johnson*, 104 Mich. 124; *Tower* v. *Divine*, 37 Mich. 443.

The court below very properly held there was no merger of the mortgage, and dismissed complainants' bill. That decree will be affirmed, the defendant to recover the costs of this court.

The other Justices concurred.

NORTHWAY *v.* NORTHWAY.

DIVORCE—DESERTION—EVIDENCE.

The testimony of the husband in divorce proceedings based upon the wife's alleged desertion, that he never assented to her leaving him, and that she went away against his will, supports a finding that the separation was against the will of the husband, although it appears from his cross-examination that he did not object to her taking her things and going, where his conduct in this respect is explained by his statement that he knew it would do no good for him to object.

Appeal from Ionia; Davis, J. Submitted February 3, 1898. Decided February 16, 1898.

Bill by Albert Northway against Laura A. Northway for a divorce. From a decree for complainant, defendant appeals. Affirmed.

Chaddock & Scully, for complainant.

V. H. & H. H. Smith, for defendant.

MOORE, J. The complainant was granted a decree of divorce upon the ground of desertion, from which decree the defendant appeals.

It is claimed by the solicitors for the defendant that:

"To constitute desertion which will be sufficient cause for a divorce, there must be satisfactory proof of three things: *First*, cessation of cohabitation; *second*, an intent in the mind of the defendant to desert; *and, third, that the separation was against the will of complainant.*"

It is admitted that the proof establishes the first two of these essentials, but it is claimed that the evidence does not show that the separation was against the will of the complainant. The proofs show that the defendant left the house of her husband at Smyrna, where they were then living, more than two years before the bill of complaint was filed. The defendant was sworn as a witness, and testified, in substance, that she would never live with her husband again, and that she so determined when she left Smyrna. The husband testified that he never consented to her moving, and that she took her things away against his will. It is true, on the cross-examination he testified that he did not object to her taking her things and going, and did not forbid the man who moved her furniture from doing so; but he added, as explanatory of his conduct, that he knew it would do no good for him to object. The circuit judge had the witnesses and parties before him. He saw their manner in giving their testimony, and came to the conclusion—which we think is fairly warranted by an examination of the record—that complainant had proven his case.

The decree is affirmed.

The other Justices concurred.

FYFE *v.* ENGLISH.

APPEAL—REVIEW—CANCELLATION OF MORTGAGE.

Upon a review of the evidence, a decree canceling a mortgage and a sheriff's deed on foreclosure thereof was affirmed.

Appeal from Berrien; Coolidge, J. Submitted October 13, 1897. Decided March 1, 1898.

Bill by Lawrence C. Fyfe, trustee for the heirs of Mary A. Thresher, deceased, against Peter English and James Baley, for the cancellation of a mortgage. From a decree for complainant, defendants appeal. Affirmed.

Edward Bacon (*George M. Valentine*, of counsel), for complainant.

Gore & Harvey, for defendants.

HOOKER, J. In the year 1877, Mrs. Joseph P. Thresher died seised of a large number of village lots in Thresher's addition to the village of Benton Harbor, including blocks 5 and 6. Her husband, and three children, named, respectively, George, Frank, and Harriet, survived her. Harriet married a man named Fitzgerald. As the children became of age, they gave powers of attorney to their father, authorizing him to convey or mortgage the premises. They were dated as follows: George's, December 22, 1881, revoked June 3, 1892; Frank's, May 10, 1887, and March 1, 1889, revoked May 18, 1892; Harriet's, July 22, 1889, revoked July 30, 1892. Joseph P. Thresher seems to have had or claimed some interest in the premises, though what the claim was, or how it arose, does not appear. On August 13, 1891, Joseph P. Thresher, acting for himself and as attorney for the three children, made and delivered to Peter English a promissory note for $1,250, due in four months, with interest at 8 per cent.,

payable annually, until paid. It was secured by a mortgage upon block 5 of the Thresher addition. The mortgage shows that the note and mortgage were given to indemnify English against loss through his indorsement of a note for a like sum, given by Thresher, on behalf of himself and children, to the First National Bank of Benton Harbor, about the same time, to procure some money for Frank Thresher. The bank note was not paid at maturity, but was renewed as follows: November 18, 1891, by a note for $1,200, executed by all; March 1, 1892, by a note for $1,200, executed by all; May 14, 1892, by a note for $1,200, executed by all except Peter English; June 24, 1892, by a note for $1,224, executed by all except Frank Thresher. It was paid September 30, 1892, by Peter English, who proceeded to a sale of the property on foreclosure by advertisement. He bid in the property, and afterwards assigned his right to Baley. Before redemption expired, this bill was filed in the interest of the Threshers, and the circuit court, in chancery, made a decree canceling the mortgage and the sheriff's deed, upon the ground, among others, that the obligation had been paid. The defendants have appealed.

To determine whether this decree was warranted, it becomes necessary to understand the business relations of English and the Threshers, which were considerably involved, and include the transfer to English of several parcels of land which the Threshers claim that he never paid for. An outline of these transactions is as follows: On May 18, 1885, the Threshers made a mortgage for upwards of $4,500, upon all of the property, to Lucy M. Dickinson, and on April 29, 1893, this mortgage was assigned to Horace M. Olney. Previous to August, 1891, English had organized the Excelsior Gas Company, and held some of its stock. He and Thresher had become interested in some business affairs, and Thresher had deeded to him lots 5 and 16, block 6, the consideration mentioned in the deed being $800. On behalf of Thresher it is claimed that these lots were never paid for, and

he testified that the only money that English ever paid him, that he could recall, was the sum of $1,500, which will be explained later. English testified that on January 15, 1891, he paid Thresher by check $500, and that this was secured by chattel mortgage, and was finally repaid by the deed mentioned, dated March 4, 1891. The check was produced upon the hearing. In December, 1890, English, Thresher, and others had associated under the name of the Benton Harbor Improvement Association, for the purpose of advancing the interests of the village, and attempted to incorporate. It is claimed by counsel for the Threshers that they did not organize a valid corporation; but, whether they did or not, it entered into a contract, on May 25, 1891, with Thresher, acting for himself and children, whereby the association conditionally purchased all of the Thresher property, and proceeded to replat it, by a plat called the "Benton Harbor Improvement Company's Third Addition," which was filed in December, 1891. By inadvertence the old plat was not vacated, it is said. It was after the making of this contract, and before the making of the new plat, that the mortgage to English hereinbefore mentioned was made. The Threshers retained possession of the property.

About January 1, 1892, a new scheme was evolved, in which both English and Thresher took a lively interest, —English, because he was a promoter of the enterprise; Thresher, because of its prospective advantage in the disposition of his lots, if for no other reason. The Benton Harbor Land & Improvement Company was formed, with the view to the sale of 1,400 village lots, at the uniform price of $200, regardless of value, the parcels to be distributed by lot among the several purchasers, after all had been sold. Life was to be infused into this project by the building of a large hotel, which was expected to materially advance values. Under this scheme, much of the identical property which was under contract to the Benton Harbor Improvement Company was to be included in the 1,400 lots to be sold by the new company, and it is obvious that

it was necessary that the Threshers should be released from the first contract. This brings us to a transaction whereby 18 lots were conveyed by Thresher to English. The deed was dated January 28, 1892, and the consideration was one dollar. On the same day, and as part of the same transaction, English made a quitclaim deed of the same lots to John Bell, Albert R. Nowlan, J. H. Lee, and J. Stanley Morton, for the nominal consideration of one dollar. Lee, at least, was a director of the improvement association, and it is said that all were, and English testified that he acted for the accommodation of the association and Thresher, and received no personal benefit or interest in the land conveyed. This is a portion of the property conveyed to English for which counsel for the complainant claim that he did not pay. English testified that it was conveyed by Thresher in payment for $5,000 stock, for which Thresher was indebted to the association. There is other testimony to the same effect. Two days later, on January 30, 1892, a contract was made between English and the Threshers, in furtherance of the scheme. This contract was in writing, and by its terms the Threshers were to sell to English 158 lots, being a portion of the property originally contracted to the improvement association, and perhaps all, with the exception of the 18 lots deeded two days before. For this property English was to pay $52,500, as follows: $1,500 on the signing and delivering of a duplicate of the contract, $25,000 on or before August 1, 1892, and $26,000 on or before January 1, 1893. English gave his notes for the last two payments. English also agreed to give a bond for $5,000 as security, and for liquidated damages in case of his failure to perform. Title was not to pass until one-half of the consideration was paid. The contract contained the further provision:

"Also, that this agreement is wholly contingent upon a settlement being made with the Benton Harbor Improvement Association, and cancellation of a certain contract for same premises here named between them and aforesaid first party. If no settlement can be amicably made, this instrument becomes void. And it is further agreed

that the party of the first part hereby conveys to the party of the second part the right to sell four of the above-described lots for the purpose of making the first payment of $1,500 to the party of the first part on the said property, if sold at actual value, and first payment is made on delivery of this contract."

The premises were to be conveyed "free and clear from all incumbrances whatever, by good and sufficient warranty deed."

On February 1, 1892, English drew his check for $1,500, which was paid on February 3d. On February 4th the Threshers conveyed to English four lots,—1, 2, 17, and 18, block 7. The consideration mentioned in the deed was $1,500. On the same day they conveyed to him the west half of lots 11 and 12, block 8, the west half of lots 5 and 11, and the west fraction of lots 6, 7, 8, 9, and 10, block 17, being all the lands east of Nowlan street. The consideration stated in this deed was one dollar. English testified that the fractions and parcels east of Nowlan street were conveyed as a part of the same transaction in which the four lots were conveyed, and were part of the property conveyed to enable him to raise the first $1,500 payment under the contract, and that such was the understanding between him and Thresher. Thresher stated that English sold lots and raised the $1,500, but could not state what lots they were. His counsel claim that the lots conveyed to English on February 4th produced more than $1,500. The record shows that the four lots were sold by English to Fifield for $1,800, and the land east of Nowlan street to Lee for $1,000. The bond mentioned in the contract of January 30th was not given, but in lieu thereof English delivered 100 shares of Excelsior Gas Company stock, of the par value of $10,000.

The hotel scheme was a failure, and the affairs between the improvement association and the Threshers remained unsettled, and the whole land improvement project appears to have been abandoned. May 14, 1892, Thresher deposited the gas stock in bank as collateral security for

his obligation. A quarrel arose between Thresher and his children, and, as already stated, on May 18, 1892, Frank Thresher revoked his power of attorney, and like action was taken by George on June 3, and Hattie on July 30, 1892. The payment upon the English contract was not made when it fell due, on August 1, 1892. On August 26th, Thresher's children commenced a suit in chancery against him. A written indorsement, signed by Thresher and English, appears upon the contract, extending the time for making payment one year. It is dated May 17, 1892, being the day before the first revocation of the power of attorney. English testified that he signed this indorsement some time in September, at the request of Thresher, to aid him in his suit with the children, to which English was made a party defendant. English was promptly informed of the revocation of the power of attorney, and Baley was directed not to deliver the gas stock to any one without an order from the younger Threshers. This occurred before the bill was filed. An answer was filed on behalf of English (though he says it was without his knowledge or instigation), admitting the executing of the contract, but alleging that nothing was due thereon, and "that on or about May 17, 1892, a valid contract was entered into by and between this defendant and Joseph P. Thresher, by which the time of payment on said contract was extended on the payments provided for in said contract for one year." On or about September 30, 1892, English obtained from Thresher an order, of which the following is a copy:

"JAMES BALEY,
"Cashier First National Bank,
"Benton Harbor, Mich.

"*Sir:* Whereas, on or about the 14th day of May, 1892, I deposited in your bank 200 shares of stock of the Excelsior Gas Company as collateral to a joint note made by myself as attorney in fact for George M. Thresher, Mrs. Hattie D. Fitzgerald, and Frank L. Thresher, and myself, and which stock was standing in the name of Peter English, and was not assigned by him; and where-

as, the purposes for which he left said stock with me have been accomplished, and I have no interest in it, either as attorney for the above-named parties or myself: Now, therefore, you are hereby instructed to deliver the same to Peter English.

[Signed] "J. P. THRESHER."

Thresher says that this was delivered upon a promise by English that he would pay the $1,224 note at the bank, and the agreement to return the stock to him as soon as acquired. English claims that he was about selling the gas works, and needed this stock to transfer, and that Thresher knew and assented to this, and that there was no promise to assume and pay the note, and thereby relieve the Threshers from liability thereon, or to return the stock to Thresher. English did pay the note in order to get the stock, and received the stock from the bank. October 15, 1892, Frank Thresher conveyed his interest in the property to Ankeny. In May, 1893, Mr. George S. Clapp, counsel for the Threshers, on their behalf, presented to English a writing admitting that the contract of January 30, 1892, was canceled, and containing a release of all claims against the Threshers, with the request that he sign it. This was refused. In October, 1893, English began foreclosure, and in January, 1894, received the sheriff's deed, and in October, 1894, he assigned his interest to Baley. In November, 1894, Thresher and his children settled their difficulties. During the time intervening between January 30, 1892, and January 11, 1894, a controversy existed between the improvement association and the Threshers over their respective rights. This does not appear to have been settled. The Olney mortgage was never paid. Fyfe, the complainant, is a trustee under a deed from the proper parties, and he filed this bill for the "cancellation of the mortgage, adjustment of equities, and an accounting."

The learned circuit judge who heard the cause filed an opinion, in which he stated his conclusions of fact. He gives prominence to the confidential relations which

existed between Joseph P. Thresher and English. It is stated therein that the contract became forfeited, and English thereby became liable to Thresher in the sum of $5,000 as liquidated damages, the gas stock being chargeable as security therefor; and that in May, 1892, this stock was deposited as collateral by Thresher, with the consent of English, and that the order for the stock was delivered to English upon the promise to pay the $1,224 note. The opinion also states that English sold lots and received money for them in excess of the $1,500, and received $1,000 for Thresher's stock in the association.

The case was elaborately argued in both courts, and, to our minds, there is ample justification for the decree made by the learned circuit judge. We are of the opinion that his decree should be affirmed, with costs; and it is so ordered.

The other Justices concurred.

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CHOATE *v.* STEVENS.

1. PROMISSORY NOTES—ADDED RECITALS—CONDITIONAL SALE.
   An instrument in the form of a promissory note, which contains a recital that the consideration for it and for certain other notes is a soda fountain, described in a contract of sale of even date; that the maker, to whom the apparatus has been delivered, is to acquire no title thereto until all the notes are paid; and that the payee is to have the right, in case of nonpayment at maturity of either of the notes, to "enter and retain immediate possession of the property, * * * and remove the same,"—imports an absolute, not a conditional, sale, with reservation of title by way of security.

2. SAME—NEGOTIABILITY.
   The negotiability of such note is not impaired by the recitals as to the consideration and reservation of title.

3. SAME—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

Whether the written contract of sale, executed some days before, in accordance with the terms of which the notes in question were given, could properly be examined by the court for the purpose of determining the character of the transaction as bearing upon the negotiability of the note, in case the recitals in the note had left the matter in doubt,—*quære.*

Error to Wayne; Hosmer, J. Submitted October 15, 1897. Decided March 1, 1898.

Assumpsit by Rufus M. Choate against Frederick D. Stevens and Frederick J. Todd upon promissory notes. From a judgment for plaintiff, defendants bring error. Affirmed.

Frank D. Andrus, for appellants.

Bowen, Douglas & Whiting, for appellee.

HOOKER, J. The defendants have appealed from a judgment upon two written instruments, substantially alike, of one of which the following is a copy:

"$115. DETROIT, July 25, 1893.

"For value received, March 16, 1895, after date, I promise to pay to the order of Low's Art Tile Soda-Fountain Co. one hundred and fifteen dollars, with interest 6 per cent.

"The consideration of this and other notes is the soda-draught apparatus described in contract of same date as this and other notes, which soda-draught apparatus the undersigned has received of said Low's Art Tile Soda-Fountain Co. Nevertheless it is understood and agreed by and between the undersigned and the said Low's Art Tile Soda-Fountain Co. that the title to the above-mentioned property does not pass to the undersigned, and that, until all said notes are paid, the title to the aforesaid shall remain in the said Low's Art Tile Soda-Fountain Co., who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retain immediate possession of said property, wherever it may be, and remove the same. Payable at the Preston National Bank."

Each bears, as an indorsement, the name of the payee. The defendants say that they were improperly admitted in evidence, for the reason that they are not promissory notes, and that, if the indorsements are to be treated as an assignment of the chose in action, it should have been alleged in the declaration; and, further, that there was no evidence that the plaintiff was the owner of the notes sued upon. Both briefs indicate that the question considered most important, if not decisive of the case, is that of the negotiability of the notes.

The instruments—to the end of the fifth line—are in form promissory notes. If there were nothing more, they would be as perfect and complete promissory notes as it is possible to make. The writing proceeds to state the consideration for said notes, which, though not essential, was harmless. *Wright* v. *Irwin*, 33 Mich. 32. This is followed by the statement that the parties agree that the title to the property for which the notes were given shall remain in the payee, who, in case of nonpayment at maturity of either of said notes, "may enter and retain immediate possession of the property, without process of law, wherever it may be, and remove the same." If it can be said that this writing shows a sale of the soda fountain, as contradistinguished from a contract to sell, the provisions as to title amount to no more than a chattel mortgage. Mr. Justice Harlan said in the case of *Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S. 280:

"The fact that, by agreement, the title is to remain in the vendor of personal property until the notes for the price are paid, does not necessarily import that the transaction was a conditional sale."

In that case the court was able to find from the evidence that the parties intended to effect a sale, and that the title reserved was merely the title of a mortgagee. The distinguished jurist added that "each case must depend upon its special circumstances," which proposition is emphasized by the case of *Harkness* v. *Russell*, 118 U. S. 663, where

the facts were held to show a conditional, and not an absolute, sale. If we can place this construction on this transaction,—*i. e.*, that it was a sale,—there is no difficulty in sustaining the negotiability of this note, under our own decisions. See *Brooke* v. *Struthers*, 110 Mich. 562; *Wilson* v. *Campbell*, Id. 580.

The record shows that the soda fountain was furnished under a written contract, and that these notes were given some days later after delivery, in accordance with its terms. If we were to consider the provisions of this contract, we should not hesitate to say that this was a sale with a reservation of title by way of security. As said in *Brooke* v. *Struthers*, *supra*, there are cases which hold that a contemporaneous writing may be examined to determine the negotiability or nonnegotiability of a note. See cases cited. While, perhaps, this contract is not strictly a contemporaneous writing, it was one of the surrounding circumstances under which the notes were made. But we find it unnecessary to pass upon that question, as we think the same is implied by the notes. These being negotiable notes, a declaration upon the common counts was sufficient, under our well-settled rule. The judge allowed the jury to consider defendants' right to damages by way of recoupment, and, apparently, such damages were allowed. We think the ownership established. No question appears to have been raised at the trial over the genuineness of the indorsements.

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

The other Justices concurred.

BURROWS *v.* LEECH.

1. PARTNERSHIP — INSOLVENCY — MORTGAGES — COMMON PARTNER.
   A mortgage given by an insolvent firm to another firm to secure a valid indebtedness is not fraudulent, as a matter of law, as against unsecured creditors, by reason of the fact that the firms have a common partner.
2. SAME—EQUITY—SCOPE OF EXAMINATION.
   The disposition of equity, when once it acquires jurisdiction of a controversy, to make its examination broad enough to do full and exact justice between the parties, would not necessarily impel it, in a suit involving an indebtedness between firms having a common partner, to go beyond the adjustment of the claim as between the firms, for the purpose of ascertaining, by taking an account of the business of the creditor firm, what, if any, balance could be found in favor of the common partner, in order that such balance might be deducted from the amount of the recovery.
3. SAME—BASIS OF ADJUSTMENT.
   The argument, therefore, that firms having a common partner cannot have their controversies adjusted at law, nor in equity except upon the basis of individual, as contradistinguished from firm, rights, is of no force when invoked by unsecured creditors of the debtor firm in support of a contention that security given to the creditor firm should be applied to the claims of general creditors to the extent that it benefits the common partner.
4. SAME—FIRM NOTE—PRESUMPTION.
   A note executed by a partnership will be presumed, in the absence of a contrary showing, to be a valid claim against the firm, although it was given for the debt of one of the members.
5. DEBTOR AND CREDITOR—SECURITY—FRAUD.
   Evidence of the invalidity of a single claim sought to be secured with other valid claims by a mortgage executed by an insolvent is insufficient to show an intent to defraud unsecured creditors, where the amount of the invalid claim is trifling in proportion to the whole amount secured.
6. SAME.
   Unsecured creditors of an insolvent cannot complain because assets of the debtor were applied by the secured creditors to

the payment of an invalid claim, where the total assets were insufficient to satisfy the valid claims secured.

7. SAME—PRIORITIES—ADJUDICATION.

The adjudication of the rights of secured creditors of an insolvent under their several securities, postponing them to a certain mortgage, will not preclude them from asserting, as against unsecured creditors, their superior claim to a fund appropriated by the trustee under the prior mortgage to the payment of an invalid claim.

Appeal from Wayne; Lillibridge, J. Submitted November 4, 1897. Decided March 1, 1898.

Judgment creditor's bill by George L. Burrows and Amasa Rust, copartners as Burrows & Rust, against Edward W. Leech, survivor of himself and Patrick M. Gamble, deceased, copartners as E. W. Leech & Co., and Archibald G. Lindsay, individually and as receiver. Complainant Rust died pending the hearing, and the cause was revived in the name of complainant Burrows as survivor. From a decree dismissing the bill, complainant appeals. Affirmed.

Thomas S. Jerome (*H. E. Spalding*, of counsel), for complainant.

De Forest Paine and *Hoyt Post*, for defendant Lindsay.

HOOKER, J. One Gamble was a member of two copartnerships, viz., E. W. Leech & Co., consisting of E. W. Leech and himself, and Lindsay & Gamble, consisting of the defendant Lindsay and himself. The firm of E. W. Leech & Co. and its individual members became insolvent, and Gamble, for and on behalf of the firm, gave mortgages upon the firm property, to secure certain creditors. The first mortgage was given to the Michigan Savings Bank, the second to Lindsay for the purpose of securing claims of Lindsay & Gamble and the People's Savings Bank, and these were followed by several others, given to persons and firms not parties to this record.

Some questions arise upon the nature of two of the claims covered by the second mortgage, but there is no doubt that one of these represents an indebtedness from E. W. Leech & Co. to Lindsay & Gamble, for lumber purchased by the former from the last-mentioned firm. Proceedings were commenced in chancery to foreclose the mortgage given to Lindsay, and to convert the mortgaged property (which was mostly personal) into money, that it might be applied upon the several mortgage claims, in proper order, so far as it would go. It seems to be admitted that there was not sufficient to pay all of the mortgages. All of the mortgagees were made parties, and Lindsay was appointed receiver, and sold the property under an order of the court. A final decree was made, directing the order and amounts in which the fund should be applied to the several mortgages. The complainants (unsecured creditors of E. W. Leech & Co.), having procured a judgment upon their claim, applied to the court having jurisdiction of the proceedings mentioned for leave to levy execution upon the property, subject to the mortgages, and this was granted. The execution was subsequently returned with a small collection from another source, and unsatisfied as to the residue. The bill in this cause was then filed, attacking the mortgage given to Lindsay as fraudulent, and asking that the receiver be required to account to the complainants, upon the ground that, inasmuch as there was a common partner, the mortgage given secured a debt in which one of the mortgagors was interested as creditor, and that, if held valid, it would have the effect of withdrawing some of the assets of E. W. Leech & Co. from their creditors, and applying them to the purpose of one of the members of the firm, *i. e.*, Gamble. It is also claimed that the mortgage was made with an intent, upon the part of Gamble, to defraud the creditors of Leech & Co.

The first contention rests upon the well-known principle of the law that, while copartnerships are treated as distinct entities in the mercantile world, they are not in the law, all common-law actions being brought for or against

persons constituting the firm, in their individual names, and upon the rule that one cannot be both plaintiff and defendant in an action at law. The authorities are therefore uniform to the effect that one firm cannot maintain a common-law action against another having a common partner, though the law does not treat contracts between such firms as void, and it is only necessary for the creditor firm to make an assignment of its claim, to make it collectible by an action at law. Evidently, as the technical rules mentioned are the only obstacle to collection of a debt by one firm against another in an action at law, the prohibition does not rest upon any obvious injustice, but is a good illustration of that inelasticity of the common law which it is the province of equity to remedy. The authorities agree that equity may take cognizance of these cases in a suit between the parties. Still equity follows the law in both respects. It does not treat the partnership as an entity, nor does it make the common partner both complainant and defendant; but, all being before the court, it so frames its decree as to grant proper relief.

Counsel for the complainants do not dispute the jurisdiction of equity in a suit arising between, and restricted to the members of, the debtor and creditor firms. They do, however, maintain that in such a suit a court of equity would not content itself with treating the two firms as distinct entities, and make a decree for the whole amount of the debt, but that, inasmuch as it is dealing with individuals, it must sift out individual, as contradistinguished from firm, rights, and that it must therefore take an account of the business of the creditor firm, and ascertain what, if any, balance can be found in favor of the common partner, that such balance may be deducted from the amount of the complainants' recovery. Here we may pertinently inquire why equity should be so strenuous to leave the interest of the common partner in the debtor rather than the creditor firm, where, as in this case, he might prefer to have it left, and where justice to persons not members of either firm might imperatively require

that it should be left. Again, it would seem to logically follow that if it is dealing with individuals, rather than partnership entities, and is going to do complete justice to all, it must go further, and take an accounting of the business of the debtor firm, in order to know what member is to have the benefit of this deduction. Counsel cite, in support of this proposition, an anonymous article published in 5 Am. Law Rev. 47, which contains the best exposition of this theory that we have seen. The author reaches the conclusion by a process of reasoning from admitted premises, and his aim seems to be, not to maintain the justice or expediency of such a rule, but its existence as a logical necessity, growing out of the legal *status* of the copartnership, with which it is evident that he is not in sympathy. The article concludes as follows:

"On the whole, therefore, it seems to us that a dissolution of the plaintiff firm is necessary, and, as incident thereto, an account between its members, before this debt can be recovered. That no more direct remedy can be had seems evident from the entire absence of adjudication upon the subject in the English equity courts, where such cases would certainly be frequent were there any remedy short of a dissolution. Like so many other anomalies in the law of partnership, this springs entirely from the failure of the courts to recognize the personality of the firm; and until that is done, and until the courts in their rules of practice cease to make the relation of partnership conform to a code of rules adopted in a state of society where mercantile usages had little influence, no change for the better will be made."

We may agree with him that matters would be simplified by the adoption of the rule of the civil and Scottish law that copartnerships, like corporations, should be treated as legal persons, and that the harmony of our jurisprudence would be thereby made more perfect; but we are not convinced that there is no escape from the hard logic by which his result is reached. The difficulty with it seems to be that it ascribes to equity some of the inelasticity pertaining to legal remedies. If the author is correct, in addition to the "anomaly" that he mentions, we

have another, viz., a case where, by reason of the rigidity of legal rules, equity cannot find a way to afford merited relief, which it is the especial boast of equity that it can always do; and this seems to stand entirely upon the proposition that in no case will equity "do things by halves," but that, having jurisdiction of a subject, it will refuse to deal with it, unless it can settle finally all questions appertaining to or growing out of the subject. We are not disposed to deny that in a proper case equity might go to great lengths to do full justice between the parties, but not to do injustice; rather than to do which it might better "do things by halves," and doubtless would. As will be seen by the article mentioned and the cases therein cited, it is admitted on all hands that equity has jurisdiction in such cases in suits between the members of the two firms. We disagree with the conclusion that it must in all cases settle the partnership affairs of one or both concerns before making a final determination. Were this a suit between the two firms, both being solvent, brought merely to settle a disputed claim, it would be a hardship to compel both to submit to accounting, that equity might settle innumerable and infinitesimal questions that neither cared to have settled, as incident to some relief which neither party desired, because of their ability to adjust their own affairs after the disputed question should be disposed of. It would be quite time enough to go into these matters when the pleadings should show that justice required it.

Conceding that equity may require an accounting if justice requires it, with a view to setting off against the debt the interest of Gamble therein, we will examine the situation. Leech and Gamble owed Lindsay & Gamble $16,000 or thereabout. It was an honest and valid debt. In a suit by an assignee, no question of Gamble's interest could be raised by way of set-off. If Gamble had seen fit to pay it, Leech must have accounted with him for his share. No creditor could dispute the validity of such payment. Had property been given in payment, it would

have been a valid transaction. But, instead of this, property was pledged, by way of mortgage. Leech appears to have consented to this when informed of it; but the firm creditors—*i. e.*, these complainants—attack it, saying that it is a fraud upon them, because it applied firm assets to a claim of Gamble, a member of the firm, thereby using the assets to pay their (complainants') debtor. The only foundation for this is that in judicial proceedings the copartnership is not treated as an entity for the purpose of procedure. But it is so treated for some purposes. We have seen that it is only necessary that the claim be assigned to show that the courts do not hold the contract invalid. It is a familiar rule that a partnership is so much of an entity that its assets may not be reached by a creditor of a partner until the creditors of the firm are satisfied, showing that its members are not treated as owners of aliquot portions of the property, as in cases of tenants in common. Even between themselves, an accounting must be taken before it can be determined that a partner's interest amounts to more than a duty to pay the debts of the concern. Courts of bankruptcy uniformly allow a creditor firm to prove its whole claim against a debtor firm having a common partner, and make no account of the interest of the common partner. We do not discover that this is limited to cases where the creditor firm is insolvent. If it were, it would become necessary for the court to inquire into the solvency of all firms having obligations against the creditor, as well as the debtor, firm, where there was a common partner in such firms, and bankruptcy proceedings might be interminable. In 17 Am. & Eng. Enc. Law, 918, it is said:

"While the common-law conception of a partnership was that it was not a thing in any way distinct or separate from the members composing it, the law of Scotland, the Roman law, and the system of continental Europe, as well as that of Louisiana, regarded a firm as a separate person, having distinct rights and interests, and capable of suing and being sued by its own members. Equity has treated partnerships as distinct from their members in

some respects, and now judicial determinations that *a firm is a distinct entity are frequently found.*"

A long list of cases support the statement.

Lindsay & Gamble were, like these complainants, creditors of Leech & Co. The assets of that firm were subject to their claims. Either might be lawfully paid, and a court would treat them alike in proceedings in bankruptcy. The amount paid to Lindsay & Gamble might furnish a fund out of which these complainants could realize something more, if, upon adjustment of the affairs of Lindsay & Gamble, a balance should be found due Gamble. But, by the ingenious process of reasoning adopted, an effort is made to deprive the creditors of Lindsay & Gamble, and the surviving partner, Lindsay, of the right of collection of any portion of their claim out of the amount due from Leech & Co., notwithstanding the fact that Lindsay & Gamble were made preferred creditors by Leech & Co., and, unless by reason of Gamble's common interest, might lawfully be such. By this course of reasoning they thwart Leech & Co. in their attempt to prefer another creditor, and succeed in getting themselves preferred. It must be conceded that, unless Gamble has some tangible interest in this debt, the complainants have no "leg to stand on;" for their equities against Gamble are in no way superior to those of the creditors of Lindsay & Gamble, or, for that matter, Lindsay, and their claim against Leech & Co. is no better than Lindsay's claim growing out of his partnership with Gamble; so their contention cannot, in any event, find a more substantial basis than the proposition that they have superior equities than Gamble's personal creditors because this property belonged at one time to Leech & Co. By the transfer to Lindsay & Gamble it was taken from the assets of Leech & Co., and substantially became assets of Lindsay & Gamble; and thereafter the complainants were in as good and no better position than Gamble's personal creditors, of which we think they have no reason to complain; for, whatever else may be said,

Gamble's interest, whatever it may have been, arising out of his connection with Lindsay & Gamble, was not in any sense or at any time an asset of Leech & Co.

This conclusion practically settles the question of fraud so far as it is predicated upon the inability of Gamble to appropriate to his own use the assets of Leech & Co. through this mortgage. We should, however, advert to the case of *Kayser* v. *Heavenrich*, 5 Kan. 324, which is relied on by the complainants as sustaining their contention that legally this was a fraud, and it must be admitted to be closely in point. In that case J. Westenberger was a partner in the firm of J. Kallman & Co., in whose name he executed a deed of assignment to the plaintiff, whereby he conveyed to him all of the firm's property, to be converted into money, with which he was to pay *pro rata* certain preferred creditors, among whom was one Loewenthal. "In this alleged claim, Westenberger was half owner, they being partners." This was concealed. The trial court found these facts, and that, to the extent of his (Westenberger's) part of the amount for which he preferred Loewenthal, the assignment was for his own benefit, and void, and that the deed was made with intent to defraud the creditors of Kallman & Co. We may note here that the opinion states the material question thus:

"The evidence, which makes part of a very voluminous record, fully sustains the findings of the court *as to the facts*, and the one material question for consideration is whether, *the facts all being true*, the conclusion of the court that the instrument of assignment is void is a just conclusion of law."

Attention is directed to the fact that the court was careful to base its opinion on the *truth of all of the facts*, and not alone upon the fact that Westenberger was a partner of Loewenthal in the particular claim. Again, there is a possible distinction in the fact that the case does not show that Westenberger was a partner in any other sense than that of part owner of this particular claim. It is said that "one-half of this amount is of right the prop-

erty of one of the assignors [which would hardly be accurate if they were copartners], and is a secret trust for his benefit." This would seem to imply that they were merely tenants in common of the claim, and that the relation of copartners may not have existed. The court determined that the facts in that case showed that there was a secret trust for the benefit of the maker of the instrument, and that it was void under a statute there cited. But, if we give this case the full force of the claim made for it, we shall find it unsupported, except as it may be thought to be supported by those authorities which hold that individual debts against partners are postponed to partnership obligations so far as partnership property is concerned, in which the decisions are uniform, but which we do not consider decisive of this question.

This conclusion does not settle the question of fact wherein lies the claim that this mortgage was given with the intent to defraud the creditors of Leech & Co., of which it is said the firm of Lindsay & Gamble were advised, because the knowledge of Gamble, who made the mortgage, was the knowledge of the firm of Lindsay & Gamble. We see no evidence of such intent, unless it is to be found in the fact that the mortgage covered the claims of the bank, $3,000, and Patterson, $725. If these were not debts of Leech & Co., they were improperly included. As to the former, we are satisfied that equity should treat it as a debt of Leech & Co. As to the Patterson claim, the facts are as follows: Patterson sold a monument to Gamble. In payment, he received some money and a note of $400, signed by Gamble, and one of $325, signed by Leech & Co., dated December 1, 1890. At the time the mortgages were given, both of these notes were unpaid, and in the hands of the bank, and are understood to have been covered by a note for $725, given with the mortgage, which mortgage, as stated, was understood to be given Lindsay in trust for the payment of the claims of Lindsay & Gamble and the bank. Lindsay knew nothing about the condition or possibly the existence

of the Patterson claim when he took the mortgage. He did when he paid it. It is possible that the $325 note was a valid claim against Leech & Co. At least, we cannot say that the evidence shows it to be otherwise, though given for the debt of Gamble. See 1 Bates, Partn. § 565 *et seq.* The $400 note never was a valid claim against them, and the mortgage could not stand as security for that, as against the creditors of Leech & Co. This, however, would not benefit the complainants, as it would simply increase the fund for the payment of succeeding mortgages, which is shown to have been inadequate. Gamble was sick at the time, and died soon after, so we have not the benefit of his version of the affair; but the amount is so trifling in proportion to the entire transaction that it does not impress us as an intended wrong to creditors. As stated, the succeeding mortgagees would have had a superior right to this amount had they asserted it. But they did not, perhaps because ignorant of the fact. The complainants now claim that inasmuch as the court has adjudicated the rights of the succeeding mortgagees, and postponed them to the mortgage of Lindsay, including the amount of the Patterson claim, they are cut off from making any claim to this fund, and, for that matter, to the amount of such mortgage to Lindsay, if it should be set aside, leaving it open to the complainants' claim; but we think this an inequitable claim, and, before we should permit it, we should allow such mortgagees to be heard, to ascertain whether they were parties to any fraud against the complainants, of which this record furnishes no evidence. As to the Patterson matter, in view of the inadequacy of the fund to pay all of the mortgages, the mere fact, if it should prove to be a fact, that the later mortgagees consented to its payment, thereby lessening their own fund, is not a matter of which these complainants can complain.

Upon the whole record, we are satisfied that the decree of the circuit court has done substantial justice. It will therefore be affirmed, with costs.

The other Justices concurred.

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[139 [2]476

KELLEY v. GUY.

1. PROMISSORY NOTES—WANT OF CONSIDERATION—EVIDENCE.
   Want of consideration for a note executed by defendant to decedent in her lifetime is established where it is shown that the note was executed merely as a memorandum of a previous transaction, whereby decedent paid to defendant the amount of the note in consideration of his agreeing to use the same in the construction of a house where she might make her home and receive maintenance and support, which agreement was carried out to the satisfaction of decedent.

2. SAME.
   A want or failure of consideration may always be shown in defense of an action on a note.

Error to Berrien; Coolidge, J. Submitted January 4, 1898. Decided March 1, 1898.

Trover by Samuel H. Kelley, administrator with the will annexed of the estate of Maria A. Rowe, deceased, against Juan M. Guy. From a judgment for defendant, plaintiff brings error. Affirmed.

Trover for the conversion of a promissory note for $500, executed by defendant to Maria A. Rowe, dated October 25, 1893, and payable five years after date. The case made by the defendant's testimony is that Mrs. Rowe, who was a sister of Mrs. Guy, came from her home in Ohio, in the summer of 1893, to visit the defendant and his wife at Benton Harbor. She was anxious to secure a home for the remainder of her life with her sister and her husband. It was finally agreed that the defendant should build a house, that Mrs. Rowe should contribute $500 for that purpose, and, in consideration therefor, should live with, and be taken care of by, the defendant and his wife. The house was built during that summer; the agreement carried out; Mrs. Rowe had her home with, and was

taken care of by, the defendant until her death, in July, 1894. The entire arrangement rested in parol, and, when Mrs. Rowe paid the money, Mrs. Guy proposed that her husband execute a note to Mrs. Rowe, so that, if Mr. Guy died first, she would have something to show that she had let him have the money. Mrs. Rowe did not want the note, but finally took it, placed it in an envelope, and wrote on the outside, "Juan, take this." The evidence justified the finding by the jury that this arrangement was made, that it was carried out to the satisfaction of Mrs. Rowe, that she did not want the note, that she wanted it given up to Mr. Guy, and there was evidence tending to show that she understood that he had taken it as she directed. Soon after her death, defendant took the note in the presence of others, and, after the appointment of the administrator, told him the facts. He was satisfied of their truth, did not include the note in the inventory of the estate, and did not bring suit until compelled to by some of the legatees. Verdict and judgment were for the defendant.

Samuel H. Kelley (*Edward Bacon*, of counsel), *in pro. per.*

G. M. Valentine, for appellee.

GRANT, C. J. (*after stating the facts*). It is contended on behalf of the plaintiff that the consideration for this note was money loaned, and that parol evidence was inadmissible to show that the consideration was otherwise, under the authority of *Phelps* v. *Abbott*, 114 Mich. 88, and authorities there cited. It is contended by the defendant that the note was given up to him by the deceased, and that it was void for want of consideration. The court instructed the jury that there was not sufficient evidence of delivery to constitute a gift, but submitted the case to them upon the theory that there was no consideration.

A want or failure of consideration may always be shown in defense of a promissory note. If it were established

that the money which defendant obtained from Mrs. Rowe was the consideration for the note, plaintiff's position would be sound; but, according to the evidence on behalf of the defendant, this was not the consideration for the note, but was the consideration for defendant's agreement to build a house, and provide a home and maintenance for Mrs. Rowe, which agreement had been executed by him up to the time the money was paid and the note given. The $500 could not serve as a valid consideration for both agreements. If it was paid pursuant to the first agreement, then there was no consideration for the note.

We think the case was properly submitted to the jury. Judgment affirmed.

The other Justices concurred.

FENTON *v.* MILLER.

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116 45
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1. TENANCY IN COMMON—USE AND OCCUPATION—ALLOWANCE FOR ON PARTITION—STATUTES.

   2 How. Stat. § 5778, which provides that one tenant in common may maintain an action for money had and received against his co-tenant for receiving more than his just proportion of the rents and profits, and which is construed to justify a recovery only for moneys actually received, exclusive occupancy not being sufficient to create a liability under the statute, does not impair the right of a tenant against whom the premises have been held adversely by his co-tenant to have an allowance made in partition proceedings for the value of the use and occupancy.

2. SAME—DEATH OF CO-TENANT—WIDOW'S HOMESTEAD AND DOWER RIGHTS—WHAT INTEREST SUBJECT TO.

   The widow of a deceased tenant in common, who, after her husband's death, holds the entire premises adversely to her co-tenant, will not be relieved from liability to such co-tenant for the rental value of his undivided interest, because of her

homestead and dower rights in the undivided interest which belonged to her husband.

3. SAME—DEMAND FOR POSSESSION—EJECTMENT.

The commencement of an action of ejectment by one tenant in common against a co-tenant who has excluded him is a sufficient demand to be let into possession.

4. SAME—PARTITION—RECOVERY OF RENTS—LIMITATIONS.

Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other from possession, the former asks credit for betterments and improvements made during the entire period, he cannot equitably have the statute of limitations applied against the excluded tenant's right to an allowance for use and occupation during the same period.

5. SAME—IMPROVEMENTS AND BETTERMENTS.

A tenant in common who makes improvements upon the common property, which substantially increase its value, is entitled, after a sale of the property in partition proceedings, to have the improvements considered in determining his just share of the proceeds of the sale.

6. SAME—ADJUSTMENT OF EQUITIES.

Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other from possession, the excluded tenant is to be allowed for rental and the tenant in possession for betterments and improvements, equity requires either that the former should be limited in his credit for rents to the value of the premises in their original state, or, if he is to have the benefit of disbursements made in improving the premises to add to their rental value, be charged with his share of the cost of the improvements at the time they were made, rather than with their depreciated value at the time of partition.

7. SAME—INSURANCE.

A co-tenant in possession is not entitled, upon partition, to an allowance for insurance claimed to have been paid by him, where it does not in any way appear that the insurance inured to the benefit of the excluded tenant.

Cross-appeals from Mackinac; Adams, J. Submitted January 4, 1898. Decided March 1, 1898.

Bill by Charles B. Fenton against Annie M. Wendell-Miller, Eva M. Wendell-McKinnon, and Romain I. Wen-

dell, for a partition of real estate. From the decree rendered, complainant and defendant Romain I. Wendell appeal. Modified.

Henry Hoffman (*C. R. Brown*, of counsel), for complainant.

James McNamara (*John Atkinson*, of counsel), for defendant Wendell.

MONTGOMERY, J. Complainant filed the original bill in this case, praying for a partition of lot 12 in the village Mackinac. An answer was put in, and subsequently proceedings were stayed until the title of complainant could be established at law. This complainant was able to do (see *Fenton* v. *Miller*, 108 Mich. 246); and thereupon, on the 5th day of October, 1896, an amended and supplemental bill was filed, setting up that, since the filing of the original bill, Annie M. Wendell-Miller and Eva M. Wendell-McKinnon had conveyed their interests in the property to Romain I. Wendell, and praying partition, or, if the property could not be divided without prejudice, that it be sold, and the proceeds divided, and that an account be taken of the rents and profits. The interest of complainant, as alleged in the bill, and as established on the trial, is 13-21. The remaining 8-21 was, after the conveyance to Romain I. Wendell, wholly vested in her. On the same day that the amended bill was filed, an answer was filed by Annie M. Wendell-Miller, which set up that the defendant had spent large sums in improvements, and asked a decree in her favor for the same. Mrs. McKinnon and Romain I. Wendell answer, alleging that their occupancy of the property was while they were minors and members of their mother's family, at least up to November 4, 1895, when Romain I. Wendell became of age, and that they are not properly chargeable with rents and profits during this time. On the filing of their answer, a consent decree was made, reciting that Romain I. Wendell had succeeded to the interests of her co-de-

fendants in the premises, defining the respective interests of the complainant and defendant as found in the suit at law, reciting that the premises were so situated that an equitable division could not be made, and providing for a sale of the premises, the payment of a portion of the purchase money into court, and a reference to take testimony touching the improvements made upon the premises, taxes paid thereon, the rents received, etc.

In pursuance of this preliminary decree, a sale was made, at which complainant became the purchaser, at the price of $7,500. Eight twenty-firsts of this sum, or $2,849.24, was paid into court, and remains in the hands of the register of the court, to abide the final order of the court. The parties proceeded to take testimony touching the rents and profits, improvements, repairs, insurance, etc. The case was brought to a final hearing, and decree made, declaring: (1) That defendants Eva M. and Romain I. are not responsible for the rents and profits. (2) That defendant Annie M. Wendell should be charged with rents and profits amounting to $5,100 in the whole, 13-21 of which belongs to complainant, viz., $3,157.05; that she should be credited with improvements and betterments, $4,737.21; with insurance paid, $266; taxes paid, $406.56,—making a total of $5,409.77, 13-21 of which is $3,348.80, leaving a balance against complainant of $191.75, from which was deducted 8-21 of certain taxes paid by complainant, $25.52, leaving the final balance $166.23, which was decreed to defendant Romain I. Wendell. (3) The costs were decreed to complainant. From this decree both parties appeal.

It is contended on behalf of defendants that no allowance should be made for the value of the use and occupancy of the premises by Mrs. Wendell. The statute (section 5778, 2 How. Stat.) limits recovery against a cotenant to moneys actually *received* by the tenant in possession in excess of his just proportion of the rents and profits. This statute is a substantial re-enactment of the statute 4 Anne, chap. 16; and under the English de-

cisions, to justify a recovery under this statute, the tenant must actually have received rents and profits. His exclusive occupancy is not enough to create liability. *Henderson* v. *Eason*, 17 Adol. & E. (N. S.) 701. See, also, *Everts* v. *Beach*, 31 Mich. 136 (18 Am. Rep. 169). But this statute has not been construed as impairing the common-law remedies existing in favor of the co-tenant who is excluded from possession by the occupying tenant. In such a case he may maintain ejectment, and in another action recover the profits. Indeed, the most forcible reason given against a right to recover on a showing of mere occupancy is that plaintiff's mere omission to occupy ought not to constitute a ground of action against one who occupies of right. In this case it appears by defendants' answer to the original bill, filed by Annie M. Wendell-Miller, December 24, 1886, that the premises had been adversely held by defendants; and, on the defendants' motion, the proceedings in this case were stayed until the title should be determined in ejectment. It is settled that on a partition it is competent for the court to adjust the equities of the parties, including rent to the excluded tenant. Freem. Co-ten. § 512; *Hoffman* v. *Ross*, 25 Mich. 175; *Hunt* v. *Hunt*, 109 Mich. 399.

It is also contended that as Mrs. Wendell occupied these premises as the widow of her deceased husband, having a dower interest and a homestead right therein, it is inequitable to charge her with the rental value of complainant's interest. The answer to this is that her dower interest and homestead right only attached to the 8-21 part, and that she had the use of the entire premises, including complainant's share.

It is also claimed that there was no demand to be let into possession; but it appears that an action of ejectment was commenced in 1880, which we think a sufficient demand.

Some question is also made as to the effect of the statute of limitations; but, in the view we take of the accounting, this question is not of much importance, as, if the defend-

ant is to have credit for the expenditures made since 1880 in betterments and improvements, it is apparent that it would be grossly inequitable to exclude all charges for rental value during the same period, as this would result in permitting the defendant to devote the avails of complainant's property to the purpose of creating a charge against him.

Complainant contends that defendant is not entitled to compensation for improvements; but we think, under the circumstances in this case, the circuit judge was right in holding that she is entitled to have the improvements considered in determining what is a just division of the proceeds of the sale. When premises are susceptible of division, the court will award to the party making the improvements the part on which the improvements are situated, and, when the entire premises are sold, it is equitable that the same result should be reached by awarding the increased value of the premises, by reason of the improvements, to the party making them. Freem. Co-ten. § 510. In such a case, however, it is but just to require that a party making claim for improvements offer to share their rents with his co-tenant. Id. § 511. For this reason, as before stated, the statute of limitations cuts no figure in this case, as complainant does not insist on it, and as defendant, as a condition to asking complainant for improvements, should be required to account for rental value.

What should be allowed as compensation? The circuit judge allowed the present value of the improvements. This course is, doubtless, in accord with the general rule. Freem. Co-ten. § 510. But defendant contends that, as against the charge for rental, the improvements should be charged at cost, as the expenditure was a disbursement in order to make the premises rentable at the price charged in the accounting. We think this contention is just. Either the complainant should be limited in his charge for rent to the value of the premises in their original state, or, if he is to have the benefit of the in-

creased rents, the defendant should have credit for the expenditures which made it possible to receive these rents. This is exact equity between the parties. We are disposed to adopt the figures of the circuit judge as to the rental value, viz., $5,100. We think his figures are also substantially accurate as to the repairs and improvements, which include rebuilding of the homestead, and the building of an additional cottage, amounting to $6,316.27. Defendant has also paid $406.56 for taxes, making a total credit of $6,722.83, which, less rental, leaves $1,622.83. Complainant should be charged with 13-21 part of this, $1,004.61. Complainant at one time paid taxes, $67.19. He should be credited with 8-21 of this, being $25.52, which, deducted from allowance to defendant, leaves $979.09, which, with interest from date of sale, will be allowed to defendant.

That this case may not be misapprehended as a precedent, it should be stated that the present value of the improvements exceeds the sum allowed, and that the expenditures in excess of the present value of the improvements have in our computation been applied in the reduction of the rental. We make no allowance to defendant for insurance, for the reason that it does not in any way appear that the insurance inured to the complainant's benefit, and we do not deem the charge proper. *Peoria Marine & Fire Ins. Co.* v. *Hall*, 12 Mich. 209.

Complainant will be entitled to costs of the court below, to be paid out of this sum. Defendant will recover the costs of this court.

The other Justices concurred.

BROWN *v.* BOLT.

MORTGAGE OF CROPS — VALIDITY — TITLE OF MORTGAGOR — PAROL LEASE.

A mortgage of an undivided half interest in a growing crop of peppermint, made by one in possession of the land on which the crop is growing, under a verbal contract good for only one year, cannot, as against the owner of the land, be held valid as to the crop grown by the mortgagor the following year, although the owner knew of the mortgage, and permitted the mortgagor to continue in possession the second year.

Error to Muskegon; Russell, J. Submitted January 5, 1898. Decided March 1, 1898.

Trover by Frank E. Brown and John Sehler against Thomas J. G. Bolt. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

Wolcott & Ward, for appellants.

Stephen H. Clink, for appellee.

LONG, J. This action is in trover, brought in justice's court, for the conversion of one-half of the crop of mint grown on the farm of defendant in the season of 1896 by one Sherman Dow, under contract with defendant, by which it is claimed by plaintiffs that Dow was to become the owner of one-half of said crop. The interest of plaintiffs was under a chattel mortgage given by Dow to them. The cause was appealed to the circuit court, there tried before a jury, and verdict directed in favor of defendant. Plaintiffs bring error.

It appears that this contract was made in the spring of 1895, and was to continue three years. The crop of 1895 was gathered, and turned over to defendant for an in-

debtedness due him from Dow. August 13, 1895, Dow bought some horses and other property from the plaintiffs, to be used in working the farm, and gave them a chattel mortgage of $180, due October 1, 1896, with interest at 7 per cent., on certain property, and on "also four acres, being the undivided one-half of eight acres, of peppermint in the township of Moorland, the peppermint growing on Thomas J. G. Bolt's farm, said farm occupied by Sherman Dow." None of this debt has been paid.

It is contended by plaintiffs that this mortgage was not intended by the parties to operate upon the crop of 1895, which was then about ready to cut, but upon the crop of 1896, and was made to mature at a time not long after the crop of 1896 would mature; that, shortly after giving this mortgage, Dow informed Bolt that he had mortgaged the crop of 1896; that Bolt had full knowledge of the purchase of the horses by Dow, and of the giving of the mortgage, and made no objection. Bolt kept a distillery, and was to distill the mint at 20 cents per pound. The crop of 1896 was harvested, and taken to the distillery, and distilled by Bolt, who kept his share, and also the share of Dow, claiming to hold it to make himself good for advances to Dow to enable him to carry on the business, and also claiming to hold it for the cost of distilling. The defense was that the mortgage covered the crop growing on the land in 1895, and not in 1896; that the contract for the cropping of the farm was not in writing, and could not extend beyond one year; that it was extended only by the agreement of the parties thereafter made, or by Dow's holding over another year, with the acquiescence of defendant; that Dow had therefore no interest in the land or crop for the year 1896 at the time the mortgage was given, and hence had nothing to mortgage; that the testimony shows that the defendant retained the ownership of all the crops until his advances were paid by Dow, and then, and not till then, was he to turn the balance, over and above such advances, over to Dow. Again, it is contended that defendant had a lien

upon the crop for the cost of distilling. The court below must have taken the view of the case as claimed by defendant's counsel, as a verdict was directed in defendant's favor, on the ground that, from the undisputed evidence, the plaintiffs had not made a case.

It appears that mint grows from roots planted. This planting was done in 1895, and two or three crops could be raised from one planting, and in fact the crop of 1896 was raised in that way. We are satisfied that the mortgage did not cover the crop of 1896. It was given before the crop of 1895 was harvested, and during the first year's occupancy by Dow. At that time Dow had no more interest in the crop of 1896 than a stranger. His contract was not in writing, and was valid for only one year. It expired before the crop of 1896 was grown, and could not be renewed except by the acquiescence or agreement of defendant. It happened that he remained over by the acquiescence of the defendant, but that did not give validity to the mortgage. The fact that defendant was informed of this mortgage would not estop him from setting up his right to the crop as against the mortgage.

The judgment is affirmed.

The other Justices concurred.

KNEELAND *v.* HULL.

1. TAXES—DESCRIPTION OF LANDS—LOTS ASSESSED TOGETHER.
   Act No. 206, Pub. Acts 1893, § 25, subd. 4, provides that platted lands may be described in the assessment roll by reference to the plat, and by the number of the lots and blocks thereof. Subdivision 5 provides that when two or more parcels adjoin, and are used and occupied together, they may be assessed by one valuation. Section 53 provides that a part owner of property assessed as one description may pay on the part owned by him. Section 66 empowers the court, before decreeing the sale of lands of different owners which have been assessed together, to separate the same, and apportion to each parcel its just proportion of the taxes. Section 70 provides that each parcel described in the decree shall be separately exposed to sale for the total taxes, interest, and charges. *Held*, that where several platted lots have been properly assessed as one description, and the tax extended against that description as a whole, it is proper to treat it as one parcel in subsequent proceedings.

2. SAME—VALIDITY OF ASSESSMENT—EFFECT OF DECREE.
   When a decree is entered against such a description as one parcel, it is a determination of the legality of the assessment.

3. SAME—CONFLICT BETWEEN TAX RECORD AND TREASURER'S CERTIFICATE.
   In case of conflict between the tax record and the county treasurer's certificate of sale as to the interest in the land sold, the former will control.

4. SAME—TAX DEED—ERROR IN DESCRIPTION—CORRECTION.
   A tax deed issued under the law of 1893 will not be held absolutely void, in a suit to quiet title based thereon, because it purports to convey the entire land, when in fact only an undivided interest was sold, but the error may be corrected by the decree in such suit.

Appeal from Grand Traverse; Corbett, J. Submitted January 5, 1898. Decided March 1, 1898.

Bill by Fred A. Kneeland and John H. Cole against Francis H. Hull and George E. Sprang to quiet title.

Defendants filed an answer in the nature of a cross-bill. From a decree for defendants, complainants appeal. Reversed.

Tweddle & Cross, for complainants.

B. T. Halstead and *Charles F. Hull*, for defendants.

MONTGOMERY, J. Complainants filed a bill in the circuit court of Grand Traverse county, in chancery, to quiet title to lots 71, 72, 73, 74, and 75 of block 3 of Oak Park addition to the village of Traverse City, relying upon a deed made by the auditor general on a sale made on decree entered in December, 1895, for the taxes of 1893. Defendants filed an answer in the nature of a cross-bill, asking to have the deed to complainants declared a cloud on defendants' title, and set aside. The objections taken to the proceeding were two: *First*, that the deed to complainants covered the whole of the lands, whereas the record of sale shows that but five-sixths of the lands were sold; and, *second*, that the sales were not made in parcels, but the five lots were offered in a body. The decree below was in favor of defendants. The complainants appeal. The case turns upon the validity of the two objections to the tax proceedings above stated.

1. Subdivisions 4 and 5, § 25, Act No. 206, Pub. Acts 1893, provide that "in case of land platted or laid out as a town, city, or village, or as an addition to a town, city, or village, the same may be described by reference to such plat, and by the number of the lots and blocks thereof. * * * When two or more parcels of land adjoin and are used and occupied together, they may be assessed by one valuation." Section 53 provides that any person owning an undivided share or any other part or parcel of property assessed as one description may pay on the part thus owned. Section 66, regulating proceedings on hearing of the petition before the court, provides that, "If the lands of two or more persons have been assessed together, the court may, if practicable, separate the

same, and apportion to each parcel its just proportion of the taxes, interest, and charges." By the same section it is provided that the court shall determine the amount chargeable against each parcel of land, and shall order and decree that such several parcels of land, or so much of each as is necessary to satisfy the amount fixed, shall severally be sold as the law directs. Section 70 provides that each parcel described in the decree shall be separately exposed to sale for the total taxes, interest, and charges. We think it is manifest from these provisions that, under certain conditions, it is permissible to assess several platted lots as one description, and that in such case the tax is extended against this description as a whole, and that, when this is done, this description, although consisting of more than one platted lot, is treated as one parcel in the subsequent proceedings. We also think that, when a decree is entered against such a description as one parcel, this is a determination of the legality of the assessment.

2. It is contended by the complainants' counsel that the record shows that the complainants really purchased at the tax sale the whole of these lots; but we do not agree with the contention. The record of the county treasurer shows a sale of five-sixths. Section 70 provides for this entry, and the certificate should be based upon it. When the two conflict, we think the entry of the sale should be treated as the original entry.

Should the deed be treated void as a whole? No good reason occurs to us for so holding. True, we are cited to cases and text writers holding that statutory provisions should be construed strictly, and that strict construction is necessary in order to divest the original owner of his title; but these authorities have little force when sought to be applied to the present case. In this case we have a chancery sale of land on a valid decree, and, by mistake, the entire land was conveyed, instead of a five-sixths interest. It would seem clear that exact equity requires that this error be corrected.

The decree below will be reversed, and decree entered here declaring the complainants entitled to a five-sixths interest in the lands. Neither party will recover costs below. Complainants will recover costs of this court.

The other Justices concurred.

PARKER *v.* BARKENOWITZ.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—SECRET TRUST—VALID CONSIDERATION.

A husband's parol agreement that lands purchased in his name shall eventually be exchanged for a homestead, which shall be taken in the name of his wife, does not operate to discharge a debt that he is owing her, so as to prevent him from thereafter conveying such lands to her in payment of the debt as against other creditors, who set up the invalidity of the secret trust.

Appeal from Wayne; Donovan, J. Submitted January 5, 1898. Decided March 1, 1898.

Bill by Thomas A. Parker against Oscar Barkenowitz and wife, in aid of execution. From the decree rendered, complainant appeals. Affirmed.

Edward McNamara, for complainant.

John A. Matthews, for defendants.

MONTGOMERY, J. Complainant, as a judgment creditor of Oscar Barkenowitz, caused a levy to be made on three lots in the city of Detroit, which had been on the 16th of December, 1896, conveyed by defendant Oscar to his wife, the co-defendant, Susie. The bill in this case was filed in aid of execution. One of these lots, viz., lot

60 of the Pulford subdivision, was purchased in the name of the defendant Oscar on the 16th day of July, 1887. The other two lots, being 300 and 301 of the Harrah subdivision, were purchased, and a deed executed to the defendant Oscar, in 1892. The circuit judge held that the lot in the Pulford subdivision should be subjected to complainant's execution, and sustained the bill to this extent, but sustained the title of the defendant Susie to the Harrah lots. Complainant appeals. Defendants do not appeal.

The rights of the parties as to the Pulford addition lot are not open on this record, and the transactions relating to this lot need not be considered, except as they may bear on the rights of the parties in the two remaining lots. The evidence shows that before the marriage of the defendants, in 1884, defendant Oscar had been in business, and was indebted in some small amounts; that after his marriage, in 1885, his wife engaged in the confectionery business at Chatham, Ontario, under the following circumstances: Both, it seems, were skilled in the business. Neither had any capital. A friend made a loan to Mrs. Barkenowitz, with which a business was opened in her name, she devoting her time to the work, defendant Oscar assisting her. Both testify that the business was done in her name, the bank account kept in her name, and the husband paid six dollars a week for his services. In 1888 the business was sold out, and about $1,100 realized. The parties then removed to Detroit, and the husband engaged in business for himself. In the meantime the lot in the Pulford addition had been purchased and the title taken in the name of the defendant Oscar, apparently with the consent of his wife. The agreement as to this was that lots should be purchased, and, when sufficient in value should be acquired, they should be exchanged for a homestead, which should be taken in the name of Mrs. Barkenowitz. The circuit judge was of the opinion that as to this lot the transaction amounted to a secret trust, which established no equity in Mrs. Barkenowitz superior to or equal to the

creditors; and on the authority of *Township of Maple Valley* v. *Foley*, 113 Mich. 622, and *Iseminger* v. *Criswell*, 98 Iowa, 382, held complainant's equities superior to those of defendant Susie as to this lot. Complainant's counsel contends that the same consideration should rule the case in complainant's favor as to the Harrah lots.

It appears, however, by the undisputed testimony, that the business at Chatham was conducted in the name of Mrs. Barkenowitz; that the bank account was kept in her name; and that, when the business was closed, the avails were paid to her, and by her loaned to her husband. There can be little doubt on this record that both defendants, up to the time of the sale, understood that the avails of the Chatham business belonged to Mrs. Barkenowitz. It does not appear that his prior creditors attempted to reach the property, and it is clear that subsequent creditors could not have done so. *Hedstrom* v. *Kingsbury*, 40 Mich. 636. Defendant Oscar, when he commenced business in Detroit, became indebted to his wife for the amount of the proceeds of the Chatham property. There is no evidence that it was a gift. On the contrary, both testify that it was a loan. These facts distinguish the case from *Iseminger* v. *Criswell*, relied upon by complainant's counsel. Assuming the existence of this indebtedness, does the fact that the two Harrah lots were bought in the name of Oscar, with the purpose of turning them into a homestead to be taken in the name of his wife, discharge the debt? It is true the attempt to create a trust was ineffectual, but, this being so, it would be a severe penalty to treat the transaction as a discharge of the debt.

The decree will be affirmed, with costs of this court to defendants.

The other Justices concurred.

FAIRBAIRN *v.* MOODY.

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1. MECHANICS' LIENS—PAYMENTS TO CONTRACTOR—ESTOPPEL.
   A subcontractor is estopped to assert a mechanic's lien as to payments that have been made by the owner to the contractor in reliance upon the subcontractor's expressed desire that they be so made.

2. SAME—OWNER'S RISK—DISTRIBUTION OF FUND.
   Under section 1 of the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893), providing that the owner shall not be liable to any subcontractors, material men, or laborers for any greater amount than he contracted to pay the original contractor, but that the risk of all payments made to the original contractor before the expiration of the period within which claims for liens may be filed, without the latter's having furnished a sworn statement as to the number and names of subcontractors, etc., shall be upon the owner, and that such payments shall not defeat any lien unless distributed among the subcontractors, material men, or laborers, "or, if distributed in part only, then to the extent of such distribution," the owner is not protected in such payments, though they equal the full contract price, and are distributed for labor and materials, if the distribution is not made *pro rata* among all those entitled to the fund.

3. SAME—CLAIM OF LIEN—VARIANCE.
   The lapse of a day between the date and the filing of an affidavit and claim of lien, under section 5 of the act, will not invalidate the lien.

4. SAME—SERVICE UPON OWNER—SUBSTANTIAL COMPLIANCE.
   Service of a copy of a claim of lien upon the owner on the day of its date, being the day before it is filed, is a substantial compliance with the provision of the statute requiring such service to be made within 10 days after filing.

5. SAME—EXCESSIVE CLAIM—MISTAKE.
   A mechanic's lien is not invalidated because the claim of lien, through an honest mistake, was for an excessive amount.

ON REHEARING.

1. MECHANICS' LIENS—CONTRACT PRICE—PRO RATA DISTRIBUTION AMONG CLAIMANTS.

Where the claims of subcontractors, material men, and laborers exceed the contract price, the amount for which a lien may be enforced by one who has received payments upon his claim, and who has estopped himself from claiming a portion of the balance, is limited to the amount in which his *pro rata* share of the whole exceeds the aggregate of the payments made and the sum he is estopped from claiming.

2. REHEARING—COSTS.

Where the court, in determining the amount for which the complainant in lien proceedings was entitled to a decree, overlooked the fact that certain payments had been made upon the claim in question, making an application for rehearing necessary, no costs of the rehearing were allowed.

Appeal from Wayne; Donovan, J. Submitted January 6, 1898; original opinion, for reversal, March 1, 1898. Rehearing granted May 4, 1898; final opinion, modifying the earlier one, May 24, 1898.

Bill by Thomas Fairbairn against George T. Moody, John J. Warren, and the Kalamazoo College, to enforce a mechanic's lien. From a decree dismissing the bill, complainant appeals. Affirmed.

James H. Pound, for complainant.

T. T. Leete, Jr., for defendant Moody.

MONTGOMERY, J. Complainant filed a bill to enforce a mechanic's lien. The bill was taken as confessed by the defendants Warren and the Kalamazoo College. The defendant Moody answered, setting up a claim of estoppel. The circuit judge dismissed the bill, and the complainant appeals.

The evidence to show an estoppel was in substance as follows: The complainant was a subcontractor. After the work was completed, he stated to the architect, Mr. Mills, that he was anxious to get the matter closed up,

and that he wished that Mr. Moody would hurry up and pay Mr. Warren, so that he (complainant) could get his money out of Warren. Subsequently the architect gave Mr. Warren the usual certificate, and Mr. Moody paid him the full amount remaining due. The architect testifies that he stated to Mr. Moody that complainant stated that he was anxious to have him give the certificate, so that Warren could get his money, and Mr. Moody testifies that Mr. Mills told him this, and that it was because of this conversation that he did pay Mr. Warren. It is true there are other portions of Mr. Moody's testimony which tend to show that he did not pay the money in reliance upon the statement made to Mr. Mills and reported to him; but he subsequently corrects such statements, and affirms that they were made because of a failure to comprehend the questions of counsel. We think the evidence fully shows that the last payment was made in reliance upon this request of complainant, and the circuit judge's finding to that effect should be affirmed. This payment was $204.92, and complainant's claimed lien amounted to $300, leaving a balance of $95.08 as to which the defense of estoppel does not apply. It therefore becomes necessary to inquire whether there are defects in the proceedings.

It is claimed that, as the full contract price was paid, and all distributed for labor and materials, there can be no further lien; but under section 1 of the mechanic's lien law, Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893, the owner is not protected in payments made to the principal contractor, in the absence of a statement on oath by the contractor, showing the names of the subcontractors, etc., and such payments are made at the risk of such owner, and do not discharge the lien, unless distributed by the contractor among the subcontractors, material men, and laborers, "or, if distributed in part only, then to the extent of such distribution."

It is also claimed that no preliminary notice of the

intention to furnish material was served. It is true no notice was served prior to the furnishing of material, but section 1 provides that such notice shall be sufficient if served at any time after the 10 days, but before the original contractor furnishes the statement under oath required by the same section. Such a notice was served later in the present case.[1]

The affidavit and claim of lien referred to by section 5 was sworn to on the 20th of October, and appears to have been filed on the 21st. It is claimed that this difference in dates invalidates the lien. Counsel relies on the analogy between these proceedings and attachment cases, and cites *Drew* v. *Dequindre*, 2 Doug. (Mich.) 93, and *McPherson* v. *McGillis*, 93 Mich. 525. We think these cases ought not to rule this. The purpose of this filing is to furnish notice. The owner is not deprived of the possession of property on the strength of this affidavit, and we do not think the lapse of a day between the date and the filing should invalidate the notice.

It is also said that the service of the notice of filing this lien was premature, as it was served on the day of its date, and before filing, whereas the statute provides that the notice must be served within 10 days after filing; but we think this a too technical construction of the statute. The purpose of the notice was subserved in this case.

It is also urged that the claim of the lien was excessive, as it was stated at $331. We are satisfied of the good faith of complainant in this regard, and the mistake does not invalidate the lien.

It appears that the total cost of the work to the principal contractor was substantially $3,500. The contract price was $2,700, which has all been paid. Had this been distributed *pro rata* to the subcontractors, material men, and laborers, complainant would have received substantially 27-35, or $73.31, for which amount he is entitled to a decree. Complainant will recover costs.

The other Justices concurred.

[1] See *Blitz* v. *Fields*, 115 Mich. 675.

ON REHEARING.

MONTGOMERY, J. A rehearing was granted in this case, and briefs have been filed by both counsel. The defendant's counsel says:

"Every dollar of the contract price has been distributed for labor and materials furnished in making the improvements. Under the statute, this would appear to be a complete defense; but the court has practically read into the statute the condition that the distribution must be *pro rata*."

We have the misfortune to have been misunderstood by counsel. The court has read nothing into the statute. We have construed the language employed in the statute itself. By the plain provisions of the statute, payments made by the owner "before the contractor shall have furnished him with a statement as hereinbefore provided" shall be at the owner's risk. "And no payment made to any contractor before the expiration of 60 days shall defeat any lien of any subcontractor, material man, or laborer unless such payment has been distributed among the subcontractors, material men, or laborers, or, if distributed in part only, then to the extent of such *distribution*." What is meant by "distribution?" The definition given by Webster is: "The act of distributing or dispensing; the act of dividing or apportioning among several or many; apportionment; as the distribution of an estate among heirs or children." It cannot be said that the payment to one of the entire contract price would amount to "distribution," nor is it doubtful that the term as here employed means a distribution among all entitled to take; otherwise the provision is meaningless, and affords no protection to the laborer or subcontractor.

But it is contended that an error occurred in applying the principle to the former decision. It appears that the actual cost of the building was $3,535; the contract price $2,704. Complainant's *pro rata* share would be $576.13.

Four hundred dollars had been paid on this contract, and complainant would have been equitably entitled to receive $176.13 more. There was in the hands of the owner the sum of $204, which the court below held was paid to the contractor under such circumstances as to estop the complainant. We think defendant's contention in this respect must be allowed. It was an error to consider the balance of complainant's claim only, and this is the manner in which the mistake in computation occurred.

The decree of the court below dismissing the bill will be affirmed, with costs. As this rehearing was made necessary by our own error, no costs will be awarded for the rehearing.

The other Justices concurred.

WILLIAMS *v.* BAKER.

FRAUDULENT CONVEYANCES—CONSIDERATION—PARTNERSHIP.

Where a partner executed and filed a mortgage upon the firm stock in favor of one whose money he had been handling as agent, and in the capacity of agent accepted the same for the mortgagee, justifying the transaction by the claim that he had applied certain of the mortgagee's funds to the use of the firm, such mortgage was *held* fraudulent at the suit of a creditor who was at the time of its execution pressing the firm for security, and who immediately afterwards accepted a mortgage upon the same stock, it appearing that the only evidence, aside from the testimony of the mortgaging partner, which was not convincing, to show that the claimed consideration ever passed to the firm, was a statement in a book wherein he kept his accounts as agent that his principal had received a firm note for the amount, and, on the date of the mortgage, an entry of interest therein.

Appeal from Lenawee; Lane, J. Submitted January 6, 1898. Decided March 1, 1898.

Bill by William C. Williams and others against Horace Baker, Daniel T. Hall, Abbie Fisher, Minor Davidson, W. F. Baker, and H. H. Baker, to foreclose a chattel mortgage, and to set aside other chattel mortgages as fraudulent. From a decree for complainants, defendant Abbie Fisher appeals. Affirmed.

William F. McCorkle (*Watts, Bean & Smith*, of counsel), for complainants.

James W. Wightman (*Morgan & Priddy*, of counsel), for appellant.

HOOKER, J. The defendants Hall and Horace Baker were copartners, doing a retail drug business, and were indebted to the complainants for goods sold by the latter to the former. A representative of the complainants called upon defendant Hall, in the early morning of the 20th day of November, 1896, and asked for security; and, after some discussion, the subject was finally deferred until afternoon, the defendant Hall finding an opportunity meantime to execute upon behalf of his firm, and file with the proper officer, three chattel mortgages upon the stock of his firm. On meeting complainants' agent in the afternoon, Hall informed him that he had executed and filed these three mortgages, and, upon request, executed and delivered to him, for the complainants, a mortgage upon the same property, for their claim, and this was filed. Subsequently, the bill in this cause was filed to foreclose this mortgage; and the three earlier mortgagees defended, but were defeated in the circuit court, relief being granted to the complainants in accordance with the prayer of the bill. The defendant Fisher only has appealed, and no questions arise in relation to the other mortgages, except as the circumstances surrounding them throw light upon the transaction in which the Fisher mortgage was executed.

The three mortgages were given to Abbie Fisher, Minor Davidson, and W. F. and H. H. Baker. It was claimed

that the Davidson mortgage was given to indemnify him for signing a note of $1,000 for Baker & Hall; while that to the Bakers was to secure them upon an agreement to support their father, Horace Baker, who was, and for a year or two had been, paralytic. The mortgage to Mrs. Fisher was for $1,342. Hall was the agent for Mrs. Fisher, whose husband had confided his business matters to his care; and, after his death, Hall was the trusted adviser of Mrs. Fisher, and had possession of her property, with full authority to invest it. It is claimed that the amount had been applied to the uses of Baker & Hall. Hall so testified, and Baker admitted that he knew of such a claim, though he did not personally know of the fact. This is denied by complainants, and though, of necessity, they are unable to produce witnesses who can dispute the fact, they assert that the testimony does not clearly show it, and that it is more probable that Hall used Mrs. Fisher's money for his own purposes, and never loaned it to or used it for the firm. Each party accuses the other of suppressing the cash-book, upon which they agree that the payment of this money to the firm should appear.

Counsel for the defendant say that the court should not determine whether Mrs. Fisher's money went into the business of Baker & Hall, and that it will be sufficient to find that Hall, as agent, had authority to loan the money to the firm, and to accept for her a mortgage, and the further fact that complainants' mortgage was taken with knowledge of Mrs. Fisher's prior mortgage. We are of the opinion that, if Baker & Hall did not receive or use any of Mrs. Fisher's money, this mortgage was a fraud upon their creditors, and that this is an important question in the case. It is clearly shown that Hall, by subterfuge, gained time and opportunity to make and file the three mortgages before giving the mortgage to complainants. If these three mortgages were given to secure honest obligations, his conduct may have amounted to no more than preferring certain creditors, which might, perhaps, be

sustained, though his conduct was not ingenuous. Hall's testimony as to the loan is not convincing. He is unable to say just when the money was loaned. He had a book upon which Mrs. Fisher's loans and business transactions were kept, but there are no such items upon it, except the statement that in February, 1896, she received Baker & Hall's note for the amount, and, on the date of the mortgage, an entry of interest. Hall testified that the money was paid at different times, and the only written evidence of these that he mentions is a cash-book kept by the firm, and that cannot be found.

We think that the conclusion reached by the circuit judge, upon testimony given in his presence, was a just one, and it is therefore affirmed, with costs.

The other Justices concurred.

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MELOCHE v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

1. CARRIERS—ACCEPTANCE OF GOODS FOR TRANSPORTATION—LIABILITY.

   A railroad company becomes immediately liable as a common carrier, where goods properly marked for shipment are placed inside its freight depot for immediate transportation, with the agreement by its agent that they will be shipped the following morning, although no shipping bill or written contract is given.

2. SAME—EXPRESS CONTRACT—CUSTOM.

   Where plaintiff in an action against a carrier of freight relies upon an express contract for the transportation of goods, a custom cannot change its terms.

3. NEW TRIAL—EXCESSIVE VERDICT—APPEAL.

   The action of the circuit judge in denying a motion for a new trial, based upon the alleged excessive character of the verdict, will not be disturbed on appeal, where some of the evidence, which is very conflicting on the question of damages, fairly tends to support the verdict.

Error to Marquette; Stone, J. Submitted January 7, 1898. Decided March 1, 1898.

Case by Hercules N. Meloche against the Chicago, Milwaukee & St. Paul Railway Company to recover the value of goods destroyed by fire while in defendant's depot. From a judgment for plaintiff, defendant brings error. Affirmed.

W. S. Hill and *Gad Smith* (*H. H. Field*, of counsel), for appellant.

Potter & Sedgwick (*A. B. Eldredge*, of counsel), for appellee.

LONG, J. Plaintiff is the survivor of the firm of Meloche Bros., who, prior to August 25, 1896, carried on a drug business in the village of Ontonagon, this State. Some days before that time, the firm had closed its drug store, and packed the goods for shipment to Ishpeming, and in the forenoon of that day had them carted to the defendant's freight depot for shipment over its road to Ishpeming. In the afternoon of the same day, a fire occurred in Ontonagon, destroying almost the entire village, and burning defendant's freight depot, together with the goods of Meloche Bros. This action is brought to recover the value of the goods so destroyed. The principal defense was that the goods had not been delivered to or accepted by the defendant at the time of the fire. The plaintiff testified that he delivered them at the depot on the morning of the day of the fire; that the packages were directed to "Meloche Bros., Ishpeming, Mich.," and that he requested immediate shipment; that the agent of the defendant agreed to ship them, and send a shipping bill next day to him, at Ishpeming. The defendant introduced testimony tending to show that the goods were not marked, and that, when plaintiff requested shipment, it absolutely refused to ship them until the same were marked. The court instructed the jury that the first question for them to determine was:

"Were those goods, after being marked, as claimed by plaintiff, delivered to and accepted by the defendant, to be transported to Ishpeming? If you say, 'No,' that is the end of the case. * * * If you say, 'Yes,' then the only other question for you to decide is, What was the value of the goods then and there?"

The court further charged:

"If there is a recovery at all, it must be because those goods were fully and fairly delivered into the possession of the defendant as common carrier, and accepted by it as such, under the promise that it would forward them to Ishpeming. That would constitute an acceptance by it as common carrier. Common carriers of freight are liable, whether careful or not, for any act or damage not caused by the act of God or the public enemy. Their liability does not arise from negligence or want of care simply. It arises from their failure to make an absolute, safe carriage and delivery, which they insure by their undertaking. * * * The fire was not such an act of God as would excuse the defendant."

Counsel for the defendant contend that the court was in error in refusing to direct a verdict for the defendant, and in the charge as given. It appears from the testimony of the plaintiff that, the day before the goods were left at the depot, he went there, and had a talk with Mr. Mathews and Mr. Jones about the shipment, and ascertained the rate. After the goods were in the depot, he again went there, and saw these parties, Mathews and Jones, from whom he had ascertained the rate the day before. They then told him they could not ship the goods that day, as they had no cars. This was between 10 and 11 o'clock, and the train was to leave at 11 on which the plaintiff was going to Ishpeming. While at the depot, he found that the goods had been attached. He went to the justice's office, paid that claim, and returned to the depot. He claimed to have been gone but about 20 minutes. On his return, he again saw Mathews and Jones. As to what then took place, the plaintiff testified as follows:

"I then had a further conversation with Mr. Jones and Mr. Mathews. I said, 'Can you ship these goods?' They

said they hadn't any car. 'We cannot ship them this morning.' * * * I asked them for a shipping bill or receipt. He says, 'I will send it to you by mail in the morning.' I had made no shipping bill.

"*Q.* You asked him for a receipt, and he told you he had no time?

"*A.* He had no time. He would send it to me by mail in the morning. * * * I asked him if I could depend on it, and he said, 'Yes.'"

The plaintiff further testified that this was about 20 minutes before the train left, and that his brother and himself left on the train. This testimony is contradicted by the defendant, evidence being given that no contract was ever made; and considerable testimony was further given tending to show that the plaintiff, immediately after the attachment case with the justice was settled, took the train, and left Ontonagon, without further talk about the shipment of the goods, and that, in fact, the plaintiff had no time after he had settled the attachment suit to see about the shipment, as the train was about leaving when the plaintiff returned to the depot. But whether the contract was or was not made as claimed by the plaintiff was a question of fact for the jury. If the jury believed the plaintiff and his witnesses, they very properly found a verdict in his favor. Under these circumstances, the court was not in error in refusing to direct the verdict in favor of the defendant.

Under the plaintiff's claim,—and we must regard that claim as settled by the verdict of the jury,—the goods were properly marked for shipment, placed inside the defendant's freight depot for immediate shipment, with the agreement on the part of defendant's agents that they would be shipped on the following morning. They were only held till then for the accommodation of the defendant, because it had no car by which to ship on the day of delivery. It is well settled that under such circumstances the company was liable as a common carrier, as the liability as a carrier commences at the time of the delivery of the goods for immediate transportation. 5 Am. & Eng.

Enc. Law (2d Ed.), 180, and cases there cited in note. The exclusive possession was in the defendant. The plaintiff had deposited the goods in the freight depot, with the agreement that they should be shipped. It was not necessary to have a shipping bill or a contract in writing to make the liability of the defendant complete. *Detroit, etc., R. Co.* v. *Adams*, 15 Mich. 458; *Cleveland, etc., R. Co.* v. *Perkins*, 17 Mich. 296.

But counsel for defendant contend that testimony was introduced on its part, which was uncontradicted, that the general custom of the defendant at Ontonagon was and had long been for shippers to mark goods intended for shipment; that it was the custom and duty of shippers to make out a shipping bill, giving a description of the property, the number of packages, and the name of the consignee; that no property was ever received for shipment, or receipted for, except upon compliance with these conditions; that the rules of the company, which were introduced in evidence, required this; that plaintiff did not claim he was not familiar with this custom; that he conceded that he had made out no shipping bill; and that he had previously shipped goods, and had marked them. The court admitted this testimony as bearing upon the question whether the goods were marked or not, and no exception was taken to this ruling. The defendant certainly has no reason to complain of this ruling. The plaintiff was claiming under an express contract of shipment. The custom which defendant was permitted to show could not change this contract. *Lamb* v. *Henderson*, 63 Mich. 302.

Exception is also taken to certain portions of the charge. We have examined those matters, and find nothing therein which calls for discussion; nor do we think it important to discuss the questions relative to the rulings of the court upon the admission and rejection of certain evidence.

A motion for new trial was made and overruled. Exception is taken to that ruling upon various grounds.

The only one we need discuss is that there was no sufficient evidence to support a verdict for $2,500. We have examined this testimony with some care. One of the witnesses called by the plaintiff testified that the value of the stock was $4,000. The plaintiff himself placed it much higher. Other witnesses stated that he had a large stock. The defendant's witnesses, upon estimates made, placed the value at from $350 to $500. The testimony as to value is very conflicting, and we are not prepared to say that the jury placed too high a value upon it. Plaintiff described the different goods in the store, giving them in detail, with values. The court below saw the witnesses, heard the testimony, and, upon a full consideration of the motion for new trial, denied it. We find nothing in the case which should disturb this finding.

The judgment must be affirmed.

The other Justices concurred.

CORNING *v.* CITY OF SAGINAW.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—BRIDGES—DEFECTIVE DRAW.

A city is not liable, in the absence of statute, for an injury to a vessel resulting from its failure to maintain a draw in a bridge in such condition that it may be properly operated, where the city does not derive any benefit from the bridge but simply maintains it for the public good.

Error to Saginaw; Wilber, J. Submitted January 25, 1898. Decided March 1, 1898.

Case by Gurdon Corning and others against the city of Saginaw to recover damages for an injury to plaintiffs' barge caused by a defective draw-bridge. From a judgment for plaintiffs, defendant brings error. Reversed.

E. L. Beach, for appellant.

Weadock & Purcell and *James H. Davitt*, for appellees.

LONG, J. Plaintiffs are the owners of the barge King, and recovered a judgment for damages resulting from the colliding of their barge with the pier which supports the draw of what is known as the "Johnson-Street Bridge," in the defendant city. The collision occurred on April 13, 1895, while the barge was being towed down stream by a tug; and it is claimed that the immediate cause of it was the failure of the bridge tender to seasonably open the draw in response to properly-given signals; that the inability to so open the draw in time was attributable to the sticking or binding of the ends of the draw against the adjoining ends of the bridge. While the declaration contained four counts, the case was submitted to the jury upon the fourth count solely, which charged, substantially, that it was the duty of the defendant to keep the ends of the swing and the adjoining portions of the bridge in repair, so that the draw could not stick or become caught or fastened when it became necessary to open it for the passage of vessels, and that defendant had neglected to perform its duty in that regard. The court charged that the burden was upon the plaintiffs to show either that the city had actual notice that the bridge was out of repair in the manner charged in this fourth count, or that it was so out of repair for such a length of time before the accident that the city, in the exercise of ordinary care, ought to have known it; and, further, that, whether the city received actual notice of its defective condition or only constructive notice, a sufficient length of time must have elapsed after the notice was received in which, in the exercise of ordinary care, the necessary repairs could have been made. Before any witnesses were sworn in the case, the following facts were agreed to:

"That, when the collision in question occurred, the city was the owner and in control of the Johnson-street bridge;

that, a number of years ago, it was built by the city, by permission of the general government and the board of supervisors of Saginaw county; that the bridge tender was in the employ of the city, having been appointed as such bridge tender under the ordinance of the city, and was placed there by the city; that the plaintiffs presented a claim for damages to the council before this suit was brought, and the same was disallowed; that the Saginaw river, at the point where the bridge crosses it, is a navigable stream, and tributary to the Great Lakes."

Plaintiffs introduced testimony tending to sustain the claim that the bridge was out of repair in the manner alleged, and that the barge was injured by reason thereof, and that the plaintiffs were in the exercise of due care. The defendant introduced testimony tending to show that the bridge was not out of repair, and that on the day in question the bridge did bind, and that there was a short delay in opening it; that the city had no notice of any such defect. The court instructed the jury that if they found the bridge was out of repair in the manner alleged in the declaration, and that the barge was injured by reason of its being so out of repair, and that the plaintiffs, in handling the tug, were without fault, the plaintiffs were entitled to recover. The jury found a verdict in favor of plaintiffs; and, judgment having been entered thereon, defendant brings error.

The defendant requested the court to charge the jury that, there being no statute providing for any action against the city for the negligence complained of, the verdict must be in favor of defendant. This was refused. The plaintiffs contend that the city is liable without any statute expressly creating such liability. The argument in support of this contention is that our State Constitution (article 18, § 4) forbids the bridging of a navigable stream without authority obtained from the board of supervisors under the provisions of law, and provides that "no such law shall prejudice the right of individuals to the free navigation of such streams;" that a law was passed in 1851 authorizing the bridging of such streams, but requiring

persons or corporations wishing to construct a bridge over a stream which is navigable, like the present, for vessels of 15 tons burden or more, to petition the board of supervisors for authority to do so, and also to give due notice by publication of the application for such authority. The statute of 1851, among other things, provides:

"Every such petition shall set forth the kind and description of the bridge proposed to be constructed, and whether the same is to be constructed with a draw, or whether any, and what, provision is to be made for the passage of vessels or boats; and such board shall have the power to grant or refuse the prayer of such petition, upon such terms as they may deem just and reasonable, and to prescribe what description of bridge may be constructed, or to prohibit the construction of any bridge on the proposed location, as in their judgment the public interest shall require." 1 How. Stat. § 495.

It is therefore contended that, inasmuch as it is admitted that the city built the bridge under the authority obtained from the board of supervisors, it must be presumed that, in obtaining that authority, the requirements of the statute were complied with both by the city and board; that on this assumption the petition must have contained provisions for a suitable draw to permit the passage of boats and vessels, and the authority given must have included a like provision, as a draw was actually constructed, which was adequate while in repair. It is further contended that the city, after so obtaining authority to construct such a bridge, and after actually constructing and operating it for years, could not permit the draw, through negligence, to become dangerous or useless, without liability to persons navigating the stream who might be injured thereby; that is, that when authority to construct the bridge with a suitable draw was obtained, and acted upon, the duty was thereby imposed upon the city to keep it in substantially the same condition as proposed, or, at least, to use ordinary care to prevent it from becoming dangerous to navigation through neglect to repair.

This contention cannot be maintained. It is undoubt-

edly true that, without the action of the board of supervisors, the bridge could not have been erected, and it would probably never have been permitted without the erection of a draw or swing therein for the purpose of the passage of boats, as the Saginaw river is navigable for craft of the burden mentioned in the act. If not erected in accordance with the requirements of the board of supervisors as provided in the act, or if it impeded the navigation of the river, it could undoubtedly have been abated as a nuisance. 4 Am. & Eng. Enc. Law (2d Ed.), 926, and cases cited in note; *Hill* v. *City of Boston*, 122 Mass. 344 (23 Am. Rep. 332). There is nothing in those statutes, however, creating a liability upon the part of the municipality to private persons for injuries occasioned through the failure of the municipality to either construct or maintain a draw, or for failure to keep the draw in repair. Neither has the general statute creating liabilities against municipalities for failure to keep their highways, etc., in repair, any application here. The only question, therefore, is whether there is any common-law liability for the damages occasioned. Judge Dillon, in his work on Municipal Corporations, says:

"According to the prevailing rule, counties are under no liability in respect of torts, except as imposed (expressly or by necessary implication) by statute. They are political divisions of the State, created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county road or bridge. Such a liability, unless declared by statute, is generally, but not quite universally, denied to exist." 2 Dill. Mun. Corp. (4th Ed.) § 963.

In this State it is the settled rule that it requires legislative action to create any liability to private suit for nonrepair of public ways. *City of Detroit* v. *Blackeby*, 21 Mich. 84 (4 Am. Rep. 450). The rule in the above case has been followed since it was announced, in 1870. The statute creating liability for nonrepair of highways has since been passed. But, as we have said, it has no application to the present case, and in fact it is not contended

by counsel that it is applicable. Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, in no instance referred to have the English courts sustained a private action against a municipal corporation for such neglect, except under a statute expressly or by necessary implication giving such remedy. *Hill* v. *City of Boston*, *supra*, and cases there cited. In *French* v. *City of Boston*, 129 Mass. 592 (37 Am. Rep. 393), it appeared that the statute imposed upon the city the duty of maintaining Warren bridge as a public highway "at its own expense, and in accordance with such ordinances as the city council of said city may establish." The duty thus imposed upon the city was a public duty, from the performance of which it received no profit or advantage. It was said by the court:

"It is well settled in this Commonwealth that no private action can be maintained against a city for the neglect to perform such a duty, unless it is expressly authorized by statute. *Hill* v. *City of Boston*, 122 Mass. 344 (23 Am. Rep. 332), and cases cited. By statute, the city is liable to a traveler thereon for any defect in the highway of which the bridge is a part; but there is no statute which makes it liable to a private action for a failure to provide a draw of proper width, or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. It follows that the plaintiff cannot maintain this action."

In the present case it does not appear that the city derives any benefit from the bridge. It is maintained for the public good by the city in its governmental or public character, and not in its proprietary or private character, and the city is therefore not liable in this action, as the statute fixes no such liability. 1 Dill. Mun. Corp. (4th Ed.) § 66.

The court below was in error in refusing the defendant's request to charge. Judgment is reversed, and no new trial ordered.

The other Justices concurred.

PEOPLE *v.* HUGHES.

1. ASSAULT—EVIDENCE—RES GESTÆ.
   In a prosecution for an assault and battery alleged to have been committed by the proprietor of a house where a spiritualistic seance was being held, upon one who had been invited there to investigate, evidence that prior to the assault, which was provoked by the investigator's striking a match, the medium had been tied to a chair, and a "dark circle" formed, was admissible as part of the *res gestæ*.

2. SAME—WITNESSES TO AFFRAY—EXAMINATION—DUTY OF PROSECUTOR.
   Upon a trial for assault and battery, the prosecuting attorney does all that is required of him when he calls the witnesses who were present at the time the offense is claimed to have been committed, swears them on behalf of the people, and tenders them to the defense for cross-examination.

3. SAME—RELIGIOUS MEETINGS—DISTURBANCE.
   An assault upon one who had been invited to attend a spiritualistic seance for the purpose of investigating the same cannot be justified upon the ground that he was disturbing a religious meeting, if he was doing nothing not reasonably calculated to carry out the purpose for which he was invited.

4. TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.
   Respondent cannot complain of the court's failure to give a specific request to charge if the subject-matter of the request was sufficiently covered in the general charge.

Exceptions before judgment from Hillsdale; Lane, J. Submitted January 28, 1898. Decided March 1, 1898.

Fred Hughes was convicted of assault and battery. Conviction affirmed.

Respondent was convicted of assault and battery in the justice's and circuit courts. The assault was committed at respondent's house, at a spiritualistic seance. The complaining witness, Gordon, testified that he had been in-

vited by respondent to come to his house to see and investigate these seances. The lights had been turned out, and what is called the "dark circle" formed. The medium had been tied to the chair, and Mr. Gordon sat at his back. Gordon's feet came in contact with the medium's chair, which was moving a little. Gordon struck some matches, when, as he testified, respondent attacked him, threw him to the floor, and choked him. Respondent denied the assault.

John F. Steward and *Grant Fellows*, for appellant.

W. H. Frankhauser, Prosecuting Attorney, for the people.

GRANT, C. J. (*after stating the facts.*) 1. Error is assigned upon the refusal of the court to strike out certain testimony of the witness Gordon relating what occurred just previous to the assault,—the tying of the medium, etc.,—and also what was said immediately after the assault. This was admissible as part of the *res gestæ.*

2. The prosecuting attorney called certain witnesses who were present, asked them a few questions, but not as to the alleged assault, and then turned them over to the respondent's attorney for cross-examination, who demanded that the prosecuting attorney be compelled to examine them as to the affray. The court refused the demand, and respondent's attorney then examined them, and elicited from them some testimony favorable to the respondent. Having produced the witnesses, and had them sworn in behalf of the people, and tendered them to the respondent for cross-examination, the prosecutor did all that the law required. *People* v. *Deitz*, 86 Mich. 430.

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

"If this was a religious meeting, and Gordon created any disturbance according to the ceremonies of that society or sect, Hughes would have had the right to suppress that disturbance, and any reasonable force to that

end would not be assault and battery; and, under such circumstances, your verdict must be 'not guilty.'"

Upon his oral charge the court instructed the jury that, if Gordon was invited there to investigate, he had a right to use reasonable means for that purpose, and any assault upon him while so doing would be unlawful. After instructing the jury fully on this theory, he then instructed them as follows:

"But if he [Gordon] was not asked there to investigate, but was simply asked to come to the house there to attend a meeting of that kind, and it was a meeting, so far as this respondent, Mr. Hughes, was concerned, which was fair and honorable in its character, it would be the duty of a person who came there under such circumstances to observe proper decorum, not to rudely interfere with the proceedings and religious rite, which, so far as this respondent was concerned, was being held in good faith. * * * He would not have a right to do those things which would interfere with the comfort and peace and enjoyment of other persons who might be there for honest purposes. And if he did do things of that character, whether it was a religious meeting or whether it was not, I think this respondent would have a right to use reasonable means to restrain such conduct. * * * If he only went so far as seemed to him at the time to be reasonably necessary to preserve decorum there in his own house, and protect the comfort and peace of those whom he had invited to his house there, then I think he would be justified in what he did."

The oral charge sufficiently covered the request and the respondent's theory.

4. Error is assigned upon certain remarks of the prosecuting attorney. We find nothing in them to justify a reversal of the case.

Conviction affirmed.

The other Justices concurred.

BROUSO *v.* GENTLE.

APPEAL—MALICIOUS PROSECUTION.

The record disclosing no prejudicial error, a judgment for plaintiff in an action for malicious prosecution was affirmed.

Error to Wayne; Hosmer, J. Submitted February 1, 1898. Decided March 1, 1898.

Case by Hattie Brouso against John R. Gentle for malicious prosecution. From a judgment for plaintiff, defendant brings error. Affirmed.

Thomas Hislop, for appellant.

Casper C. Weber and *John Considine, Jr.*, for appellee.

PER CURIAM. Defendant made a criminal complaint for assault and battery against plaintiff. She was tried and acquitted. She then brought this suit for malicious prosecution, and recovered a verdict of $150. Errors are assigned upon the admission of testimony and the charge of the court. We find no prejudicial error in admitting the testimony. The charge of the court was fair, fully stated the claim of each party, and correctly instructed the jury upon the law. There is nothing in the case to justify an extended discussion.

Judgment affirmed.

SMITH *v.* BYE.

1. EVIDENCE—SUNDAY CONVERSATIONS.
   The fact that a conversation, relied upon by plaintiff in an action of trover to show that defendant had knowledge that a third person, from whom defendant bought the goods, was not authorized to dispose of plaintiff's interest in them, was held upon Sunday, does not render evidence of such conversation inadmissible.

2. SAME—ORDER OF PROOF—DISCRETION OF COURT.
   The court, under its authority to direct the order of proof, may refuse to take proposed testimony until other facts material to the case are shown.

Error to Benzie; Aldrich, J. Submitted February 1, 1898. Decided March 1, 1898.

Trover by Henry Smith against Nels Bye. From a judgment for plaintiff, defendant brings error. Affirmed.

Dodge & Covell, for appellant.

M. M. Larmonth, for appellee.

LONG, J. This action in trover originated in justice's court, was tried before a jury, and resulted in verdict for defendant. The plaintiff appealed, and obtained a judgment in the circuit court for $46.10.

It appears that in December, 1896, the plaintiff and one John Johnson together called on the defendant, who owned and operated a shingle mill at Wallin, in Benzie county, and bargained with him to cut into shingles for them certain pine logs, which they afterwards delivered at defendant's mill. At the same time they talked with the defendant about selling the shingles to him, and also afterwards. In hauling the timber, loading it on the cars, and delivering it at the mill, Smith and Johnson worked to-

gether, and the understanding with defendant was that he was to cut it for both of them. After the shingles were cut, Johnson went to Wallin, and sold them to the defendant, receiving therefor his check in the sum of $76.14, payable to Smith & Johnson. The check was paid by a merchant in Thompsonville, who deducted a merchandise account he had on his books against Smith & Johnson, and the balance was paid to Johnson in cash. Smith received no part thereof. Thereupon Smith brought this action in trover.

The defendant claims that there were such representations and such a holding out on the part of Smith and Johnson in regard to the transaction, that, as to him, constituted them partners; that he was led to believe, and did believe, that said Smith and Johnson owned said timber and shingles in common, and that they were engaged in the business of manufacturing and selling them for their mutual profit; and that he bought and paid for the same in good faith. The testimony on the part of the plaintiff tended to show that he and Johnson got out logs to be cut into shingles, each party getting his out on his own land, but exchanged work in doing so. The logs were shipped to Wallin, to the defendant's mill, to be cut into shingles. After two car loads had been shipped, the parties went to Wallin, saw the defendant, and then had a talk about selling them to him. Plaintiff testified:

"I was dissatisfied with the price offered by Bye, so far as I was concerned, so I told Johnson he could do just as he had a mind to, but, so far as I was concerned, I was not going to let my shingles go. * * * At the time we were up to Bye's the second time, we had the conversation with him on Sunday. I told Johnson he could use his own judgment; * * * but I was dissatisfied with the price, and was going to keep mine. This was in the presence of Bye."

This conversation the defendant asked to have stricken out, for the reason that it was had on Sunday. This was refused. This ruling constitutes the first assignment of error. Counsel cite, in support of their contention, section

2015, 1 How. Stat., and claim that, where valuable and material knowledge is gained in the course of a transaction that is expressly prohibited by statute, no use can be made of such knowledge by either party in the matter in which they are mutually interested. We should hardly treat this matter seriously, were it not that counsel in their brief still insist and urge that the court erred in refusing to strike out this testimony. While contracts of sale made on Sunday are void by reason of the provisions of this statute (*Tucker* v. *Mowrey*, 12 Mich. 378), yet we know of no case or rule of law which holds what is contended for here. The plaintiff was not claiming that any contract of sale was made with the defendant, but, on the contrary, his claim was that he absolutely refused to put his shingles in with Johnson's in any sale made to Bye at the price proposed, and so stated in presence of Bye. While this was stated to Bye on Sunday, he cannot be heard to say, "Yes, that was said by the plaintiff, but it was Sunday, and therefore I could buy all of the shingles from Johnson the same as though plaintiff had not refused to sanction the bargain." He did not buy on Sunday. No sale was made on Sunday, but on Sunday he was told that plaintiff would not sell. This testimony was competent for the purpose for which it was offered. The defendant denied that any such talk was had, but claimed that the shingles purchased were owned by the parties as partners, and that they so held themselves out.

While the defendant was on the stand, he was asked by his counsel: "When was it you settled with Johnson or with these parties for the shingles?" This was objected to, on the ground that any settlement with Johnson, unless in Smith's presence, would not bind Smith. The court held this testimony incompetent at that stage of the proceedings, on the ground that the plaintiff had denied that a partnership existed between himself and Johnson, and that the defendant had not introduced at that time any testimony tending to show such partnership. The court finally remarked:

"I think you had better proceed in the proper order. First introduce some proof that there was some partnership between these parties. I do not think there is any proof to that effect. It is denied by the only person who has testified on that point. The only proof that would tend in that way at all would be the proof that they made a contract for the manufacture."

Counsel now complain of the remarks of the court in sustaining the objection, and contend that the conversations between Smith, Johnson, and Bye, which had already been shown, left the impression on Bye's mind that the timber and shingles were to be handled on their joint and mutual account; that Smith had already testified that it was understood that Bye was to cut the timber for Smith and Johnson, and that it was a joint affair,—a mutual undertaking. We think the court was not in error in his ruling. It appears from the record that up to that time defendant had introduced no testimony tending to show a partnership, and the testimony of the plaintiff had no such tendency. In fact, he had denied that any partnership existed between himself and Johnson in the shingles, and had stated that he told the defendant he would not sell his shingles to him. If this was so, the defendant must have had notice that the parties were not claiming as partners, but each claiming the shingles cut from his own logs. But the court had also the right to direct the order of proof, and it was not error to refuse to take that testimony at that time.

Some question is raised over the refusal of the court to receive in evidence the check which the defendant gave to Johnson in payment for the shingles. The first time the check was offered in evidence the court refused to receive it at that time on the same ground that has been stated in reference to the settlement with Johnson, but before the trial was concluded the check was again offered and received.

Some other questions are raised; but we do not consider it important to discuss them, in view of the fact that the

court submitted the question to the jury to determine whether there was a partnership between the parties, and instructed them that, if they so found, their verdict should be in favor of defendant; and also that the jury should find in favor of the defendant if the plaintiff, either by his own representations, or by his standing by while Johnson made representations that they were partners, led the defendant to believe that they were partners. The charge was a very full and fair one to the defendant, setting forth the claims made by him. The jury found the facts in accordance with plaintiff's claim.

The judgment must be affirmed.

The other Justices concurred.

KUNST *v.* RINGOLD.

SETTLEMENT—EVIDENCE—APPEAL.

A judgment for defendant in an action to recover an alleged balance of a loan was affirmed; there being testimony in the case which, if believed, would sustain the jury's finding that the claim in suit had been included in a settlement between the parties.

Error to Kent; Adsit, J. Submitted February 1, 1898. Decided March 1, 1898.

Assumpsit by Lewis Kunst against Joost Ringold for money had and received. From a judgment for defendant, plaintiff brings error. Affirmed.

Rodgers, McDonald & Corwin, for appellant.

Dunham & Thornton, for appellee.

GRANT, C. J. This is a contest between two brothers-in-law over $50. Plaintiff loaned defendant $150. De-

fendant had paid $100. Two or three days after the loan was made, the parties purchased a greenhouse, and entered into a partnership in carrying it on. They afterwards sold out the business, equally divided the money received upon the sale, and it was claimed by defendant that the balance due for the money loaned was included in that settlement. Plaintiff proved the loan, defendant admitted it, and gave testimony tending to show a settlement. In reply to a specific question, the jury found that it was included in the settlement. This was the only question of fact to be determined. If the jury believed the testimony of the defendant, it sustains their verdict.

Several questions are raised upon the admissibility of evidence. We find no error in the rulings. The court stated the claims of each party, and called the attention of the jury to some of the salient facts in the case, and instructed them to consider all the testimony and circumstances bearing upon the question. He instructed them that the burden of proof was upon the defendant. Isolated sentences from the oral instructions are claimed to be erroneous, but, when the instructions are considered together, there was no error. The questions involved are not of importance to the profession.

Judgment affirmed.

The other Justices concurred.

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McQUEEN *v.* COMMON COUNCIL OF DETROIT.

COURTS—DISCRETIONARY WRITS—REMOVALS FROM OFFICE — CONFESSED INCOMPETENCE.

Where one's unfitness for an official position from which he has been summarily removed is conceded, he cannot invoke the aid of the discretionary writ of *mandamus* to exact payment of salary for a period succeeding his discharge, even though his removal may have been illegal because without opportunity for hearing and defense.

Certiorari to Wayne; Carpenter, J. Submitted March 1, 1898. Decided March 1, 1898.

Mandamus by James McQueen to compel the common council of the city of Detroit to pay to relator his salary as assistant boiler inspector. The writ was denied, and relator petitioned for the writ of *certiorari*. Petition denied.

The relator was appointed assistant boiler inspector of the city of Detroit, duly qualified by filing his oath and bond, and held the position until July 21, 1897, when he was discharged by the inspector. He afterwards presented a petition for the writ of *mandamus* to the Wayne circuit court, to compel the city to pay him his salary for August, September, October, and the first half of November. The respondent answered this petition, issue was joined, and the following are the stipulated facts:

"The position of assistant boiler inspector, to which the relator was appointed, is one of grave responsibility, and for a proper discharge of its duties requires a sober, temperate, and trustworthy man. Among other things, he is required to inspect and test boilers located in buildings and factories where large numbers of workmen are employed, and the least carelessness, neglicence, or inattention to such work is liable to result in a great loss of life and destruction of property. Soon after the appointment

as above, the relator inspected a boiler used by the Volksblatt Printing Company while he was very much intoxicated. Upon learning this, the boiler inspector warned the relator that, if he again got intoxicated while in the performance of his duties, he would be summarily discharged, and the relator fully knew and understood that, if he again became intoxicated while on duty, he would be discharged. Relator got in the habit of drinking heavily while off duty, and the boiler inspector, after the incident above related, again warned the relator against being intoxicated while on duty, and of the consequences which would follow, viz., a summary discharge. On or about July 21, 1897, the relator, while on duty, was very much intoxicated, and got into a violent altercation with the clerks in the office of the boiler inspector, and, when the boiler inspector came in, was using violent, abusive, and vile language. The boiler inspector attempted to quiet him, but, being unable to do so, summarily discharged him for being drunk while on duty, and ordered the relator to leave the office, which he did, but subsequently returned, and was arrested by a police officer for being drunk and disorderly. No written charges were made against the relator by the boiler inspector, but the relator fully understood why he was discharged, but said he ought to be paid for a month. Subsequently he sought to have the boiler inspector reappoint him to his old position, and frequently importuned him to do so. This being refused, the relator then presented his claim to the common council for the time he remained unemployed, which claim was denied. The relator was given no trial or hearing other than is herein stated."

The court below denied the petition. Relator now petitions this court for the writ of *certiorari* to review the judgment of the lower court.

John J. Speed, for relator.

GRANT, C. J. (*after stating the facts*). The relator insists that he could not be removed except upon the preferment of charges and an opportunity to be heard and defend himself. The agreed facts show that relator was unfit to hold the important position to which he was appointed, and that his removal was justified. He now de-

mands payment from the city for services not rendered, because his removal was not in accordance with the strict rules of the law, and asks the court to issue the discretionary writ of *mandamus* to accomplish that purpose. Courts will not grant discretionary writs to accomplish an apparent injustice, and to enforce payment where clearly nothing is equitably or justly due. We therefore decline to issue the discretionary writ of *certiorari* to review this proceeding. We, of course, express no opinion upon the question of the power of removal. We only determine that, where one's unfitness for the position is confessed, he cannot invoke discretionary writs to test the question. Merrill, Mand. § 74; *Board of Sup'rs of Cheboygan Co.* v. *Township of Mentor*, 94 Mich. 386.

Writ denied.

The other Justices concurred.

PULEZER *v.* KUCHARZYK.

116 92
123 429

1. EQUITY—ADEQUATE REMEDY AT LAW.
   A bill in equity will not lie to recover damages for the wrongful act of a depositary in suppressing a conveyance, there being an adequate remedy at law.
2. SAME—PARTIES.
   All of the heirs of a decedent are necessary parties to a bill to establish a deed alleged to have been executed by him in his lifetime.
3. SAME—RIGHT TO RELIEF.
   A bill in equity is properly dismissed where the complainant has by other means obtained all of the relief to which he is entitled, except damages for the wrongful act of the defendant, for which there is a complete remedy at law.

Appeal from Huron; Beach, J. Submitted February 2, 1898. Decided March 1, 1898.

Bill by Paul Pulezer against Ignace Kucharzyk and John Pulezer, Jr., to establish a deed and contract alleged to have been fraudulently withheld from record. From a decree dismissing the bill, complainant appeals. Affirmed.

The bill of complaint alleges that on November 20, 1880, John Pulezer, Sr., the father of complainant and defendant John, executed a deed of 80 acres of land to defendant John; that, at the same time, the father, his wife, and son John executed a contract by which it was agreed that, when Paul became of age, John should deed one-half of the land to Paul, and that Paul and John were to take care of their mother and a brother who was an imbecile; that the deed and contract were given to defendant Kucharzyk to take to the office of the register of deeds, and have recorded; and that he did not record them, but kept and secreted them. The prayer of the bill is that such deed and contract be established, and for damages for the wrongful act of the defendants. Defendants filed a joint and several answer, denying the material allegations of the bill, and assert that no contract or deed was made, but that John Pulezer, Sr., at that time, executed a will, which Kucharzyk, at his request, deposited with the judge of probate. Proofs were taken, and the bill dismissed.

Charles H. McGinley, for complainant.

John F. Murphy, for defendants.

GRANT, C. J. (*after stating the facts*). John Pulezer, Sr., died November 28, 1880. Complainant, defendant John, their mother, and the imbecile son lived together upon the place after the father's death until complainant became of age. It appears from the allegations of the bill, answer, and proofs that complainant, shortly after he became of age, and several years before this bill was filed, obtained from all the heirs except the imbecile brother quitclaim deeds of one-half the land, and that he also

quitclaimed the other half to John. He therefore obtained all the relief to which he was entitled except the interest of his imbecile brother, who is living, and the damages he claims. He has a complete remedy at law for damages if he is entitled to any, and the brother is a necessary party when he seeks to establish the deed and contract. The bill was therefore properly dismissed.

Decree affirmed, with costs.

The other Justices concurred.

PARKER *v.* CANFIELD.

116 94
145 411

EXECUTION—LEVY—EXEMPTIONS.

It is the duty of an officer, who levies under an execution upon property which is exempt up to a certain value, to make an inventory, and allow the defendant in execution to select his exemptions; and, not having done so, he is liable in trover for the part that he sells.

Error to Washtenaw; Kinne, J. Submitted February 3, 1898. Decided March 1, 1898.

Trover by Francis Parker against Lester Canfield. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

Defendant, a deputy sheriff, under an execution against plaintiff, levied upon certain property belonging to him. He was a farmer. After the levy, defendant, of his own motion, released the levy as to part of the property, on the ground that it was exempt. He retained the levy on 106 bushels of barley situated in plaintiff's barn. Plaintiff claimed this as exempt property. Defendant took it away, and sold it under his execution. Plaintiff thereupon

brought this suit in trover. The court directed a verdict for the plaintiff for the value of the property.

Lehman Bros., for appellant.

J. W. Bennett, for appellee.

GRANT, C. J. (*after stating the facts*). The instruction was correct. When an officer levies under his execution upon exempt property, it is his duty to make an inventory, and allow the defendant in execution to select his exemptions. *Stilson* v. *Gibbs*, 53 Mich. 280; *Hutchinson* v. *Whitmore*, 90 Mich. 255, 262 (30 Am. St. Rep. 431); *Ostrander* v. *Packer*, 35 Mich. 430; *Town* v. *Elmore*, 38 Mich. 305.

Judgment affirmed.

The other Justices concurred.

STEVENSON *v.* KURTZ.

FORGERY—EVIDENCE.

The testimony of an aged man that he did not sign certain papers, which purport to have been executed by him 10 years previous as administrator, is insufficient to show a forgery, where it is so weakened on cross-examination that it amounts to little more than a statement that he has no recollection of signing them, and that, if he did sign them, it must have been when his hands were cold, and it further appears that he had little to do with the business of administrator, and that advanced age has rendered his memory very poor; especially if the papers are such as he would undoubtedly have signed upon request, thus doing away with any motive for a forgery.

Appeal from Wayne; Donovan, J. Submitted February 5, 1898. Decided March 1, 1898.

Bill by Girvin Stevenson and others against Frances Kurtz to set aside an administrator's sale of real estate. From a decree dismissing the bill, complainants appeal. Affirmed.

Edward S. Grece (*Howard J. Hall*, of counsel), for complainants.

George Gartner, for defendant.

LONG, J. Defendant, by assignment, became the owner of a note and mortgage executed by one James H. Stevenson. Proceedings were by her instituted to foreclose, in which a decree was entered. Subsequently, and after the decree had been carried out by a sale of the mortgaged premises, the complainants in the present case, children and heirs of Stevenson, who had died, brought a bill of review to set aside the decreee and the sale made thereunder. The bill was on final hearing dismissed, and on appeal the dismissal was affirmed in this court. *Stevenson* v. *Kurtz*, 98 Mich. 493.

Pending the foreclosure proceedings, Stevenson died, and proceedings to administer his estate were had in the Wayne probate court. Josephine Stevenson, the widow, was appointed administratrix. Commissioners on claims were appointed, before whom the claim of Mrs. Kurtz on the note, to which the mortgage in process of foreclosure was collateral, was proved, allowed by, and reported to the probate court. Upon a sale under the foreclosure decree, the sum realized failed to satisfy the amount due, a large deficiency remaining unsatisfied. The administratrix having neglected and refused to subject the property of the estate to the payment of the debts proved, proceedings were instituted by Mrs. Kurtz in the probate court for her removal; and, after a hearing, she was removed from such trust, and one Joseph Karrer was duly appointed administrator *de bonis non* of said Stevenson's estate. The only remaining property of the estate out of which to pay the debts proved against the estate was the

lot now brought in question in this suit. Mr. Karrer, as administrator *de bonis non*, then petitioned the probate court for license to sell the same, which was granted; and the sale thereafter made was confirmed by the probate court, and a deed ordered executed to Mrs. Kurtz in pursuance of such sale. This deed was executed September 22, 1885. The complainants are the five children and heirs of said James H. Stevenson, the youngest of whom arrived at the age of majority in June, 1888. The bill of complaint is brought to set aside the probate sale of the lot to Mrs. Kurtz, and was filed in June, 1893. The answer of Mrs. Kurtz, the defendant, meets and answers fully the allegations of the bill, and sets forth the proceedings of the probate court, showing the proceedings in all things regular, and in full and strict compliance with all statutory requirements. The hearing of the case on proofs taken in open court came on before the circuit court, in chancery, and a decree was entered in favor of defendant. Complainants appeal.

It is contended by counsel for complainants that the sale to defendant was void, for the reason that the bond on the sale, the oath before the sale, and the final account of the administrator *de bonis non* were each and all of them forgeries. Unless this claim is sustained, the complainants have no standing in court. We have examined the testimony very carefully, and the circumstances under which these papers were executed, and agree with the court below that the complainants have not made out a case of forgery. The original papers have been submitted to us. It appears from the testimony of Mr. Karrer, the administrator *de bonis non*, whose signature is claimed to have been forged to the bond, oath, and account, that he had been for many years a member of the firm of Karrer Bros., which carried on a tannery business in the suburbs of the city, where he spent most of his time. He was upwards of 70 years of age at the time of his examination. He remembered signing a paper in the office of Mr.

Gartner, who was then acting as attorney for the sale of this property, in 1885. This paper, which he admitted he signed, was the petition to the probate court for the sale of the property to pay debts. It is dated August 12, 1884. The bond is dated March 28, 1885, and as sureties appear the names of Aaron Karrar, the brother of the administrator, and William Champ, a clerk to Karrer Bros. at that time. Their signatures are admitted to be genuine. The oath before sale was taken before the same William Champ as notary public. Mr. Champ's signature thereto is admitted to be genuine. On the examination of Mr. Karrer, he was asked:

"*Q.* Do you know anything about having been appointed administrator of the estate of James H. Stevenson by the probate court?

"*A.* No; I do not. I had to sign one paper. * * *

"*Q.* Do you remember having anything to do with it?

"*A.* No; I do not recollect. That was five years ago; but I could not recollect. * * *

"*Q.* I show you a paper, Mr. Karrer, which is entitled 'Bond on Sale.' See if you recognize your signature on that paper.

"*A.* Well, that is a question. I find out such a thing; you cannot write your name twice alike when you have cold hands. I might put those signatures on, and not in the office. Sometimes Champ came up to the office or to the tannery, and I signed papers sometimes. I did not know exactly. * * * I say I cannot tell my signature. If I did it myself, I could not swear. * * *

"*Q.* Now, look at that signature which is on the petition.

"*A.* See that? That is different. If he came up to the tannery in a hurry, and signed in a hurry, write that. I see now the difference when I receipt a bill. It is different. Sometimes alike and sometimes not. I cannot give you any more satisfaction than that. * * * It might be; I could not say. How can I remember 15 years ago, when I am working hard? I do not pretend to; I told you that before. * * * I did not take time always when they wanted me to sign something. * * *

"*Q.* Look at this paper,—petition for license. Is that your signature? No question about that?

"*A.* No, sir. * * * Oh, I have seen it, and you

see that is different. I might have signed it. I would not swear. I think I signed it.

"*The Court:* Do you think that is your handwriting?

"*A.* That is the way it looks. I cannot swear. Believe it is by the looks of it. Do not remember signing it. * * * It is so long ago. Do you suppose 15 years ago I can recollect everything? * * * I cannot swear either side. That is enough to state that is my name. * * * The first time I told you I could not swear. The others, I told you I could not say. I say I could not swear. I signed the papers in the tannery and at home. * * * I do not recollect so long. Am most 73. Speak German better than English. Write English slow and broken. My hands are hard and stiff. Deliver goods. * * *

"*Q.* You did not have anything to do with the Stevenson estate?

"*A.* No, sir. I did not really know anything before he came up to the house. [This is when Mr. Grece first went to see witness.] * * * I answered I did not know if I did or not; that is all. You cannot make me swear to any other answer. I know I have just got as far as I know. There is no use talking that way. I told you the first time. I always told you I could not swear, and I tell you that now. * * *

"*Q.* I suppose you have failed? You have felt old age coming on you, and a great many things happened you do not now remember?

"*A.* Oh, yes! Thousands and thousands. My memory not very good; memory goes backward. * * * Have noticed my writing not always the same. Cannot do it alike. Have no recollection of signing a deed or signing any paper at all. Unless you show me a paper with my name, I would not remember anything at all about it."

It is true that on a former examination of this witness in this cause, before a notary public, he had testified that he did not sign these papers which are claimed as forgeries; but no cross-examination was then had. Complainants also called several experts in handwriting, who testified that the signatures to these papers were not in the handwriting of Mr. Karrer. It appears also that the name "Karrer" was misspelled, and in one instance the letter "h" was left off the name of Joseph. But we think

the whole explainable by the fact that Mr. Karrer had not much to do with the business of administrator. The papers were made out, and they were undoubtedly, as Mr. Karrer says, taken to the tannery for his signature. There, without much facility to write, and, as he says, while his hands were cold, he signed them.

There is nothing in the case showing, or tending to show, what motive any of the parties could have had in forging papers which Mr. Karrer would, without doubt, have signed if presented to him. He made the petition for the sale. The business was carried on by Mr. Gartner and Mr. Barlow, two of the most reputable attorneys of the Detroit bar. The papers, the bond and oath, were necessary papers in the proceedings. They were made at the time required, and filed in the probate office. Mr. Champ is dead. Mr. Karrer is an old man, and from his examination it can be seen that his memory is very poor. In fact, about all that can be said of the examination is that he had no recollection of signing those papers, and, his name being spelled differently, he thought it was not his signature. But his own explanation that, if he signed them, it was at the tannery, when his hands were cold, we think sufficient. It is not at all strange that, with his personal business, and what may have come before him as administrator, he could not remember the tenor and substance of every paper signed by him after the lapse of many years. It would be more strange if he could. There being no motive for the forgery shown, we cannot say that we are satisfied that the papers were forged.

The decree of the court below must be affirmed.

The other Justices concurred.

SERVISS *v.* WASHTENAW CIRCUIT JUDGE.

1. GARNISHMENT—PAST-DUE NOTE.
   A past-due promissory note is subject to garnishment.

2. SAME—DISCLOSURE—CONCLUSIVENESS.
   A disclosure by a garnishee that he does not know whether or not a past-due note executed by him to the principal defendant was still in the latter's hands at the time of service of process is not conclusive against his liability to the plaintiff, since the statute (2 How. Stat. § 8068) provides for a trial of the issue framed by the affidavit and the disclosure.

3. SAME—NONRESIDENT DEFENDANT—SUBSTITUTED SERVICE.
   The validity of the substituted form of service on the principal defendant in garnishment proceedings, where he is a nonresident, provided by 2 How. Stat. § 8087, does not depend upon the disclosure of the garnishee, although no judgment can be had in such case against the principal defendant unless some credits are found in the garnishee's hands; as the existence or nonexistence of such credits is the subject of inquiry under section 8068.

4. SAME—JURISDICTION.
   The courts of this State may, by garnishee process, acquire jurisdiction over a nonresident defendant for the purpose of subjecting a debt due him from a citizen of the State to the payment of plaintiff's demand.

Mandamus by Wilber M. Serviss to compel Edward D. Kinne, circuit judge of Washtenaw county, to set aside a service upon the principal defendant, a nonresident, in garnishment proceedings. Submitted February 8, 1898. Writ denied March 1, 1898.

Lawrence & Butterfield, for relator.

Arthur Brown and *M. J. Cavanaugh*, for respondent.

LONG, J. The relator is a resident of the State of Indiana. In November, 1897, Nellie A. Lennon, of Washtenaw county, this State, commenced an action in

the Washtenaw circuit court against relator by summons, and caused a writ of garnishment to issue against Edward S. Serviss, of Washtenaw county. The writ of garnishment was based upon an affidavit setting forth that the principal defendant was a nonresident of this State, and that said garnishee was indebted to the principal defendant in certain sums of money. Proceedings were thereupon taken, which are claimed to be in accordance with section 8087, 2 How. Stat., providing for substituted service upon nonresidents where property or credits of nonresidents have been garnished in this State; and a copy of said summons, affidavit for writ of garnishment, writ of garnishment, and return of the officer thereon of service upon the garnishee defendant were served upon the principal defendant in the State of Indiana. The garnishee filed a written disclosure, in which he stated that, at the time of the service of the writ upon him, he had made, executed, and delivered to the principal defendant three certain promissory notes, which remained unpaid, but that he did not know whether or not said notes were at the time of the service of said writ still held by the principal defendant. A demand was thereupon made by the plaintiff for an oral examination of the garnishee. The garnishee appeared, and gave testimony, which was taken by the court stenographer, and by him reduced to writing. This does not appear to have been signed by the garnishee, though it was filed in the case. On such direct examination, the garnishee testified that he still owed the principal defendant, who is his brother, about $3,000. On cross-examination the following took place:

"*Q.* Do you know whether you owe your brother anything or not?

"*A.* There are two ways of answering that.

"*Q.* Do you know whether he held any papers at that time?

"*A.* No; I don't know that."

Upon further cross-examination he testified that he gave his brother three promissory notes,—one for $2,000, given

in 1893; one for $1,000, given in 1896; and one for $633.38, given November 18, 1897; that he gave chattel mortgages with the first two notes, but could not state whether his brother held the mortgages when the garnishee process was served on him, November 27, 1897. It is conceded that the first note was past due when the process was served on the garnishee, and that the other two notes were not due at that time. A motion was made in the court to set aside the service on the principal defendant, upon the ground that it does not affirmatively appear by the disclosure that property or credits had been reached by garnishee process. This motion was denied; and relator now asks a *mandamus* to compel the circuit court to vacate the order denying the motion, and directing the entry of an order to set the service aside. A return has been made to an order to show cause, and the above statement is substantially what appeared in the court below.

It is contended by the relator that, before the circuit court has jurisdiction to proceed against the principal defendant, it must affirmatively appear that he had the notes in his possession at the time of service on the garnishee, and that it cannot be said that under this examination the garnishee defendant is indebted to the principal defendant. In *Littlefield* v. *Hodge*, 6 Mich. 326, it was said:

"Garnishee process is not, we think, properly applicable to such paper [negotiable paper] until it ceases to become negotiable by falling due. The debtor cannot know certainly in whose hands his obligation may be when it matures, and his admission that such a note is outstanding cannot be effectual as an admission of an indebtedness to the original holder of such a character as to be a continuing liability in his hands. The courts have very generally, in the absence of statutes to the contrary, regarded negotiable paper as not liable to be reached in this way."

But it appears that the first note given was past due when the garnishee process was served. It was expressly held in *Somers* v. *Losey*, 48 Mich. 294, that a promissory note

may be garnished after maturity. It is true that the garnishee defendant was unable to state whether or not any of the notes were still in the hands of the principal defendant at the time of service of process; yet we think this disclosure is not conclusive on the right of the plaintiff to further inquiry. In *Fearey* v. *Cummings*, 41 Mich. 376, it was said:

"It became a question whether, in trying this issue, the denial made by the garnishees in their disclosure of all indebtedness to Nellis, and their denial of possession and control of any property, money, goods, chattels, credits, and effects belonging to him, was conclusive on the plaintiffs, except in so far as there might be occasion to inquire concerning fraud; and the plaintiffs insisting that it was not, and that they were entitled to controvert such denial, and the garnishees contending to the contrary, the circuit judge sustained the position of the garnishees. The court is unable to concur in this view. The issue instituted at the instance of the garnishees after their disclosure is one expressly ordained for the trial of the garnishees' liability to the plaintiffs (2 Comp. Laws 1871, § 6475), and it covers exactly the same ground to which the denial applies; and it occurs to ask for what purpose authorize a trial to be invoked if the matter has already been settled in favor of the garnishees by their denial?"

It was held, therefore, that the plaintiffs were entitled to make out an indebtedness from the garnishees to Nellis, notwithstanding this denial.

The statute referred to in that case is section 8068, 2 How. Stat., as amended. This section provides that, upon the filing of the disclosure, answers to written interrogatories, or report of the testimony or statement made by the garnishee on such personal examination in cases where such examination is had, "the matter of such affidavit [the affidavit for the writ of garnishment] shall be considered as denied (except so far as the same is admitted by such disclosure, answers to interrogatories, or report, which admissions shall have the effect of admissions in a plea, and also shall be *prima facie* evidence of the matters therein admitted). And thereupon a statutory

issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff." The plaintiff in the suit followed the provisions of 2 How. Stat. § 8087, in relation to bringing in the principal defendant, who was a nonresident of the State. The validity of this substituted form of service upon the principal defendant does not depend upon the disclosure of the garnishee defendant, or upon the denial of an indebtedness which he may make when interrogated thereon. No judgment could be had against the principal defendant, it is true, unless some credits were found in the hands of the garnishee; but whether such credits are in his hands is the subject of inquiry which may be had upon the statutory issue, which is provided in section 8068, 2 How. Stat.

It is further contended that a debt due to a nonresident defendant from a citizen of this State is not property, effects, or credits within this State, and hence will not support the jurisdiction of the courts of this State for a proceeding *in rem;* that the domicile of a garnishee within this State does not give the courts of this State jurisdiction over the debts he owes to a party in another State, and is not sufficient to support an action *in rem.* It was held, however, in *Newland* v. *Wayne Circuit Judge*, 85 Mich. 151, that the statute points out the procedure to acquire jurisdiction over the principal defendant, not for the purpose of rendering a personal judgment against him, but to subject the choses in action in the hands of a third party to the payment of the plaintiff's demand; and to this extent it confers jurisdiction upon the court to proceed. It was there said:

"It is not instituted for the purpose of the recovery of property, nor the enforcement of a lien thereon. Its primary object is to reach the *res* in the hands of third persons, against whom there is no foundation for a personal claim when the summons issues."

The court below was not in error in refusing to set aside the service upon the principal defendant.

The writ must be denied, with costs.

The other Justices concurred.

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THOMAS *v.* KENT CIRCUIT JUDGE.

1. MANDAMUS—DISSOLUTION OF INJUNCTION—QUESTION OF LAW.
   Mandamus to compel the dissolution of an injunction is a proper remedy where the dispute is one of law merely.

2. BOARDS OF SUPERVISORS—PUBLIC BUILDINGS—BORROWING MONEY—SUBMISSION TO ELECTORS.
   The board of supervisors of a county may, by a mere majority vote of the members elect, adopt a resolution to submit to the electors of the county a proposition to borrow money for the purchase of a site for a county asylum for pauper insane, and the erection of suitable buildings thereon, under 1 How. Stat. §§ 475, 483 (subd. 7), empowering a majority of the board to borrow or raise by tax any sums necessary for any of the purposes mentioned in the act, provided that no greater sum than $1,000 shall be borrowed or raised in any one year for the purpose of repairing or constructing public buildings, unless authorized by a majority of the electors of the county voting therefor, although by section 484 a two-thirds vote is required before the board can exercise the power conferred by section 483, subd. 6, to "cause" such buildings "to be erected."

3. SAME—DETERMINATION AS TO NECESSITY AND COST.
   The adoption of a resolution which recites that such asylum, if erected, would within a few years be a self-sustaining institution and a saving to the county, and which fixes the amount of the proposed loan, is a sufficient determination by the board of the necessity for the building and of the sum necessary to be raised, within 1 How. Stat. § 492.

4. SAME—FORM OF BALLOTS—STATUTES—DIRECTORY PROVISIONS.
   The resolution of submission provided that the ballots should be in the following form: "Shall the board of supervisors * * * borrow * * * the sum of $50,000, and spread upon the various assessment rolls, * * * for the repayment of said money, $10,000 in the year 1898 * * * [providing for five annual payments], for the purpose of purchasing a suitable site, and the erection of suitable buildings thereon, for a county pauper insane asylum?" followed by the word "Yes," and a duplicate thereof, by the word "No." *Held*, a sufficient compliance with 1 How. Stat. § 492, pro-

viding that such ballots shall have thereon the words, "For the Loan," and "Against the Loan," which is to be construed as a directory provision.

5. SAME.

The fact that the proposition, as submitted to the electors, embodied method and time of payment, did not render it objectionable.

Mandamus by William J. Thomas, clerk of the board of supervisors of Kent county, to compel Allen C. Adsit, circuit judge of said county, to dissolve an injunction restraining the submission to the electors of the question of borrowing money and levying a tax to erect a county pauper insane asylum. Submitted March 1, 1898. Writ granted March 8, 1898.

Stuart & Barker, for relator.

Rodgers, McDonald & Corwin, for respondent.

HOOKER, J. At its January, 1898, session, the board of supervisors of the county of Kent adopted the following resolution, upon aye and nay vote:

"*Whereas*, Kent county has been highly favored, through the untiring efforts of the senators and representatives of said county in the State legislature, in securing the necessary legislation to enable said county to erect and maintain a county pauper insane asylum to care for the indigent insane of said county; and

"*Whereas*, several thousand dollars is annually paid by said county to the State asylum at Kalamazoo for the care of the indigent insane of said Kent county, as the statistics for the last five years, ending December 1, 1896, show the amount so paid to be $46,575.80, with 44 inmates on September 15, 1897; said asylum also receiving from the State, for county charges who have remained therein for two years or more, for the fiscal year ending June 30, 1896, the sum of $22,498.36, as the statistics show, such asylum having as State charges from Kent county on said June 30, 1896, 128 patients, and on September 15, 1897, 154 patients; taking said sum as a basis, the amount paid by the State for the past five years for the care of the indigent insane of Kent county would amount to the sum of $112,491.80; and

"*Whereas*, in a few years such an asylum would be a self-sustaining institution, and a saving to Kent county: Therefore be it

"*Resolved*, by the board of supervisors of the county of Kent, that there be submitted to the qualified electors of said county, at the annual spring election to be held on the first Monday in April, A. D. 1898, the proposition to borrow, on the faith and credit of said county, and to issue its evidence of indebtedness therefor, the sum of $50,000, the proceeds to be used solely for the purpose of purchasing a suitable site for and the erection of a suitable building or buildings thereon for a county pauper insane asylum in said county of Kent; said money so borrowed to be paid in five equal annual installments, of $10,000 each, the first installment thereof to be paid in the year 1898. Said sum so borrowed to be repaid by spreading the same upon the taxable property of Kent county, as follows: $10,000 in the year 1898, $10,000 in the year 1899, $10,000 in the year 1900, $10,000 in the year 1901, and $10,000 in the year 1902. And be it further

"*Resolved*, that the county clerk be, and he is hereby, instructed to cause notices of said proposition to be posted in three conspicuous places in each of the several townships and wards in said county of Kent, at least 30 days prior to the first Monday in April, A. D. 1898; and that said county clerk cause such notice to be published in two of the newspapers printed and circulating in the said county of Kent for at least three successive weeks prior to the time of holding said election. And be it further

"*Resolved*, that the form of the ballots shall be as follows: 'Shall the board of supervisors of the county of Kent, State of Michigan, borrow, on the faith and credit of said county, the sum of $50,000, and spread upon the various assessment rolls of the townships and wards of said county, for the repayment of said money, $10,000 in the year 1898, $10,000 in the year 1899, $10,000 in the year 1900, $10,000 in the year 1901, and $10,000 in the year 1902, for the purpose of purchasing a suitable site for and the erection of a suitable building or buildings thereon for a county pauper insane asylum in said county of Kent? Yes.' 'Shall the board of supervisors of the county of Kent, State of Michigan, borrow, on the faith and credit of said county, the sum of $50,000, and spread upon the various assessment rolls of the townships and wards of said county, for the repayment of said money,

$10,000 in the year 1898, $10,000 in the year 1899, $10,000 in the year 1900, $10,000 in the year 1901, and $10,000 in the year 1902, for the purpose of purchasing a suitable site for and the erection of a suitable building or buildings thereon for a county pauper insane asylum in said county of Kent? No.' And be it further

"*Resolved*, that the county clerk of said county be, and he is hereby, directed to take the necessary steps to cause said proposition to be placed on proper ballots, to be distributed in the same manner and by the same persons distributing the regular ballots for said spring election to be held on said first Monday in April, A. D. 1898."

It received 27 votes; 18 supervisors voted against it, and three were absent. Subsequently certain taxpayers filed a bill, and obtained an injunction restraining the submission of the question to the electors of the county. Upon the denial of a motion to dissolve said injunction, this application was made for a *mandamus* to require such action.

That this is a proper remedy where the dispute is one of law merely, see *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 204, McGrath, Mand. Cas. No. 827; *Ionia, etc., Ins. Co.* v. *Ionia Circuit Judge*, 100 Mich. 606, McGrath, Mand. Cas. No. 810.

The meritorious question is whether a sufficient number of the supervisors voted for the resolution, counsel for the respondent urging that the assent of two-thirds of the supervisors elect was essential to the submission of the question.

Section 475, 1 How. Stat., provides:

"A majority of the supervisors of any county shall constitute a quorum for the transaction of the ordinary business of the county, and all questions which shall arise at their meetings shall be determined by the votes of a majority of the supervisors present, except upon the final passage or adoption of any measure or resolution, in which case a majority of all the members elect shall be necessary."

Section 483 prescribes the powers of boards of supervisors, and contains 17 subdivisions. We quote a few of them:

"*Fifth.* To remove or designate a new site for any county buildings required to be at the county seats, when such removal shall not exceed the limits of the village or city at which the county seat is situated, as previously located.

"*Sixth.* To cause to be erected the necessary buildings for poor-houses, jails, clerks' offices, and other county buildings, and to prescribe the time and manner of erecting the same.

"*Seventh.* To borrow or raise by tax upon such county any sums of money necessary for any of the purposes mentioned in this act: *Provided*, that no greater sum than one thousand dollars shall be borrowed or raised by tax in any one year, for the purpose of constructing or repairing public buildings, highways, or bridges, unless authorized by a majority of the electors of such county voting therefor as hereinafter provided.

"*Eighth.* To provide for the payment of any loan made by them, by tax upon such county, which shall in all cases be within fifteen years from the date of such loan."

Were there no further provisions, the board might do any of these things by a vote of the majority of the members elect; but section 484 provides that—

"None of the powers mentioned in the third, fifth, sixth, eleventh, twelfth, thirteenth, fifteenth, and sixteenth subdivisions of the last preceding section shall be exercised without a vote of two-thirds of all the members elected to such board."

And section 492 designates the mode of submitting propositions to loan or tax to the electors. It provides:

"Whenever it shall become necessary, under the provisions of this act, to submit to a vote of the electors of any county the question of raising any sum of money by loan or by tax, the said board, after having determined the sum necessary to be raised, whether the same shall be made by loan or by tax, shall proceed to give the notice of such determination, and of the time when the question will be submitted to the electors of such county in the several townships; which notice shall be for the same length of time, and posted in the same manner, as required by the eighteenth section of this act; and the votes shall be taken,

canvassed, certified, and returned in the same manner as required by the nineteenth section of this act, except that those voting for such tax or loan shall have written or printed on their ballots the words, 'For the Tax,' or 'For the Loan,' as the case may be, and those voting against the tax or loan shall have written or printed on their ballots the words, 'Against the Tax,' or 'Against the Loan,' as the case may be."

Subdivision 7 of section 483 is the one under which the borrowing or raising by tax is to be done. To the extent of $1,000 per year, it may be done without authority from the electors. It can hardly be contended that the determination to spread a tax or borrow $1,000 requires the assent of two-thirds of the board, and the only limitation on the authority to raise more is found in that subdivision. Obviously, after the favorable vote is cast, a majority of the board may order the tax or negotiate the loan. There is nothing in this subdivision that forbids the submission of the proposition to the electors by a majority vote. But a majority merely cannot "cause county buildings to be erected." See section 483, subd. 6, and section 484, and *Board of Sup'rs of Wayne Co.* v. *Wayne Circuit Judge*, 111 Mich. 33. If we are to say that the submission of the question to the electors can be called a "causing to be erected," the respondent's contention is correct. In that case it would follow that a two-thirds vote would be necessary, not only where it is proposed to submit a proposition to the electors, but where the board itself proposes to raise $1,000 *for the purpose of erecting buildings*, though, if it were to be used for repairs, it is not clear that such vote would be required. The construction contended for is a technical one, and we doubt if it was contemplated by the legislature. Abstractly, we see no good reason for requiring a two-thirds vote by the supervisors before allowing the electors to determine the question, and we are of the opinion that a vote of the majority of the supervisors elect is sufficient.

Some other questions are raised; *e. g.*, it is said that the board never determined that such a building was neces-

sary, and that they did not determine the amount necessary to be raised. This is a requirement which counsel ascribe to 1 How. Stat. § 492, already quoted. We are of the opinion that the resolution submitted is tantamount to a formal determination of the necessity for the building, if such determination is required, and that the resolution, and its adoption by the people, are all the determination of amount that is necessary. Had the vote been upon a resolution which did not fix the amount to be raised, such determination by the board would be necessary. We think the proposition was to raise by loan, notwithstanding it also provided, and the people voted upon, the method and time of payment; and we are also of the opinion that the form of the ballot is not objectionable. It is not literally in accord with the prescribed form, but gives the voter information as to the nature of the proposition, which the prescribed form would not do. The statute should be considered directory. See Paine, Elect. § 528, and cases cited.

We are of the opinion that the injunction should have been dissolved, and the respondent should be so advised.

The other Justices concurred.

TRUMP MANUFACTURING CO. *v.* VILLAGE OF BUCHANAN.

1. VILLAGES—WATERWORKS—POWERS OF COUNCIL—CONTRACTS OF PURCHASE—CHARTER LIMITATIONS—PRESUMPTIONS.

   Under the general statute for the incorporation of villages, which empowers the common council to raise by general tax a sum, not exceeding in any one year one and one-fourth per cent. of the assessed valuation (1 How. Stat. § 2923), and which permits it to raise and expend, in making repairs or alterations upon waterworks previously constructed, such sum, not exceeding in any one year one-half of one per cent., as it may see fit, without submitting the question to the electors (3 How. Stat. § 2973), provided such sum shall be included in the one and one-fourth per cent. limitation, *it seems* that an indebtedness not exceeding one-half of one per cent., incurred by the common council for waterworks appliances, would, as against the objection that, together with the amount raised for the general fund, it exceeded one and one-fourth per cent., be presumed, in the absence of evidence that the general fund had been otherwise appropriated, to be payable out of such fund, and therefore to be valid.

2. SAME—ANTICIPATING REVENUES.

   The council, however, in view of the provision (1 How. Stat. § 2957) that "no loans shall be made by the council, or by its authority, in any year, exceeding the amounts prescribed" by the act, has no power to anticipate the revenues of succeeding years by executing a contract of purchase upon terms of credit which make the purchase price payable beyond the current fiscal year.

3. SAME.

   And it cannot be presumed, in order to sustain such a contract, that the council intended to raise the amount during the current year, and set it aside to meet the payment when due.

Error to Berrien; Coolidge, J. Submitted October 6, 1897. Decided March 15, 1898.

Assumpsit by the Trump Manufacturing Company

against the village of Buchanan to recover the purchase price of waterworks appliances. From a judgment for defendant, plaintiff brings error. Affirmed.

Howard, Roos & Howard, for appellant.

A. A. Worthington and *Edward Bacon*, for appellee.

LONG, J. This action was brought to recover the amount of $815.10 and interest, claimed to be due plaintiff upon a written contract for the purchase by defendant of two penstocks for waterworks purposes. The cause was heard before the court without a jury, and findings made. Judgment was entered in favor of defendant.

It substantially appears from the findings that the plaintiff is the assignee of W. C. Leffel & Co., and is entitled to sue in its own name on this contract. The defendant village was organized under the general law. In September, 1894, Leffel & Co. made a proposition in writing to sell to the defendant the two penstocks, and set the same, for the sum of $843.10, terms of payment to be agreed upon. The president and clerk of the village wrote in answer to this proposition that it was accepted, and added: "Will at once correspond with your company as to our best terms of payment." At a meeting of the village council had October 1, 1894, a resolution was passed accepting the proposition of Leffel & Co., with the following proviso: "That they furnish the same on one year's time, at 5 per cent. interest." On October 5th the clerk of the village sent a copy of this resolution to Leffel & Co., who answered on the 15th, acknowledging the receipt of it, and agreeing to the terms proposed, and stating: "We are at work upon the job, and will rush it through as rapidly as possible." The clerk of the village acknowledged receipt of this letter. The work was completed, and sent forward to the defendant. The agent of Leffel & Co. was at Buchanan when the penstocks came, and he was directed by the president of the village and one of the trustees to take the penstocks to the dam across the St.

Joseph river, in the village, and place the same in the stone wall which separated the race from the river. They were set, and the village authorities caused them to be cemented in at the expense of the village. On January 25, 1895, the clerk, at the request of the common council, wrote Leffel & Co. as to what would be the best figure cash down, instead of note, which would be received in payment for the penstocks. In answer to this, Leffel & Co. wrote that it would take $830.78 if paid at the next meeting of the council. This was not paid, and no further action was taken. On April 25th Leffel & Co. presented its bill to the council. The legal name of Leffel & Co. was changed to the Trump Manufacturing Company, the plaintiff here, and in November it presented claim to the defendant. The common council thereupon, at a meeting duly held, took action upon the matter, and resolved:

"That the alleged contract, by reason of want of authority, was never obligatory on said municipal corporation, and has ever been inoperative and of no legal effect; that it never received said penstocks, and has never received any benefit; that they have never been annexed to any real estate, so as to become a part thereof, and are not in possession of the village."

The proposition is then made in the resolution that the plaintiff receive them back, and that, if so accepted, the village will load them on cars, with freight prepaid to Springfield, Ohio. This proposition was refused by the plaintiff, and suit was commenced. The court further found:

"(10) That the assessed valuation of the real and personal property of the village for the year 1894, as shown by the assessment roll of that year, was the sum of $562,000, and that the village council duly and legally voted to raise for the year 1894 twelve mills on the dollar for the general fund, and three mills on the dollar for the highway fund; that, for the year 1895, the assessed valuation of the real and personal property of the village, as shown by the assessment roll, was the sum of $565,000, and that the village council duly and legally voted to raise for the year

1895 twelve and one-half mills on the dollar for the general fund, and two and one-half mills on the dollar for the highway fund.

"(11) That the common council undertook to purchase the penstocks in question under a supposition that the proposition for purchasing the horse power of the Buchanan Power & Electric Company, and operating waterworks by power obtained at the dam, would receive a majority of the votes of the taxpayers, and that the agent of the plaintiff had knowledge of the fact that the penstocks would be of no use or benefit to the defendant unless a new system or radical change in the existing waterworks should be introduced, and that a meeting of the taxpayers to determine whether such new system or change should be introduced was proposed.

"(12) That on October 1, 1894, and for some time prior thereto, the village of Buchanan had operated a system of waterworks, but that they were located about three-fourths of a mile distant from the place where the penstocks were placed.

"(13) That on December 21, 1894, a resolution was passed by the common council, submitting to the vote of the taxpayers of said village a proposition for purchasing 150 horse power of the Buchanan Power & Electric Company, at an expense of several thousand dollars; that it was contemplated, among other things, that pumps to be used in the waterworks system of said village should be operated by the power thus obtained, and that water-wheels would be placed at the dam on the St. Joseph river, inclosed by the penstocks in question, to be used in connection with the operation of said waterworks system; that said proposition, at the meeting of the taxpayers on January 4, 1895, was defeated, and the plan of operating the waterworks from power obtained at the dam was abandoned."

As conclusions of law, embracing therewith some findings of fact above recited, the court found as follows:

"(1) That in the year 1894 the common council of the village of Buchanan had the legal authority to raise by taxation and loan a sum not exceeding one and one-quarter per cent. on the dollar of the assessed valuation of the property in said village; that such assessed valuation amounted to the sum of $562,000; that the amount, therefore, which said council might lawfully raise by levy and

pledge, was $7,025; that the council, in the spring of 1894, levied a tax of twelve mills on the dollar for the general fund, which made a total assessment of $6,744; that thereafter the common council, during the fiscal year, could not legally increase the indebtedness of the said village more than $216 without the consent of the taxpayers, at a meeting properly called; that the resolution of said council adopted October 1, 1894, providing for the purchase of the penstocks in question, attempted to create an indebtedness of $843.10 against said village, to be paid in one year; that this sum was intended to be an additional burden on the taxpayers of said village, in addition to the amount of the general levy, since it was not to be paid out of the appropriations made by the common council to meet the expenses of the year, but was to be paid in the middle of the next fiscal year; that the purchase price of the penstocks was not embraced or intended to be embraced among the liabilities and expenses contemplated by the general levy, or by the appropriations made out of the general fund for the year; that the resolution of October 1, 1894, above recited, and all proceedings thereunder, were *ultra vires;* and that, as the alleged contract is not susceptible of apportionment, it is wholly void, and the defendant is not liable thereupon.

"(2) That the acts of the officers and members of the common council in regard to the reception and placing of the penstocks did not constitute an acceptance or use of the goods by the defendant.

"(3) That the village of Buchanan never accepted nor used the said penstocks, and is therefore not estopped from contesting the claim of the plaintiff.

"(4) That the penstocks having been placed on property not in the ownership, possession, or control of the defendant, and a spot quite remote from the location of any existing waterworks, and the uses to which such penstocks were naturally to be applied being foreign to any needs or uses of any existing waterworks, and such facts having been known by the plaintiff, there was never any actual delivery to the defendant of the goods in question.

"(5) That no contract to pay for the goods on a *quantum meruit* can be implied in this case.

"(6) That the plaintiff is not entitled to recover; and judgment will therefore be rendered in favor of the defendant, and against plaintiff, for costs of suit to be taxed."

Counsel for plaintiff requested the court to find that the

proposition made by Leffel & Co. was accepted by the village, and by such acceptance became a legal and binding contract upon both parties; that the plaintiff fulfilled its part of the contract, and the village had accepted the property delivered, and that the contract was within its power to make; that the plaintiff was entitled to recover the contract price. These findings were refused. Plaintiff took exception to such refusal, as well as to the findings of law made by the court. Plaintiff also excepted to the eleventh finding of fact, on the ground that there was no evidence to support it.

The general law, under which the defendant village was reincorporated, provides:

"The council of any village subject to the provisions of this act shall have authority to raise by general tax upon all the real and personal property liable to taxation in said village (exclusive of taxes for highway and street purposes) such sum, not exceeding in any one year one and one-fourth of one per cent. of the assessed value of such property, as they shall deem necessary," etc. 1 How. Stat. § 2923.

Section 2959 of the statute provides:

"The council may purchase and provide suitable fire engines and apparatus for the extinguishment of fires; and may sink wells and construct cisterns and reservoirs in the streets, public grounds, and other suitable places in the village, and make all necessary provisions for a convenient supply of water for the use of the department."

From these provisions of the charter it is apparent that the common council had the power to purchase the penstocks in question, provided that the purchase price did not exceed the amount which the council was authorized to raise without the vote of the taxpayers. This charter, which was passed in 1879, was amended in 1887 (3 How. Stat. § 2973), which amendment provides that—

"After waterworks have been constructed in a village by virtue of any of the provisions of any law of this State, the council may then raise and expend in making repairs or alterations, or in extending such works, such

sum as it may see fit, without submitting the question to the electors of the village: *Provided*, the sum to be so expended in any one year shall not exceed the sum of one-half of one per cent. of the assessed valuation of the village: *And provided, also*, the sum to be raised for such purpose shall be included in the amount which, by the provisions of section 1, chapter 9, of this act, the council is authorized to raise."

That section provides, as we have seen, that the council may raise, exclusive of taxes for highways and streets, in any one year one and one-fourth of 1 per cent. of the assessed valuation, etc.

It is conceded that the village, at the time this contract was made, had already in operation a system of water-works operated by steam power. From the findings of the court below, it appears that the assessed valuation of the village in the year 1894 was $562,000, and in the year 1895 $565,000. The contract price for the penstocks was $843.10. This does not exceed the one-half of 1 per cent. of the assessed valuation for each year. In the year 1894 there was ordered to be raised by the council for the general fund 12 mills on the dollar, which would be $6,744; in the year 1895, 12½ mills on the dollar, or $7,062.50. Thus, it appears that the council brought itself within both the provisos contained in section 2973, 3 How. Stat., above quoted. The only appropriation which is shown of this fund is the resolution to raise the amounts, in which 12 mills on the dollar was appropriated in 1894 to the general fund, and in the year 1895 12½ mills on the dollar to the same fund. If, therefore, the council had purchased these goods to be paid for within the same fiscal year in which they were bought, the council would have had the right to pay for them out of the general fund.

But it is contended by counsel for defendant that, inasmuch as the council of the village purchased on one year's time, this would run the payment into the succeeding year, and it would therefore be void, because the council could not anticipate the fund in advance of the year in which the contract was made. In *Putnam* v. *City of*

Grand Rapids, 58 Mich. 416, it appears that the city entered into a contract with an electric light company whereby it was to have 25 towers put up in various places, and electric lights furnished for five years in the times and manner specified, at $26,000 a year, at the end of which period all the fixed property was to belong to the city, if desired. A bill was filed to restrain the council from carrying out this contract. The bill was sustained and the relief granted. But it was said that the decision was placed entirely on the restrictions of the charter, and not upon any general incapacity had the charter been silent; and that—

"In the face of the charter provision, the array of authorities allowing time contracts by cities, which is certainly very respectable, does not apply."

We must therefore look to the village act to determine whether any restrictions are there imposed upon the village council to enter into this contract, under which the payments were to be made in the future. The only authority in the council to make a contract for the waterworks system is contained in section 2973, 3 How. Stat., above quoted. This section does not authorize the council to incur an indebtedness to be paid in a future year, but provides that it may raise such amount in any one year. Section 2957, 1 How. Stat., provides that "no loans shall be made by the council, or by its authority, in any year, exceeding the amounts prescribed in this act." But it is contended by counsel for plaintiff that it was held in *Spitzer* v. *Village of Blanchard*, 82 Mich. 242, that a village organized under this act could not incur an indebtedness to *exceed* 1¼ per cent. of its assessed valuation, and that this statute was not construed as a restriction upon the village to incur an indebtedness to that extent. In that case the question was not presented whether the village had the power to incur an indebtedness to be paid in the future, but the question there considered was whether the bonds sued upon were in an amount beyond the power of the council to issue. It was held that the council exceeded

its power in issuing them. The question here presented was not squarely in issue there. We think that section 2957 must be considered as a restriction upon the council to enter into a contract payable in the future. *Newaygo County Manfg. Co.* v. *Echtinaw*, 81 Mich. 416. If plaintiff's contention could be sustained, then the council could enter into a contract for waterworks repairs to the amount of one-half of 1 per cent. in any one year, and at the same time incur an indebtedness payable from year to year, extending over several years in like manner. While the council may readily estimate the amount it may raise for waterworks during any current year, so that the total amount raised for general purposes shall not exceed $1\frac{1}{4}$ per cent. of the assessed valuation, yet it is apparent that no estimate could be made for the following years, so that the total amount should not exceed that sum.

But counsel for plaintiff contend that, the amount being within the power of the council to raise in the year that the contract was made, the contract is not void by reason of the fact that the payment under it was to be made the following year, for it must be presumed that the council would raise the fund, and set it aside to meet the payment when due. It appears, however, that the penstocks were not to be paid for that year, but the village was to have one year's time, with interest at 5 per cent. It cannot be presumed, therefore, that the council intended to raise the amount the year the contract was made, but intended it as a time contract, the fund to meet it not to be raised until the succeeding year. We think the council has no such power under the charter.

The judgment is affirmed.

The other Justices concurred.

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AUDITOR GENERAL *v.* DULUTH, SOUTH SHORE & ATLANTIC RAILWAY CO.

1. TAXES—HIGHWAY AND SCHOOL—TOWNSHIP MEETING—SUBMISSION TO ELECTORS.

   Unless propositions to raise money for highway and school purposes were submitted to the electors at their annual township meeting, they cannot be said to have neglected or refused to vote the same, within 3 How. Stat. § 1328, providing that, in case the electors present at any annual township meeting shall neglect or refuse to vote any highway taxes, the township board may order the same to be levied, and Act No. 176, Pub. Acts 1891, § 9, conferring like authority upon the board of education, under such circumstances, with reference to school taxes.

2. SAME—STATUTORY PROVISION—IMPOSSIBILITY OF COMPLIANCE.

   The fact that a township is divided into election districts, and that one of the polling places is nine miles distant from the one at which, under 1 How. Stat. § 131, the township meeting is to be held, does not render it legally impossible for the electors to attend such meeting.

3. SAME—GENERAL LEVY—EXEMPTIONS—INVALIDITY.

   Where the township board, in levying highway taxes upon the property of the township, exempts the property in a particular village in the township, the levy is void.

4. SAME—TAX LAW—CURATIVE PROVISION—JURISDICTIONAL DEFECTS.

   The curative provision of the tax law of 1893 (Act No. 206, § 99) does not relieve against defects which go to the jurisdiction of the body authorizing the levy. So *held*, where a board of education and a township board assumed to determine the amounts to be raised for school and highway taxes, without the questions' having been submitted to the electors at the annual meeting, and their having neglected or refused to act.

Appeal from Baraga; Hubbell, J. Submitted October 8, 1897. Decided March 15, 1898.

Petition by Stanley W. Turner, auditor general, for the sale of lands delinquent for the taxes of 1894. From a decree setting aside certain taxes upon objections filed by the Duluth, South Shore & Atlantic Railway Company and others, petitioner appeals. Affirmed.

William K. Haviland, Prosecuting Attorney (*Philip R. McKernan*, of counsel), for petitioner.

M. J. Sherwood, for defendants.

LONG, J. The petition of the auditor general came on for hearing at the October term, 1896, in the Baraga circuit court, in chancery, for the sale of lands delinquent for the taxes of the year 1894. The respondents had paid all the taxes in the township of L'Anse, except the highway and school taxes, and, as to them, they contended that they were void. The court below held them void. The auditor general appeals.

As to the highway taxes, it is contended that they were not authorized by the electors of the township, the question of raising such taxes not having been submitted to them. It appears that the question was not submitted to the electors. The records of the township show that, at a meeting of the township board, the following preamble and resolution were passed:

"*Whereas*, the electors present at the annual township meeting of the township of L'Anse, held therein on the first Monday of April, 1894, neglected to vote a money tax upon the property of said township for highway purposes: *Resolved*, that a tax of fifty cents upon each and every one hundred dollars of the assessed valuation of the township of L'Anse for the year 1894, except that on the property in the village of L'Anse, be, and the same is hereby, levied on the value of such property."

This resolution was unanimously carried.

Section 1328, 3 How. Stat., provides:

"In case the electors present at any annual township meeting shall neglect or refuse to vote any rate of highway labor to be assessed, as by the first subdivision of the last

preceding section provided, the commissioner, in making his assessment, may assess not exceeding one-half day's labor upon each one hundred dollars of valuation; and in case such electors shall neglect or refuse to vote a money tax, as by the second subdivision of the preceding section provided, the township board may order to be levied such sum, within the limit herein above provided, as such board may deem necessary for the improvement of roads and bridges."

It has been held, under this statute, that the power of the board to raise money for these purposes depends upon the neglect or refusal of the voters to do so, and, unless the proposition to raise said moneys has been submitted to the electors, they cannot be said to have neglected or refused to vote the same. *Tillotson* v. *Webber*, 96 Mich. 154, and cases there cited.

But this highway tax is void for another reason. The order made by the township board was that the highway tax should be spread upon all the property of the township, except that in the village of L'Anse. The township board had no power to exempt that property from the tax, even if the board had the power to raise it. 3 How. Stat. chap. 29; *Ryerson* v. *Township of Laketon*, 52 Mich. 509. For this reason alone the court below very properly held the highway tax void.

The school district comprises the whole of the township of L'Anse, and was organized under Act No. 176, Pub. Acts 1891. Section 9 of that act provides that the qualified electors at any annual township meeting shall determine the amount of money to be raised by tax for all school purposes for the ensuing year; but it is provided that, "in case the electors at any annual township meeting shall neglect or refuse to determine the amount to be raised as aforesaid, then the board of education shall determine the same at any regular meeting thereof," etc. It will be seen that the wording of this statute is identical with the general law for raising highway money taxes. 3 How. Stat. § 1328. It appears that this question was not submitted to the electors at the annual township meeting, but the board of education passed a resolution to

raise the sum of $7,000 by taxation. The same rule must be applied as in matters of highway taxes, and the case of *Tillotson* v. *Webber*, *supra*, and the cases there cited, are decisive of it.

The claim made by petitioner that this is cured by the provisions of section 99, Act No. 206, Pub. Acts 1893, cannot be sustained; and the case is not ruled by *Auditor General* v. *Hutchinson*, 113 Mich. 245. In the present case the question is one of power in the board to act. There can be no taxes raised without express authority of law, and the mode pointed out by the statute must be followed. The board of education has no authority to act in raising money until the question has first been submitted to the electors, and they refuse or neglect to raise the tax. Then the board of education may act. It is a question going to the jurisdiction of the board. The board, under the facts here shown, acted without authority.

It is contended, further, that the township of L'Anse being divided into two election districts, and the places of holding the elections being some nine miles apart, it would be impossible for the electors to pass upon this question. We do not see any such difficulty in the case. Section 131, 1 How. Stat., provides that—

"The electors of each election district shall meet at one o'clock in the afternoon at the polling place of district numbered one, unless some other place of meeting be designated by the board of inspectors of district numbered one, which place shall be announced by the clerk of the board of each district to the electors present, and there transact such business as is usually transacted at township meetings, by *viva voce* vote."

We think the court below was not in error in holding these taxes void. The decree must be affirmed, with costs in favor of defendants, for the payment of which the auditor general will draw his warrant upon the state treasurer.

The other Justices concurred.

116	126
128	366
116	126
134	1 82

BEDIER *v.* FULLER.

1. FRAUD—ACTIONS—ASSUMPSIT.

One who, having been induced by fraudulent representations to sell property for less than its real value, under the advice of counsel, and with full knowledge of the facts, makes a sale of a purchase-money mortgage received by him, thereby affirming the contract, cannot afterwards maintain an action of *assumpsit*, based upon an implied contract, to recover the avails of the property in the hands of the grantee.

2. SAME—STATUTES—PENDING LITIGATION.

Act No. 195, Pub. Acts 1897, permitting an action of *assumpsit* in all cases where, by the fraudulent representations or conduct of any person, an injury has been produced for which an action on the case for fraud or deceit may be brought, does not affect litigation pending on appeal when the act took effect.

Error to Wayne; Hosmer, J. Submitted October 13, 1897. Decided March 15, 1898.

Assumpsit by Josephine Bedier against Jay Fuller, Hiram D. Willmarth, and Dennis J. Reaume for money had and received. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Fred A. Baker, for appellant.

John D. Conely, for appellees Fuller and Willmarth.

Levi T. Griffin, for appellee Reaume.

MOORE, J. This cause was commenced by attachment. The declaration is in *assumpsit*. It contains all the common counts, and, in addition thereto, a special count. A demurrer was interposed to the special count, and was sustained, and was afterwards affirmed in this court. To the other counts, the plea of general issue was interposed,

with a notice that the matters declared upon were *res judicata*. The attorney for the plaintiff made an opening statement of what he expected to prove. Upon the conclusion of his statement, upon motion of defendants, the court directed a verdict in favor of defendants.

The parties to this action have been in this court twice before. The first time the plaintiff filed a bill in chancery, to have a deed set aside upon the ground of fraud and misrepresentation. Her bill was dismissed, and, upon appeal, the decree was affirmed. The case is *Bedier* v. *Reaume*, 95 Mich. 518. After the chancery case was ended, this proceeding was begun. As already stated, defendants demurred to the special count in *assumpsit*. The demurrer was sustained, and the case in this court is *Bedier* v. *Fuller*, 106 Mich. 342. In the last-named case there is a full statement of what was contained in the special count, and a reference to the two cases will make it unnecessary to make a very long statement here in order to understand the questions involved.

In addition to what is contained in the special count, counsel offered to prove, in substance, that in April, 1891, a brother of the plaintiff filed a bill to partition the real estate, and that such proceedings were had thereunder that a portion of the real estate was sold, and there was left in the hands of the commissioner, to be paid to the plaintiff or to Mr. Reaume, $2,500.89. He also stated that proceedings were had to partition the farm property, which resulted in defendant Reaume obtaining title in fee simple, subject to the right of dower of the widow, to 82 acres of land, in the place of an undivided one-sixth interest in 400 acres, which he had before the partition was made. No appeal was made from the order directing the payment of the $2,500.89 or from the partition proceedings. It is now the claim of the plaintiff that she can waive the tort, and recover in *assumpsit*, not only the $2,500.89 paid to Reaume, as before stated, and a sum of about $360 received for rent, but also for the value of the 82 acres, which was fixed by the commissioners in the

partition proceedings at $4,087.40. It is the claim of the plaintiff that when Reaume exchanged his undivided interest in the 400 acres of land for the title in fee, subject to the dower right of the widow, to 82 acres of land, which was valued at a fixed sum, it was equivalent to his having received so much money, and therefore *assumpsit* could be maintained for all of these items.

It is doubtless true that, when one who has been led to make a contract by fraudulent representations discovers the fraud, he may affirm or disaffirm it; but he cannot affirm it in part and disaffirm it in part. If he affirms it, and asserts the fraud, he could doubtless retain what he had received, and, in the proper action, recover for the damages sustained by reason of the fraud; but it would be anomalous to say that he can affirm the contract, and at the same time recover as for an implied promise in *assumpsit*. Plaintiff having affirmed the contract, it cannot be said that the property transferred by her continued to be hers; therefore no implied promise could be presumed to pay the avails of the property upon the theory that the money which was received was hers. We think the case is controlled by *Bedier* v. *Fuller*, 106 Mich. 342.

It is suggested by counsel that Act No. 195, Pub. Acts 1897, if properly construed, authorizes the plaintiff to maintain this action. This act did not become operative until long after this case was decided in the court below. There is nothing in the act to indicate that it was intended to affect pending litigation, so that there is no necessity for giving the act a construction, further than to say that its provisions do not apply to this case, which was commenced long before the act became a law.

Judgment is affirmed.

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

116 129
134 601

SCHILLER COMMANDERY NO. 1, UNITED FRIENDS OF MICHIGAN, *v.* JAENNICHEN.

1. VOLUNTARY ASSOCIATIONS—WITHDRAWAL OF MEMBERS—RIGHT TO PROPERTY.

   The withdrawal of two-thirds of the members of a voluntary association does not change its identity, and the remaining members are entitled to the property.

2. SAME—INCORPORATION.

   The provision of Act No. 119, Pub. Acts 1893, that voluntary associations may become bodies corporate if two-thirds of the members present and voting at any regular meeting shall vote in favor of such incorporation, does not operate, so far as it relates to associations formed before and existing at the time of the enactment, to vest in the corporation funds belonging to the association, where the action to incorporate was not acquiesced in by all the members of the association.

Error to Wayne; Hosmer, J. Submitted October 13, 1897. Decided March 15, 1898.

Assumpsit by the Schiller Commandery No. 1, United Friends of Michigan, against Louis Jaennichen, John Groll, and Catherine Thomas for money had and received. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

The United Friends of Michigan is an incorporated fraternal beneficiary association, and is within the provisions of Act No. 119 of the Public Acts of 1893. The plaintiff is a subordinate body of the United Friends of Michigan, and as such attempted to incorporate shortly before the commencement of this suit. Sections 11–13 of the act referred to provide for the incorporation of such subordinate bodies. Before the incorporation of the plaintiff, a voluntary association known as "Schiller Commandery No. 1" had accumulated a general fund of $889.76,

and this money was in the bank in the name of its trustees on the 1st day of June, 1896. At that time the plaintiff had about 670 members, but, in July following, more than 400 of these members withdrew from the organization, and among them the defendants in this suit. These defendants were at that time the trustees of Schiller Commandery No. 1, and as such had control of the fund involved in this suit. They have kept it ever since, and, after demand, have refused to turn it over to the plaintiff. After the secession, those who remained members in good standing of the Schiller Commandery agreed to become incorporated at a meeting of the association at which 150 out of 180 members who had adhered to the original association, and who were then in good standing, were present, the action being unanimous. It is said in defendants' brief that it does not appear upon what notice the meeting was called. This is true, but the fair inference is that the meeting was a regular one. After the incorporation this suit was brought. No evidence was offered or given on the part of the defendants as an excuse for or explanation of the secession or the withholding of the money. The bill of exceptions shows that the 400 who withdrew from the commandery did not pay any more dues, and set up for themselves, and claimed this fund because they were the large majority of the voluntary association Schiller Commandery No. 1, United Friends of Michigan.

John G. Hawley, for appellant.

William E. Henze (*Otto Kirchner*, of counsel), for appellees.

MONTGOMERY, J. (*after stating the facts*). The withdrawal of the 400 members did not change the identity of the association. The remaining members represented the society, and were entitled to retain the property. *Sommers* v. *Reynolds*, 103 Mich. 307; 1 Bac. Ben. Soc. § 38*a*. The Schiller Commandery No. 1, United Friends of Michigan, was, under the facts stated in the record,

clearly entitled to the fund on hand at the time of the withdrawal of the 400.

The question is whether the incorporated body is legally identical with the previously-existing voluntary association. The incorporation of the body appears to have been made in accordance with the provisions of Act No. 119 of the Public Acts of 1893, which provides that the voluntary association may become a body corporate if two-thirds of the members present and voting at any regular meeting shall vote in favor of such incorporation. The statute further provides that, when the requirements named in the statute are complied with, such subordinate body shall be a body corporate by the name expressed in the articles, and by that name be a person in law capable of suing and being sued in the courts, and taking and holding property of every kind, the same as natural persons. The question for decision is whether this act, so far as it relates to associations formed before and existing at the time of its enactment, is operative to vest in the corporation funds belonging to the previously-existing association, where, as in this case, the action to incorporate was not unanimous. We think this question is ruled in the negative by *Mason* v. *Finch*, 28 Mich. 282. It should be noted that the record fails to show that the remaining members of the association, the 30 who did not participate in the attempt to incorporate, acquiesced in the action taken. If such affirmative showing had been made, quite a different question would have been presented.

The judgment will be affirmed.

The other Justices concurred.

116 132
156 472

PEOPLE *v.* DETROIT CITIZENS' STREET-RAILWAY CO.

1. MUNICIPAL CORPORATIONS—PENAL ORDINANCES—COURTS.
The authority to prescribe penalties for violations of city ordinances, conferred upon the common council of Detroit by section 257 of the charter of 1893, is not limited to such ordinances as are adopted under the police power of the council, but includes those that may be enacted by virtue of contract relations existing between the city and the owner of a public franchise, and, under section 249, the recorder's court of said city has jurisdiction over a prosecution for a violation of *any* ordinance of the city.

2 STREET RAILWAYS—CAR SERVICE—ORDINANCES—CONSTRUCTION.
By ordinance passed in 1862, when street railroading was in its experimental stage, the common council of a city of 50,000 inhabitants granted to a street-railway company a 30-year franchise. Among other provisions, the ordinance prescribed that cars should be drawn by animals only, at a speed not exceeding six miles per hour, and should be run as often as public convenience should require and the council should direct, provided that the council should not require the running of cars oftener than once in 20 minutes during 14 hours in the day for part of the year, and 12 hours in the day for the rest of the year. In 1879, the city having in the meantime doubled in population, a new ordinance was adopted, and accepted by the company, extending the franchise for 30 years, and providing merely, with reference to car service, that the cars on all lines should be operated "as the public convenience may require and the common council order." It was further provided that all ordinances or parts of ordinances not in conflict therewith should continue in force. *Held*, that the limitation upon the authority of the council with respect to the service of cars, contained in the earlier ordinance, was abrogated by the later one.

3. SAME—PUBLIC OFFICERS—PRESUMPTION OF GOOD FAITH.
It will not be presumed that the members of a city council were actuated by improper motives in the passage of an ordinance prescribing the frequency with which street cars should be run, but, on the contrary, it will be presumed that such action was taken in the exercise of a judgment based upon an acquaintance with all the facts; and such judgment, as embodied in the ordinance, will control the courts, upon inquiry as to the reasonableness of such ordinance, unless it clearly appears that it was improperly exercised.

4. SAME—REASONABLENESS OF ORDINANCE—EVIDENCE.

A city ordinance requiring a street-railway company to run its cars every six minutes on a specified street will not be held unreasonable, where no trial has been made of its provisions, upon a showing merely that the average number of passengers to a car, under the existing 12-minute service, is between seven and eight only.

Certiorari to recorder's court of Detroit; Chapin, J. Submitted October 13, 1897. Decided March 15, 1898.

The Detroit Citizens' Street-Railway Company, a corporation, and Jere C. Hutchins, its vice-president and treasurer, were convicted of violating an ordinance of the city of Detroit respecting the service of cars. Conviction affirmed.

Brennan, Donnelly & Van De Mark and *Bernard B. Selling*, for appellants.

C. D. Joslyn, for the people.

MOORE, J. Mr. Hutchins is vice-president and treasurer of the Detroit Citizens' Street-Railway Company, a corporation operating a line of street railways in the city of Detroit. In February, 1897, the common council of the city adopted an ordinance requiring the street-railway company to "provide sufficient cars upon Gratiot avenue so that a six-minute service shall be given upon said avenue between Mack and Sheridan avenues between the hours of 5:30 a. m. and 10 p. m." Section 3 of the ordinance reads as follows:

"Sec. 3. Any violation or failure to comply with the provisions and requirements of this ordinance shall be punished by a fine of not to exceed $300; and said fine, when so imposed, may be recovered from the person or corporation so convicted in an action of law, in the proper court."

The company did not comply with the terms of this ordinance. A complaint was made in the recorder's court for the city of Detroit against Mr. Hutchins, as

vice-president and treasurer, and the railway company. They were convicted under the direction of the court, and a writ of *certiorari* has been issued to review the proceeding here.

To discuss the questions involved intelligently, it is necessary to make quite a complete statement of what is shown in the record. In 1862 a number of gentlemen proposed to organize a corporation under the provisions of "An act to provide for the construction of train railways" (Act No. 148, Laws 1855). The common council passed an ordinance, which was approved November 24, 1862, granting to them a franchise to operate a railway in certain streets in the city of Detroit. The ordinance contained these provisions:

"Sec. 7. The cars to be used on said railways shall be drawn *by animals only*, at a *speed not exceeding* the rate of *six miles per hour*, *and shall be run as often* as public convenience shall require and the common council shall prescribe: *Provided always*, that said council will not require them to run regular *cars oftener than once in twenty minutes during fourteen hours* every day from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April. * * *

"Sec. 19. It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or *accommodation of the public* in relation to said railways.

"Sec. 20. The powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

In November, 1879, an ordinance was adopted by the council containing, among others, the following provisions:

"Sec. 4. On the first of July and January in each half year from the first of January, 1880, the Detroit City Railway Company shall pay to the treasurer of the city of Detroit a tax of one per cent. during the period of this ordinance, on the gross receipts of the several lines of street railway operated by said company. * * *

The foregoing special tax and undertaking as to paving shall be in lieu of license and other taxes and charges for paving under existing ordinances. And it is hereby stipulated and agreed that the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the common council order.

"Sec. 5. The powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the amendments thereto, are hereby extended and limited to thirty years from this date. * * *

"Sec. 6. This ordinance shall take immediate effect when written acceptance of the terms thereof is filed in the office of the city clerk of Detroit by the Detroit City Railway Company, the Detroit & Grand Trunk Junction Street-Railway Company, and the Central Market, Cass Avenue & Third Street Railway Company, or their successors; and from that date all ordinances, or parts of ordinances, in conflict with the provisions hereof, shall stand repealed; and all ordinances and parts of ordinances not in conflict herewith are hereby affirmed and continued in force."

It is by virtue of the ordinances mentioned that the street-railway company is operating its line of road today.

On the trial it was shown on the part of the railway that the Michigan-Gratiot line of its system runs from the end of Michigan avenue, across the city, out Gratiot avenue. Upon this track, from Trumbull avenue to Chene street, the Trumbull-Chene street line also runs; so that from the intersection of Trumbull and Michigan avenues to the intersection of Chene street and Gratiot avenue there is a double service on the line. On both the Trumbull-Chene and the Michigan-Gratiot lines is a six-minute service, so that from Trumbull avenue to Chene street the cars run every three minutes. After the Chene-street cars leave the Gratiot-avenue track, from that point out there is again a six-minute service on the Michigan-Gratiot line, which six-minute service continues as far as Mack avenue. From that point, one-half of the cars of the Gratiot-avenue line go out Mack avenue, and the other half continue out Gratiot avenue as far as the loop, which is a

little beyond Sheridan avenue. This gives a 12-minute service on Mack avenue, and also a 12-minute service on Gratiot avenue from Mack to Sheridan avenues. From 5:30 to 7 a. m., and from 5:15 to 6:15 p. m., cars are run every six minutes on Gratiot avenue from Mack to Sheridan, and cars from Mt. Clemens, run by the Rapid Railway, come down and go up Gratiot avenue every 30 minutes. It is the claim of the railway company that there is not sufficient travel beyond the junction of Mack and Gratiot avenues to make it necessary to put on cars more frequently than they now run them. They also claim that to give the service required by the ordinance of 1897 would involve an annual expenditure of about $50,000. It is the claim of the people that, in view of the settled condition of that part of Detroit beyond the junction of Mack and Gratiot avenues, there is need of a six-minute service to comply with the reasonable demands of the public; that the six-minute service would not be nearly as expensive as claimed by the railway company; that some of the cars could be run out Mack avenue, and return only to Gratiot; and that, even if it was expensive, the cost would not be a reason why they should not comply with the ordinance. Proof was introduced on the part of the respondents to the effect that during a portion of March, after the ordinance went into effect, they caused the number of passengers carried by their cars on Gratiot avenue, at a point just beyond the junction with Mack avenue, to be counted, and the average was a trifle more than 7 persons to the car during the 12-minute service, and 13 during the 6-minute service. To get this average, the car service both ways was included.

Counsel for respondents in their brief say:

"There are practically but three questions in this case: * * * (1) Has the common council of the city of Detroit the power, under its police regulations, to pass the ordinance upon which the complaint is based? (2) Has the common council the power to pass this ordinance under its contract with the railway company? (3) Is the ordinance reasonable?"

In our view of the law, it will not be necessary to discuss at length the first question. It is claimed that, unless the ordinance is passed by virtue of the police power of the council, the recorder's court has no jurisdiction. It may be well to say that if, under the contract relations existing between the city and the company, the former had the right to pass the ordinance of 1897, the common council had a right to provide a penalty for its violation. This right is expressly conferred by section 257 of the charter (Charter of Detroit, 1893). Section 249 confers upon the recorder's court authority to try persons charged with violation of the ordinances of the city.

Passing to the second question, it is said by counsel that, under the franchise held by the railway company, the city had no right to pass the ordinance of 1897. It is said that the ordinances of 1862 and 1879 constitute a contract between the city and the street-railway company, and that "the ordinance of 1879 was not a new grant or a new consent; it was confessedly an extension of the old grant of consent, upon the terms and conditions of the old consent, except in so far as those terms were readjusted,"—citing *Detroit Citizens' St. R. Co.* v. *City of Detroit*, 12 C. C. A. 365 (26 L. R. A. 667). It is now urged that as the city agreed, by the provisions of section 7 of the ordinance of 1862, not to require the company "to run regular cars oftener than once in twenty minutes during fourteen hours every day from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April," by reason of its contract with the company the city cannot now require the company to run cars oftener than once in twenty minutes. All of these provisions in the various ordinances, so far as they appear in the record, relating to the frequency with which cars shall be run, the rate of speed, and the motive power allowed, have already been quoted.

In construing these ordinances, it may be worth while to inquire into the situation when they were passed.

Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center. A street railway was comparatively unknown. It was yet in an experimental stage. No more practical method of furnishing motive power was known than the use of animals. It was believed that a speed not exceeding 6 miles an hour, and cars run not more frequently than 3 times an hour for 14 hours in the day part of the year, and 12 hours a day for the remainder of the year, would answer the convenience and demands of those who were likely to be patrons of the road. The franchise conferred by the ordinance of 1862 would end by its terms in 1892. In 1879 the population of the city was upwards of 100,000 people, and the city was growing rapidly. Street-railway systems were no longer experiments. A franchise like that conferred by the ordinance of 1879, in a city like Detroit, was known to be an exceedingly valuable thing. The ordinance of 1879, by its terms, gave the company a franchise for 30 years. Improved methods of motive power were coming into vogue. Portions of the residence part of the city were much farther from the business center than in 1862. The public demanded quicker and more frequent service then than it had earlier. Is it likely that, under such circumstances, the council would confer a franchise for 30 years over the principal streets of a great and growing city, with a limitation that the city should not require the running of cars oftener than 3 times an hour, and not at all for 10 hours of the day for part of the year, and 12 hours a day for the remaining portion of the year? On the other hand, is it probable that the railway company would be willing to accept an ordinance running for 30 years which limited it to the use of animal power in the transportation of its cars, and to a speed of 6 miles an hour? We think this contention is unreasonable, and that the ordinance of 1879 was given and accepted with the understanding of all parties to it that the provision in section 4 "that the cars on all lines subject to this ordinance shall be operated as

the public convenience may require and the common council order" should control.

Is the ordinance reasonable? Who shall determine? It is evident that, when the provisions of the ordinance ceased to direct how frequently the cars should run, the parties to the ordinance understood that, in the first instance, the common council should decide. It is urged that the interests of the company and the public are identical, and that the frequency with which the cars shall be run can safely be left to the company. It is sufficient reply to this suggestion to say that the ordinance does not so provide. It is said, in substance, that, if the power is lodged with the common council, the chances are that the public interests would not be subserved, but private spites and hatreds gratified, and that a corrupt common council may sap the life-blood of industries in cities unless the corporations "see" the members of the council. We cannot presume that members of a common council are actuated by improper motives, or that their actions towards corporations are actuated by improper motives. But, if this were conceded, there would be two remedies: *First.* The aid of the criminal law should be invoked to punish alike the members of the council whose official acts are influenced by corrupt means, and the corporation which makes use of the corrupt methods to improperly influence official action. The second remedy is for the people to elect honest members to the common council. It may be assumed, in the very nature of things, that the members of the common council are acquainted with the city, the number and direction of the streets, the density of its population, the need of quick transportation, and how well the need is supplied. They ought to be men, too, who would stand impartially between the people whom they represent and the corporations to whom franchises have been granted, and would respect the rights of both. The common council acts as the public and municipal agent, and, in the passage of an ordinance affecting subjects of municipal administration, it should and will be

presumed that the council acted in the exercise of a judgment upon the facts, and their judgment must control until it has been shown that it has been improperly exercised. *Mayor, etc., of New York* v. *Dry-Dock, etc., R. Co.*, 133 N. Y. 104 (28 Am. St. Rep. 609). We have no doubt, if it was clearly made to appear that the action of the council was capricious and arbitrary, or that the public convenience did not require the provisions contained in the ordinance, that the courts might intervene. It is not made to appear that the action of the common council is unreasonable, especially if stub trains are allowed to be run from the junction of Gratiot and Mack avenues, out Mack avenue, which should be allowed if the company so desires. Until the company has given the provisions of the ordinance a trial, no one can say that they are unreasonable. This the company should be required to do.

The judgment of the court is affirmed, and the case is remanded for further proceedings.

The other Justices concurred.

116 141
f151 1127

McNAUGHTON *v.* EVERT.

1. CONTINUANCE—DISCRETION OF COURT.
   The matter of the continuance of causes is one resting in the sound discretion of the court, which is not reviewable except where there is the clearest evidence of willful or wanton disregard of justice or a mistake of law.

2. SAME—REVIEW ON CERTIORARI.
   Certiorari will not lie, as a matter of right, to review the action of a circuit court commissioner in denying an application for a continuance in summary proceedings, since complete justice may be obtained by an appeal and a trial on the merits.

3. SAME—ABSENT WITNESS—MATERIALITY OF TESTIMONY.
   The fact that an application for a continuance is supported by an affidavit setting forth the serious illness of a witness whose testimony is alleged to be material does not render its denial an abuse of discretion, where two continuances have already been granted the affiant, and no showing is made by him, aside from his statement, that the testimony of the absent witness is material, and the circumstances surrounding the case are such as to cast doubt upon the good faith of the application.

Error to Muskegon; Russell, J. Submitted January 4, 1898. Decided March 15, 1898.

Summary proceedings by Edward J. McNaughton against John Evert, before a circuit court commissioner, to recover the possession of land. There was a judgment for complainant, and defendant removed the cause by *certiorari* to the circuit court, where the judgment was affirmed. Defendant brings error. Affirmed.

Turner & Turner, for appellant.

Stephen H. Clink, for appellee.

HOOKER, J. Summary proceedings to recover possession of land were brought against the defendant before a circuit court commissioner. The return day was upon April 20th. On that day a motion to adjourn was made by the defendant, and the cause was adjourned until April 24th. At this time, counsel for the defendant assured the counsel for the complainant that his witness would not be able to be present on April 24th, as he could not possibly recover his health sufficiently. On April 24th the motion was renewed, and affidavits of the defendant, who was the son, and Caroline Evert, who was the wife, of the alleged sick witness, were read, stating that he was so sick that neither could leave his bedside, except as defendant might find it necessary to go for the doctor, who lived in Muskegon, although the affiant was in Muskegon on urgent business that morning. A counter affidavit was filed showing that both defendant and Caroline Evert were in Muskegon that morning. The commissioner adjourned the case for one week, against the protest of defendant's counsel, who said that he should have to ask for another adjournment, as his witness would not be well enough to be present. Counsel for the complainant replied that he would take the risk of that. On May 1st the motion was renewed, supported by affidavits of the defendant and the attending physician, both saying that Peter Evert, the witness, was better, but, in their opinion, not physically able to appear or have his deposition taken, but they thought he might have a deposition taken in a short time. The commissioner denied the motion, and the defendant's counsel abandoned the case, whereupon a trial was had, and a judgment against the defendant was rendered. The case was removed by *certiorari* to the circuit court upon the single question of the propriety of the denial of the adjournment, where the judgment was affirmed. It is now here on writ of error.

Although three motions to adjourn were made, there is nothing to show what might be proved by the witness, and the only evidence that what he might tes-

tify to is material is the statement of the defendant himself, under advice of counsel. In other courts it is usual to require an application for a second continuance to set up these facts. Indeed, up to this time there is nothing in the record to show the nature of the defense, if there be any; and, when the motion was denied, the defendant seems to have preferred to risk his entire interest upon the question of the adjournment than to go to trial with what evidence he had. Again, with the right to appeal and try the merits, he preferred to turn the complainant out of court. The adjournment of causes is always a matter of discretion. It is not usual to permit a counter showing; yet applications are frequently denied, and it is understood that the discretion is not reviewable, except where there is the clearest evidence of willful or wanton disregard of justice or a mistake of law. In my opinion, we have neither in this case, and apparently such was the view of the circuit judge.

There is another reason why this writ should be denied. It is a discretionary writ, and equitable in its nature. It will never be allowed to aid a wrong, or a technical practice, which justice does not demand, when there is a way open to try the merits. It would have been quite as easy, fully as cheap, and justice would have been done much more expeditiously, had an appeal been taken. By delaying this proceeding, the complainant would be prevented from putting in the spring crop, and the commissioner may well have taken that into consideration with other surrounding circumstances, which are not before us, in determining the good faith of the application and the truthfulness of the showing. At all events, we cannot presume that he did not.

I am of the opinion that the writ was improvidently issued, and the learned circuit judge was quite right in refusing relief under it. The complainant is entitled to costs of both courts.

The other Justices concurred.

VINING *v.* MILLAR.

116	144
s121	235
116	144
139	208

CHATTEL MORTGAGES—DELAY IN FILING—RIGHTS OF INTERVENING CREDITORS.

An intervening creditor does not lose the right to avail himself of 2 How. Stat. § 6193, making a chattel mortgage, unaccompanied by change of possession, invalid as against a creditor whose claim accrues between the execution of the mortgage and the filing thereof, by taking a chattel mortgage to secure his claim under circumstances not entitling him to protection as a subsequent good-faith incumbrancer; nor is such right affected by his failure either to take possession by virtue of his mortgage, or to have the same properly filed.

Error to Wayne; Frazer, J. Submitted January 4, 1898. Decided March 15, 1898.

Replevin by James B. Vining and Donald Ferguson against Charles Millar and David W. Fox. From a judgment for plaintiffs, defendants bring error. Reversed.

Moore & Moore, for appellants.

F. L. Brooke (*Thomas S. Jerome*, of counsel), for appellees.

MOORE, J. This case has been here before, and is reported in 109 Mich. 205, where there is a full statement of the case as it was made in the first trial. Some new features are involved in this hearing, and, in addition to the statement of facts contained in the reported case, it is necessary to state further what occurred. On the second trial it was claimed by plaintiffs that when Vining fell sick, and was unable to remain with the horses personally, Stilson was put in charge of the horses, and was to have the same authority that Vining, up to that time, had exercised. Construing the testimony in the most favorable light possible to the plaintiffs, there is nothing in the

record to show that when Leroy gave his mortgage to the plaintiffs, or at any time afterwards, and before Leroy gave the mortgage to Millar, plaintiffs took possession as mortgagees, or that Vining or Stilson had any other possession than as representing George Leroy & Co., and for the purpose of accomplishing the purposes of the partnership. Nor is there any testimony that Leroy surrendered his right to possession as a partner. Additional proof was given upon the question of the possession given to Millar and Briggs shortly after the mortgage to Millar was given. A judgment was rendered upon the verdict in favor of plaintiffs, from which judgment defendants appeal.

It will be observed that the mortgage to the plaintiffs was given October 11, 1892. It was not filed anywhere until July 17, 1893. June 30, 1893, Millar let Leroy have $230, and between then and July 5th other sums, until $727.25 had been furnished him in all. The chattel mortgage was executed about midnight of June 30, 1893. It bears date July 5, 1893, and was recorded on that day. It is now claimed that, irrespective of the other questions in the case, a verdict should have been directed in favor of defendants, for the reason that plaintiffs' mortgage, being unrecorded, was void as against the defendant Millar, who was a subsequent creditor as well as a subsequent mortgagee, and that this is in accord with 1 Revised Statutes of Ontario, 1887, chap. 125, § 4 (*River Stave Co.* v. *Sill*, 12 Ont. 557; *Marthinson* v. *Patterson*, 20 Ont. 125, 720), and also in accord with the laws of Michigan (2 How. Stat. § 6193; *Boydson* v. *Goodrich*, 49 Mich. 65; *Root* v. *Harl*, 62 Mich. 420).

In *Crippen* v. *Fletcher*, 56 Mich. 386, it was said:

"We have heretofore held that a chattel mortgage not seasonably filed is void, and not merely presumptively void, against creditors whose rights intervene between the making and filing. *Haynes* v. *Leppig*, 40 Mich. 607; *Fearey* v. *Cummings*, 41 Mich. 383; *Hurd* v. *Brown*, 37

Mich. 484; *Cummings* v. *Fearey*, 44 Mich. 39; *Waite* v. *Mathews*, 50 Mich. 392; *Wallen* v. *Rossman*, 45 Mich. 333. The law does not require previous proceedings to exhaust other remedies."

The case of *Dempsey* v. *Pforzheimer*, 86 Mich. 652 (13 L. R. A. 388), is much in point. October 22, 1886, Harris & Karpp borrowed of Mr. Borgess, plaintiff's decedent, $2,000, and gave him a chattel mortgage on the same day, which was not recorded until December 26, 1887. Between the date of the giving and filing of this mortgage, the defendants, who were residents of New York city, sold Harris & Karpp goods, to secure the payment of which they took a chattel mortgage on December 30, 1887, which was filed the same day. Afterwards the defendants took possession of the stock under this mortgage. While they were in possession, demand was made on them for the stock by the holder of the first mortgage. They denied its validity, and sold the goods under their mortgage. Plaintiff brought trover for a converson of the stock, and recovered a judgment. This court reversed that judgment, and in the opinion said:

"It is plain, under the rulings of this court, that the Borgess mortgage was void for want of filing as against the original indebtedness of Harris & Karpp to defendants, incurred while the mortgage was in existence and not filed, and for goods sold by defendants in the usual course of business, in ignorance of the existence of such mortgage. *Fearey* v. *Cummings*, 41 Mich. 383; *Wallen* v. *Rossman*, 45 Mich. 333; *Waite* v. *Mathews*, 50 Mich. 392; *Talcott* v. *Crippen*, 52 Mich. 633; *Crippen* v. *Fletcher*, 56 Mich. 386; *Root* v. *Harl*, 62 Mich. 420; *Johnson* v. *Stellwagen*, 67 Mich. 10; *Brown* v. *Brabb*, Id. 17 (11 Am. St. Rep. 549); *Cutler* v. *Steele*, 85 Mich. 627.

"If the defendants, before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of law a lien upon it, or had they obtained judgment upon their claim, and issued execution, and levied on it, there can be no doubt but such lien or levy would have been good as against the Borgess mort-

gage. But it is claimed on behalf of plaintiff that, because defendants took a mortgage to secure the indebtedness to them after the Borgess mortgage was put on file, and therefore had notice of it, they cannot now claim the benefit of the rule adopted by this court as shown above, and that they have no standing under the statute upon which the rule is founded. It is contended that, to avail themselves of the statute, the defendants, at the time of seizing the goods in question, must have the standing either of 'creditors of the mortgagors,' or of 'subsequent purchasers or mortgagees in good faith;' that they cannot claim as subsequent mortgagees in good faith, because they took their mortgage with full notice of the Borgess mortgage, which had then been on record for four days; and that the benefit of the statute cannot be invoked in favor of creditors, except by those who have a lien by process of law upon the property in question. And it is argued that a mortgage lien will not avail, except, perhaps, in equity. We are cited to *People's Savings Bank* v. *Bates*, 120 U. S. 560, and other cases, in support of this contention. But we can see no difference between a lien obtained by process and one gotten by consent of the owner through a chattel mortgage. If the defendants were entitled, as they undoubtedly were, to obtain a lien upon this property by legal process, and to hold it to the amount of such lien against the mortgage of Borgess because the debt they were seeking to collect was contracted while this mortgage was withheld from record, we can see no reason in principle why they cannot hold the property under a lien obtained by chattel mortgage to secure the same indebtedness."

The court then enters upon a full review of the cases, saying:

"It would seem to be settled in *Root* v. *Harl*, 62 Mich. 420, that, when an assignment is made by a debtor for the benefit of creditors, such creditors as are the defendants in this case can, upon the equity side of the court, attack the unrecorded mortgage, and obtain a preference over it, although they have no lien whatever upon the debtor's property; and that they are not 'general creditors' in such a sense that they cannot attack the mortgage without first obtaining a lien, by legal process or otherwise. If this is so, why cannot such a creditor, who has obtained a mortgage lien upon the property, and pos-

session under it, defend against a void mortgage, without resorting to legal process against the property? And why should he be compelled to relinquish his possession under such mortgage lien, or pay the amount of a void mortgage? In my opinion, there is no equity or justice in the plaintiff's claim in this case, and no law under which he can enforce it."

The opinion concludes:

"Under the facts as stipulated, the defendants were entitled to the possession of the property as against the plaintiff, and to make their claim out of it by a sale of the property under such mortgage."

See *First Nat. Bank* v. *Guntermann*, 94 Mich. 125.

Counsel state in their brief: "Even had plaintiffs not had possession of this property before, they might, on its arrival in Michigan, complete their inchoate lien by filing their mortgage, or by taking possession, as they did;" citing *Waite* v. *Mathews*, 50 Mich. 392. A reference to this case shows that the debt which was attempted to be secured by a judgment levy was a debt made before the giving of the chattel mortgage. In the opinion Justice CAMPBELL says:

"The other question was substantially decided in *Kohl* v. *Lynn*, 34 Mich. 360, and *Fearey* v. *Cummings*, 41 Mich. 376, where it was distinctly intimated that, in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done, or some detriment sustained, during the interval. As against all such rights, a mortgage without such possession or filing is absolutely, and not merely presumptively, void; while conveyances not by way of mortgage are only presumptively void, under such circumstances."

Defendant Millar was a subsequent creditor, in possession of the property under his mortgage, seeking to enforce the lien given to him by it, when the plaintiffs replevied it. Their mortgage was void as to him. The circuit judge should have directed a verdict in his favor to the amount of his indebtedness, but not exceeding the

value of the interest of Mr. Leroy in the property. Mr. Millar's mortgage, even though it was not properly filed, and though he had not taken possession of the property by virtue of it, was not void as to the mortgage of plaintiffs, for the reason that they were neither subsequent creditors nor subsequent incumbrancers. Their debt accrued and their mortgage was given prior to the making of the Millar mortgage, and does not come within the provision of the statute.

Judgment is reversed, and new trial ordered.

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

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136 114

SMIZEL v. ODANAH IRON CO.

1. NEGLIGENCE—INJURY TO EMPLOYÉ—MINING OPERATIONS—PLATFORM IN SHAFT—DEFECTS IN CONSTRUCTION—EVIDENCE.

A plank in a platform constructed in a mining shaft was disturbed by blasting at a lower level, and plaintiff, an employé in the mine, while attempting to cross such platform, fell and was injured. Upon the question of fact whether the planks were spiked down, the workman who supervised the construction of the platform, and a shift-boss who was with plaintiff at the time of the injury, testified in the affirmative. The latter further testified that, upon replacing some of the planks after the explosion, the spikes fitted the same holes they had been drawn out of; that the planks "went down even" at the first effort, with no more force applied than simply stepping upon them. A fellow workman testified that he saw no spikes in the plank, and other witnesses testified that blasts such as the one used would not be likely to disturb a platform if spiked down. *Held*, that, upon the whole evidence, the question was for the jury.

2. SAME—INSTRUCTIONS.

An instruction that the company would be liable to plaintiff for his injuries if the platform in question was insufficient and unsafe for such general use as the company was putting it to, and was liable to be loosened by explosions in the shaft below, was not objectionable as withdrawing from the jury the question as to whether the accident to plaintiff was one which the company might reasonably have anticipated, when it was given in connection with instructions that the burden was upon plaintiff to show that the platform was not such a one as a reasonably prudent company would, under the circumstances, have erected, and that no presumption of want of reasonable care arose from the fact of the planking's being disturbed by the firing of the blast, and that such care would not require the company to build a platform which could not be disturbed by blasts below, unless experience had shown that such blasts would probably disturb such platform.

3. SAME—INTERVENING CAUSE.

The company was bound so to construct the platform that it should be capable of withstanding the strain to which the ordinary operations of the mine would subject it; and if the platform became loosened under the strain of such ordinary operations, by reason of defects in the original construction, the company would not be entitled to have the operations themselves treated as an intervening cause of injuries to a workman under whom it gave way.

Error to Gogebic; Haire, J. Submitted January 4, 1898. Decided March 15, 1898.

Case by Wenzel Smizel against the Odanah Iron Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Charles E. Miller (*Fish & Cary*, of counsel), for appellant.

J. J. Patek (*Charles A. Withey* and *C. F. Button*, of counsel), for appellee.

MONTGOMERY, J. This is an action for negligent injury. On the 26th of February, 1890, the defendant was the owner of the Cary Mine. At this mine was a

shaft known as "No. 1 Shaft," which shaft was about 148 feet deep. The first level of said shaft was about 35 feet from the surface, the second level about 50 feet below the first level, and the third level 63 feet below the second level. Shortly before the day in question, the defendant company caused a platform to be built at the second level above mentioned. The shaft at that point was about 8 by 10 feet across, and the platform was about 10 by 12 feet; the planks of the platform projecting onto the rock at each edge of the shaft. This platform was built of timber 8 by 10 inches in diameter, and three timbers running crosswise of the shaft. On these timbers were laid 2-inch planks. Through this platform was a hole used for the skip-road, which hole was about 4 feet 6 inches square, and near that hole was what was known as the "manhole" or "ladder-way;" being a hole through which men passing up and down the ladder-way might pass, which was sufficiently large to admit of the passage of a human body of ordinary size. The platform in question extended over the entire shaft, except for the holes above mentioned. As to whether the planks were spiked down is a matter of controversy. Defendant's counsel contend that the undisputed testimony shows that they were, while plaintiff's counsel contend that it was a question for the jury.

On the day in question, the plaintiff, together with another workman at the Cary Mine, named Prelomski, were engaged, together with the shift-boss, whose name was Matthews, in building what is known as a "skip-rest," just beneath the surface of the platform. This skip-rest was built of timbers, and was located about six feet below the level of the platform, and was used for the purpose of allowing the skip to rest thereon while the same was being loaded. At the third level, 63 feet below, the miners were engaged in mining ore by blasting and drilling and picking, and the testimony shows that at the third level a drift had been mined out to the east and to the west of the shaft in question, to the east about 25 feet and to the west about 15 feet, and blasting was going on at the end of one

of these drifts, but whether in the east or west drift is not shown by the evidence in this case. While the plaintiff and shift-boss and Prelomski were thus engaged in building the skip-rest, warning was given by the miners below that they were about to fire a blast, and the shift-boss ordered the two men who were working with him to leave the place where they were working, under the platform, and all three went up onto the platform, thence east across the platform into a drift, and through a door into what is known as the "open pit." After these three persons had arrived at the open pit, the blast was fired, and the shift-boss stepped out to the shaft, and found it filled with smoke. He then noticed that some of the planking of the platform at the second level had been disturbed by the blast, and he and some miners who were on the west side of the shaft took hold of the planks which had been disturbed, and laid them down flat upon the platform as they had been originally. The planks which the shift-boss thus rearranged were the long planks, being about 12 feet long. Between the hole made by the skip-road and the edge of the shaft the planks were short, being approximately 6 feet long. The shift-boss testified that he did not notice that any of the short planks were disturbed or overthrown.

After the shift-boss had thus rearranged the platform, he called to the men who were in the open pit to come up the ladder, and go over into another shaft to work; and the shift-boss walked across the platform to the ladder-way, followed by Smizel, the plaintiff, who was in turn followed by Prelomski. As the shift-boss started up the ladder-way, Smizel fell, and it is claimed by him that he stepped upon a plank which had been blown loose by the explosion, which slipped with him, and that he then fell through the hole made in the platform, falling to the bottom of the shaft, by which he was seriously injured. None of the timbers in the platform were disturbed, nor were any of the planks composing the platform broken. The platform in question was built under the supervision of

one Thomas Bolitho, who, so far as appears in this case, was entirely competent to do that work. This platform in question was used simply for men to stand upon and to pass over. It is claimed by the defendant that the undisputed testimony shows that a platform such as this was the usual and customary platform used in the mines in this locality for the purpose for which this platform was intended. It is further claimed by the defendant that the probability of the platform's being disturbed by blasting below, under circumstances such as were shown in this case, was very remote, and that it was not such an occurrence as would be taken into consideration or as would be apprehended by reasonably prudent mining men.

As the plaintiff's counsel concede the importance of the question of fact as to whether the planks were spiked, it is necessary to look into the record to ascertain whether defendant's contention that the evidence was conclusive of the fact should be sustained. Two witnesses for the defendant testify that the planks were spiked, viz., Matthews and Bolitho. Matthews was the shift-boss, who testified that, after the explosion, boards were torn up, and he replaced them. He was asked, "Do you know whether those planks were spiked?" and answered, "Yes, sir; they were spiked." He further testified as follows:

"*Q.* What did you do with the spikes when you put them down?

"*A.* The spikes went right down.

"*Q.* You mean the spikes fit the same holes they had been drawn out of?

"*A.* They might have. The boards went right down just as even as they are there [pointing to the model].

"*Q.* What I want to find out is, when you jumped onto the plank you jumped on so that the spikes went right down into the timbers again?

"*A.* Perhaps so. They went down even."

He also testified that he used no hammer, and that it took him but a very short time to replace the planks. Bolitho, who built the platform, testified that he spiked the plank down. On the part of the plaintiff, Prelomski, who was working with plaintiff, testified:

"I didn't see any nails in the loose plank after Smizel went through. If there were spikes in it, sure I must have seen it; I would have seen it."

On cross-examination he testified as follows:

"*Q.* Do you know whether there were any spikes in it at that time or not?

"*A.* I didn't see any spikes in the plank.

"*Q.* Did you look to see whether there were any in it or not?

"*A.* If there were spikes there I would have seen it; everybody would have seen it.

"*Q.* Did you look to see whether there were any spikes in it or not?

"*A.* No.

"*Q.* Did you see any spikes in the other planks?

"*A.* No, sir.

"*Q.* Do you know whether there were any or not?

"*A.* I didn't see any.

"*Q.* Do you know whether there were any?

"*A.* I don't know; I couldn't say that.

"*Q.* Could you have seen spikes if there were spikes in the other planks?

"*A.* If there was, the spike is so long I could see it.

"*Q.* Suppose the spikes were the other side down?

"*A.* I think if the spikes were in there the planks wouldn't set level; it would be kind of tipping on each side.

"*Q.* Did you say that you know there were no nails in that plank?

"*A.* I couldn't say sure, but I didn't see them.

"*Q.* You didn't look for them, did you?

"*A.* No.

"*Q.* You were pretty badly frightened, weren't you?

"*A.* I was scared awful much, but I would see it some way if there were spikes in there. My foot or something would probably touch it.

"*Q.* You wouldn't necessarily touch a spike with your foot, would you, that was in this plank?

"*A.* I didn't see it. I went over that plank to get to the ladder-way. I was excited and frightened.

"*Q.* When you started to go you were in a hurry, weren't you?

"*A.* Sure, there was nothing to look around.

"*Q.* And you didn't pay much attention to whether

there were nails in the plank or not, as you were in a hurry to get to the ladder? Isn't that right?

"*A.* I couldn't say sure.

"*Q.* There might have been spikes in that plank without your seeing it, might there not?

"*A.* About the spikes I couldn't say, because I haven't seen them.

"*Q.* You couldn't say whether they were there or not, because you didn't see them?

"*A.* No; I didn't see them, if there was or not."

This cross-examination materially impairs the force of the testimony of this witness; but should we say that there was no question for the jury on this point? We think not. Defendant called witnesses who testified that blasts such as used in the mine would not be liable to disturb such a platform if spiked down, and the cross-examination of Matthews tends strongly to show that the planks were not spiked. It was certainly a very remarkable fact that these planks, if they were spiked, torn loose as they were, should have been by the first effort replaced in such a way that the spike would exactly fit the hole it had previously made, and that they should go into place with no more force applied than simply stepping on them. This question was, on the whole record, a question for the jury.

An examination of the record satisfies us that it did not appear by the undisputed testimony that the platform in question was the usual and customary platform used in the locality. On the contrary, there was evidence that such platforms were in many instances constructed with a double thickness of plank. The jury, in answer to a special question submitted to them by defendant, found that the platform was not such a one as was usually and customarily adopted by mining companies in that locality.

The theory on which the case was given to the jury is indicated by the following extract from the charge:

"Now, gentlemen, in this case, the plaintiff claims, and has introduced testimony which he claims tends to show, that in February, 1890, in the State of Wisconsin, he was

employed in the Cary Mine by the defendant, the Odanah Iron Company, as a common laborer, and that while so employed he was injured, and that he was injured by reason of the improper construction of a platform in one of the levels at defendant's mine; and he claims that, by reason of that improper construction of a platform, he was injured, and therefore he claims damages at your hands. In other words, he claims that the original construction of this platform in question was not proper; was not safe; was not so constructed that it was a safe place to work. The defendant, on the other hand, has introduced testimony which it claims tends to prove that this platform in question was properly constructed; that it was constructed as such platforms are ordinarily and usually constructed, and with due care, having in view the safety of persons that worked thereon and the uses to which it was to be put. If you find that that is the case, then, even though the plaintiff was injured, he cannot recover, because it would be one of the risks of his employment, and he would have to suffer the consequences if he was so injured.

"That, in general, gentlemen, is the case that we have for you to consider today. I charge you more specifically on that subject, gentlemen, that it was the duty of the defendant in this case to make and keep its shafts where it placed plaintiff to work, and every part thereof, in a condition which was reasonably safe, under all the circumstances surrounding the situation. This applies to defendant's platform at the second level, where the plaintiff was hurt; and the defendant's care should have been equal to the risks of the business in which it was engaged. The work of mining is always attended with more or less danger. Those engaged in the business know the fact, and it is their duty to use enough diligence and care in preparing their premises, structure, and appliances so that no more than the usual and ordinary risks would attend the work which they require of the men in their employ. If the defendant failed to do this, and solely because of that failure the plaintiff was injured, substantially as claimed in his declaration, and as shown by the evidence, he is entitled to recover, and your verdict should be in his favor. *The defendant was bound to know all the consequences which usually attend such operations as it was carrying on at the time in question;* and, if explosions in the drifts below the platform on the second level were liable to disturb and disarrange the platform,

it was bound to know it, and to take all necessary and reasonable precautions to prevent such a thing happening in the ordinary course of its business, and to take all precautions that it could well and reasonably take to so construct and keep the platform in question strong, and all parts thereof in place, so that the plaintiff could safely go over it and go upon it, as the work required of him made it necessary. If the defendant failed to do this, and failed to exercise such care as it reasonably should have done under all the circumstances, and because of that the plank or planks of the platform were blown or became disarranged, and the plaintiff, without fault on his part, fell through and received the injuries in question, then your verdict should be for the plaintiff."

The defendant's counsel requested the court to direct a verdict for the defendant for the following reasons:

"(*a*) The proximate cause of the injury to the plaintiff was, as appears from plaintiff's evidence, a defect in the platform, in that one of the planks thereof had become loosened by an explosion immediately before the injury, so that, when plaintiff placed his weight thereon, the plank slid forward, and the plaintiff was precipitated through the hole thus made in such platform.

"(*b*) While it is the duty of the master to use reasonable care to provide employés with a safe place to work and with safe implements, still the duty thus imposed is only to use reasonable care under the then existing circumstances; and it appearing by the undisputed testimony that the alleged defect in the platform was the result of a sudden explosion, and that the defendant had had no time to make a thorough investigation previous to the injury complained of, the defendant cannot be said to have been negligent in this case.

"(*c*) The plaintiff and his fellow-servants had as good or a better opportunity to discover the alleged defect in the platform than the defendant had at that time, as appears from the undisputed evidence in this case, and, that being so, the plaintiff cannot recover in this case."

It is also assumed by counsel that certain specific requests were also presented orally, which the court refused; but this assumption is not borne out by the record. The record discloses that, at the close of the testimony, the defendant's counsel orally requested the court to instruct

a verdict for defendant for certain specific reasons. This was denied, and then the counsel requested the court in writing to direct a verdict for the reasons above set out. It is apparent, therefore, that the only questions which we can consider are whether there was a case for the jury, and, if there was, whether the court committed error in his charge to the prejudice of the defendant. It is contended that the injury to the plaintiff was not the proximate result of fault of construction. It is said that one is responsible for only such consequences of his fault as are natural and probable, and that if his fault happens to combine with something extraordinary, and not likely to be foreseen, he will not be responsible for the unexpected result. We think it would be a misapplication of this principle to rule the present case by it. It is apparent that this platform was built with a knowledge that it was likely to be subjected to the strain caused by explosions in the shaft beneath it. It was built as a structure more or less permanent, and the servants of the defendant had the right to assume that it would stand the test to which the ordinary operations of the mine subjected it. Such ordinary operations cannot be treated as constituting an intervening cause.

It is also contended that the court erred in instructing the jury as follows:

"It is claimed by the plaintiff that this platform in question was not strong, thick, and substantial, as it should have been, and that it was not properly nailed or fastened down, and was insufficient and unsafe for such general use as the defendant was putting it to, and was liable to be blown up, disturbed, and loosened by explosions in the drifts below, such as the defendant caused to be made. If you find this to be true, under the evidence in the case, it was negligence in the defendant, and your verdict should be for the plaintiff."

It is insisted that the question whether such an accident is one which would have been likely to happen, and should have been anticipated, was by this instruction withdrawn from the jury. It is scarcely necessary to say that the

charge should be construed as a whole. When so construed, we are satisfied that it is not subject to the criticism stated. In other portions of his charge the court covered this point fully:

"*In order for the plaintiff to recover in this case, he must establish by a clear preponderance of the evidence that the platform as constructed was not such a one as a reasonably prudent mining company would erect under the circumstances, with reference to the safety of the parties working thereon or passing over the same.*

"*The mere fact that the planking of the platform in question was disturbed by the firing of blasts would not necessarily raise the presumption that the defendant did not exercise reasonable care in the erection thereof. It was only one of the circumstances bearing on the question of whether or not it was properly constructed.* * * *

"Reasonable care on the part of the defendant would not require it to build a platform which could not be disturbed by blasts fired in the level below, unless experience had shown that such blasts in the drifts in the level below would probably disturb such platform."

While numerous errors are assigned on the charge of the court, we think the foregoing discussion and the special findings of the jury sufficient answer to all.

A motion for a new trial was made and overruled, and error is assigned on the ruling. We are satisfied, on a careful examination of the record, that the verdict is not so clearly against the weight of the evidence as to indicate that it was influenced by passion or prejudice, or was not the result of the deliberate and fair judgment of the jury.

Judgment affirmed.

The other Justices concurred.

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FREY *v.* EISENHARDT.

1. ESTATES OF DECEDENTS—PARTNERSHIP—RIGHTS OF SURVIVING PARTNER.

A surviving partner cannot, by will, confer upon his executor a right to continue the business for any longer period than he himself might lawfully have continued the same, which is limited to such time as is necessary to close out the business without sacrificing it.

2. SAME—TRADE DEBTS—PROPERTY SUBJECT TO.

Where an executor or administrator, instead of closing out decedent's business with reasonable promptness, assumes, with the consent of the parties interested, to conduct the same as a going concern for a series of years, contracting extensive debts and sustaining heavy losses, only the trade assets—*i. e.*, the property employed in the business or resulting from it—can be subjected to the payment of such debts.

3. SAME—WIDOW AND CHILDREN—ALLOWANCES PENDING SETTLEMENT.

Nor will decedent's widow and children be compelled in a court of equity, as a condition to their being allowed an injunction restraining the application of the general assets to the payment of the trade debts, to refund amounts which had been allowed to them for their support out of the funds of the estate when the same was solvent.

4. SAME—TRADE ASSETS—WHAT CONSTITUTE.

Premises purchased by two brothers in their individual names, with moneys taken from the funds of a brewing business, in which they were copartners, at a time when the firm was entirely solvent, and occupied for years by their families under circumstances indicating that they regarded them as their respective homesteads, will not be held liable as trade assets for the payment of debts contracted by the administrator of the partners, who ran the business to insolvency, although it appears that water for the use of the brewery was procured from a pipe running across the property, that empty beer barrels were at times piled upon the lots, and that employés sometimes boarded with the families.

Cross-appeals from Kent; Grove, J. Submitted November 6, 1897. Decided March 15, 1898.

Bill by Caroline B. Frey and others against Jacob Eisenhardt and others to enjoin an administrator's sale. From the decree rendered, complainants and defendants Mary Frey, Mary M. Oswald, and Chrisitan F. Frey appeal. Reversed.

Charles B. Blair, for complainants.

Crane, Norris & Stevens, for appealing defendants.

S. Wesselius and *Frank W. Hine*, for defendant Eisenhardt.

J. T. Preston and *Birney Hoyt*, for other defendants.

MOORE, J. Carl Frey and Christian Frey were partners, doing business at Grand Rapids as brewers, conducting the Coldbrook Brewery, under the name of Frey Bros. Carl Frey died November 12, 1885, leaving a widow and six minor children. Upon his death, John Sehler was appointed his administrator. Christian Frey continued to conduct the business until his death, which occurred March 12, 1886. He left a widow and two minor children. Prior to his death, Christian Frey made a will disposing of his property, and containing this provision:

"I hereby nominate and appoint my brother-in-law, William Burgtorf, executor of this, my last will and testament, to carry out all the provisions of this, my last will, and see that the same is done according to the spirit of the same, and to assist, advise, and assist to manage said property, both real and personal; and if at any time it appears advisable to my said wife and executor to convert my said property, both real and personal, into money, then they shall act in the premises as to them shall seem to be for the best interest of my said estate; on the other hand, if it shall seem to them best and proper to keep said property and carry on said business, then it shall be their option so to do."

Burgtorf qualified as executor, and, instead of closing up the business, ran it, in connection with Sehler, administrator of the estate of Carl Frey, until October, 1890, when Jacob Eisenhardt was appointed administrator of both estates. Burgtorf and Sehler, at the time of their resignations, filed with the probate court their final accounts, which were allowed, and they were discharged. It will appear a little later what the condition of the estate was at the commencement and end of Mr. Burgtorf's executorship, and at the commencement of Mr. Eisenhardt's administration, and at the time of filing his last account. Mr. Eisenhardt, instead of closing out the business at once, continued to conduct it as a brewery business, making large improvements to the plant, and incurring many debts.

In December, 1892, the brewery plant was sold at probate sale for $18,000. After this sale, the administrator filed a petition in which he claimed that the indebtedness incurred by him in conducting the business should be paid *pro rata* out of the fund realized from the sale of the brewery. A contest was made over this claim in the probate court, at which time it was also claimed that the lands belonging to the estate were not liable for debts incurred by the administrator, even though the brewery plant was liable. An arrangement was finally made in August, 1893, between the heirs of Carl Frey and the administrator, that the fund realized from the sale of the brewery might be used to pay debts and expenses of administration, upon condition that the lands now in question should be exempt from paying any of the outstanding claims. This fund was so used, but the administrator claims that, because the creditors would not consent, he could not carry out the arrangement. In May, 1894, he petitioned the probate court for leave to sell the lands in controversy, to pay the outstanding debts and expenses of administration. The complainants, who were the minor children of Carl Frey, filed this bill to enjoin the court from subjecting the real estate then unsold, which was appraised in the original

inventory at less than $6,000, to sale, because of the outstanding debts, and asking that a portion of the property might be found to be the homestead of the widow and heirs of Carl Frey, and another portion be found to be the homestead of the widow and heirs of Christian Frey, deceased, and that, as to the balance of the real estate, an undivided one-half thereof might be declared to belong to the complainants, because in equity it belonged to them by virtue of the partner's lien, which arose on the death of Carl Frey. The widow and heirs of Carl Frey, and the widow and heirs of Christian Frey, have, since the filing of the bill, adjusted their respective rights as between themselves, so that particular feature of the bill is not very important. In the hearing below, it was the judgment of the trial court that the administrator had acted in good faith; that the lands in controversy were partnership lands, and should be subjected to the payment of the outstanding liabilities; and dismissed the bill of complaint. The case comes here by appeal.

The complainants claim as to the estate of Carl Frey that, as there was no will, it was not competent for the administrator to continue the business, but it was his duty to close it out within a reasonable time; and that, if this had been done, the debts would have been paid, and a handsome surplus left to divide among the heirs. It is also claimed that if, because of the provisions of the will of Christian Frey, the administrator was authorized to continue the business as a going business, any debts incurred would be trade debts, which must be paid out of the trade assets, and that none of the assets outside of the brewery plant could be used to pay the trade debts. They also say that the original debts have been paid, but, if it should be conceded that they have not been, that, because of lapse of time, the real estate cannot now be sold to pay them. The administrator claims that what he did was done in good faith, with the knowledge of the widows and the guardians of the minors, and the approval of the court, and for the purpose of conserving the

property; and that the debts made by him and the expenses of administration should be paid by the property of the estates, even though it takes all of it to pay them. It is the claim of complainants that the estates of Carl Frey and Christian Frey were solvent at the times of the death of the persons constituting the partnership. This is admitted by counsel for the other parties to the litigation. The inventory and appraisal made by Mr. Burgtorf as executor, in April, 1886, shows the assets to be upwards of $66,000, and the debts to be less than $22,000, leaving a surplus of upwards of $44,000. The inventory and appraisal made by Mr. Eisenhardt, administrator, October 1, 1890, shows the assets to be about $60,000, and the liabilities about $13,000, leaving a surplus of upwards of $47,000. As before stated, Mr. Eisenhardt, instead of closing out the business and converting the assets, made extensive improvements of the property, and ran it as a going concern. The record discloses the widows knew this was being done, though it is claimed they did not know it was done at a loss. The judge of probate was also consulted from time to time, but no order was ever made extending the time for settling the estates, or authorizing the administrator to conduct the business as a going business. Doubtless this was done with the best of motives, but it was very unfortunate for everybody concerned.

It is urged that, as a result of the administration of Mr. Eisenhardt, a profit was earned to the estate; but a careful analysis of the facts disclosed by the record shows this to be a serious mistake. It has already appeared that, when Mr. Eisenhardt began the management of the estate, it was worth, according to the appraisal, over and above its liabilities, upwards of $47,000. The administrator's expense account from October 1, 1890, to January 1, 1893, in carrying on the business, exceeded the receipts of the business by nearly $10,000. The administrator has sold all the property belonging to the estate when he became administrator, except the real estate involved in

this controversy, which was appraised in the original inventory at $5,300, and some accounts and personal property, which he says are worth not more than $750. This real estate has now depreciated in value, so it is now worth, according to the brief for the administrator, $3,850. It is sought by the administrator to have this real estate sold to satisfy debts and expenses of administration which existed January 1, 1893, to the amount of upwards of $8,000. It will be seen by this statement that not only has there been no profit growing out of the administration by Mr. Eisenhardt, but that the surplus of $47,000, less the real estate, now valued at $3,850, and the small amount of personal property, has disappeared, and that there is an indebtedness of upwards of $8,000 yet unpaid; so that, after absorbing all of the estate, there would be more than $4,000 of debts remaining. It is true, there has been a large shrinkage in values, but it is also true that the administrator has realized more than enough, out of the sales of real estate, to pay the debts which were in existence when he took possession of the estate.

Carl Frey did not make a will, so that no power was conferred, so far as his estate was concerned, to continue the business. The will of Christian Frey did not direct that the business should be continued, but left it to the discretion of his widow and his brother-in-law, Mr. Burgtorf, to carry on the business; but it did not leave it to the discretion of any one else to do so. The death of Carl Frey dissolved the partnership. The surviving partner had the right to continue the business long enough to close it out, without sacrificing it (*Loomis* v. *Armstrong*, 49 Mich. 521; *Brown* v. *Watson*, 66 Mich. 225; *Van Kleeck* v. *McCabe*, 87 Mich. 602); but he did not have the right to continue it for a series of years as a going concern, and he could not confer upon his executor a right he did not possess himself.

When Mr. Eisenhardt took control of the estate, there was, according to his testimony, but $65 in money on hand. There was a large quantity of beer, according to

his testimony, some of which was spoiled, and the balance of which was soon spoiled, so it had to be thrown away. He at once, without an order of court, and after the time fixed by sections 5918 and 5919, 2 How. Stat., for the settlement of claims against estates, had expired, began to borrow money to improve the plant, to buy new stock; he expressing his intention to be (after having conferred with the widows and Mr. Blickle, guardian) "to run it as a live business, under the will and authority of Christian Frey and the consent of the guardians and the respective widows, for the joint benefit of both families, so as to enable them to live from the business. These families had no means of support except from the proceeds of these estates, that I know of." He increased the debts more than $10,000 the first year, and even more the second year, and continued to run the business as long as he could borrow money to do so. It is said by counsel that his purpose in doing this was to keep the business running until a purchaser could be found, and that, where there is a long-established business, the administrator may continue the business for a time, for the purpose of holding the business, and until a sale can be made and the business closed; citing *Poole* v. *Munday*, 103 Mass. 174; *Merritt* v. *Merritt*, 62 Mo. 150; *In re Benedict*, 13 Abb. N. C. 67; *Collinson* v. *Lister*, 20 Beav. 356. They also say it may be done under the terms of a will; citing *Packard* v. *Kingman*, 109 Mich. 497. In the last-named case the testator was careful to provide how the trust might be executed, and for what period of time, and by whom. In deciding what the executors might do in that case, the court was careful to say:

"And while we do not mean to imply that his trustees might enlarge his obligations already existing, by furnishing new and additional financial aid to the corporations mentioned in the bill, we are of the opinion that they might properly, and where it should appear for the best interests of the estate, extend or renew existing obligations of the estate, or borrow money in the usual course of business to meet obligations when due. * * * While we hold

that it is within the power of the executors to perform the acts mentioned, and, therefore, that the estate would be bound thereby, we do not overlook the rule that the effect of such contracts is usually to bind the trustee personally, and that the other contracting party must pursue his remedy against the trustee. This doctrine is established by a list of cases, long and generally uniform,"—citing a long list of cases.

In *Collinson* v. *Lister*, *supra*, it was said that "an executor cannot carry on the trade of the testator, except for the mere purpose of winding it up; but the executor may, and in some cases is bound to, complete contracts entered into by his testator,"—citing a number of instances. In that case it was held that the executor could not charge the estate as he sought to do.

In *Re Benedict*, *supra*, the testatrix had conducted a young ladies' seminary for about 30 years. Eleven weeks of the school year remained at the time of her death. Her executor kept the seminary in operation for the remaining 11 weeks, and until the end of the school year; and it was held that this was right, for he was thus fulfilling the various contracts to which the decedent had made herself a party.

In *Merritt* v. *Merritt*, *supra*, decedent left half of his estate to his widow, who was also his administratrix. The estate included an hotel furnished and in operation, which was held under a lease requiring $1,000 rent to be paid monthly. When her husband died, she could not dispose of the hotel furniture. It was appraised at upwards of $11,000, but could not be sold at auction for more than $8,000. The administratrix decided to continue the business till a more favorable time for selling arrived. She kept the hotel for a little over a year, and sold the furniture for $20,000, $18,000 of which she collected, but the purchasers became bankrupt before the remaining $2,000 was collected. She accounted to the estate for the $18,000, and it was sought to make her lose the $2,000. The court said: "She was only endeavoring to secure, preserve, and take care of the effects till she could advantageously get them

off of her hands. It would be inequitable that she should bear all the loss, and the estate reap all the benefits resulting from her skill and care."

In *Poole* v. *Munday*, *supra*, the intestate died in 1862, leaving a widow, and a daughter 18 years old, and a son 20 years and 10 months old. There were no creditors interested. The business was that of wholesale and retail butcher. The widow and children requested the administrator to keep the business going until the son became of age, and it was kept going until March 2, 1863, when it was sold to the son. It was held that, under the circumstances of that case, the account of the administrator must be allowed.

It is not believed, however, that a case can be found anywhere which holds that, if the executor or administrator runs the business as a going concern for a series of years, he can charge the estate with the deficiency if the business results in a loss. The true rule is as follows:

"An administrator is not justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys; besides which, trading lies outside the proper scope of administration functions. Under circumstances not clearly imprudent, however, an executor may pursue an authority which was plainly conferred upon him by the will in this respect; though less as an executor, perhaps, than as one specially honored or burdened by his testator's personal confidence. Chancery protects the executor who can show his testator's express sanction, but scarcely beyond this, and chiefly so as to keep the hazardous investment under its prudent direction. To employ trust funds in trade on the representative's own responsibility has always been treated as essentially a breach of trust; and the courts have resisted much pressure to relax the rule. * * * For the loss of assets placed or left by him in trade, he may be charged as for his imprudence. * * * But as to withdrawing assets from a partnership, or closing out a business in which the decedent was engaged, a wider discretion must occasionally be conceded. * * * An administrator is not necessarily wanting in due care, so as to be responsible personally, if he suffer the surviving partner to remain in possession

of and sell out the joint stock in the usual course of trade. * * * These principles apply to speculative investments of all kinds with the assets. * * * But if assets came to him thus invested by the decedent, it is a question of prudence when and how he shall withdraw the fund; and though he is not justified in continuing the speculation, and involving the estate more deeply, a reasonable latitude of honest discretion should be allowed him as to closing the transaction. * * * Where the business of the decedent is carried on by executors under a will, or by representatives duly empowered, * * * the representatives incur a personal liability for the debts thereby contracted. They are not absolved from accounting for the property. But they have a right in equity to indemnify themselves for the payment of such debts out of the property lawfully embarked in the trade. Out of this right springs an equitable right of the trade creditors to resort to such fund for payment, if their remedy against the representative be unavailing. * * * Where, on the contrary, the executor or administrator carries on a trade without any authority to do so, and the business proves disastrous, this will not of right involve the decedent's estate for the debts; but such assets as may be shown to have been wasted in the trade, those interested in the estate have the right to claim. * * * Acts of the representative *ultra vires*, or in excess of his express power to trade, do not give those dealing with him an equity against the trade assets." Schouler, Ex'rs, §§ 325, 326; *Ward* v. *Tinkham*, 65 Mich. 698.

As already stated, no order of court was obtained authorizing the executor to continue this business. No guardians *ad litem* were ever appointed for the minor children. What was done cannot be regarded as done with their consent. Their interests in the estates of their fathers, at the time Mr. Eisenhardt became administrator, upon any reasonable basis, would exceed the value of the real estate now left; and we do not think it competent to subject these lands to sale for trade debts.

It is now claimed that payments have been made to the widows and children out of the funds of the estate, and that the estate should be reimbursed for those amounts, or that the widows and minor children should be compelled

to do equity before the claim in the bill should be sustained. These payments were made by direction of the probate court, and nearly all of them were made before Mr. Eisenhardt became connected with the estate. When the bulk of the payments were made, the estate was solvent, and had funds with which to pay them. The widows and minors were entitled to their support during the progress of the settlement of the estate, and they cannot now be required to repay this money because the administrator has lost money in the management of the estate. *Dunlap* v. *J. P. Donaldson Co.*, 74 Mich. 290.

This estate affords an illustration of the dangers growing out of continuing estates along without settling them. Here was an estate worth, after paying all its debts, upwards of $40,000. This estate belonged to two widows and eight minor children. Instead of being settled as it should have been, it was managed first by the administrator of one estate and the executor of the other, and then by the administrator of both estates, for the period of eight years. This management resulted in such a way that the estate is all gone, if the expenses of the management and the debts are all paid. I do not question the good faith of the executor and the administrators, but they did what the law does not permit. As already stated, this estate was solvent, and all of its original debts have been paid. The widows are shown to have been consulted about the continuance of the business. The proceeds of sales already made have been distributed, and it is not necessary to discuss here the effect of that distribution. We understand the rule is that where an administrator or executor, instead of closing out a business, continues it, even when authorized by will to do so, the trade debts will reach only the trade assets; that is, the property that was employed in the business or that was the result of doing the business. *Laible* v. *Ferry*, 32 N. J. Eq. 791. See, also, *Altheimer* v. *Hunter*, 56 Ark. 159; *Lucht* v. *Behrens*, 28 Ohio St. 231.

It becomes important, then, to inquire whether the

property described in the bill of complaint is part of the trade assets. It is pretty clearly established by the record that when the firm of Frey Bros. was entirely solvent, as early as July, 1873, money was taken from the business of the firm, and a deed was obtained running not to Frey Bros., as partners, but to Christian Frey and Carl Frey; that a year later the family of Christian Frey took possession of this property, and occupied it as a home until the death of Christian Frey, and since his death it has been occupied continuously by his widow and children. It also appears that as early as August, 1878, another piece of property was bought and paid for in the same way, which was at once occupied by the family of the other brother as its home, until his death, and since his death has been occupied by his widow and children as their home; and by direction of these men at one time quitclaim deeds were drawn for the purpose of creating homesteads of these properties, but for some reason were not signed. The record discloses that, when this property was obtained, it was for the purpose of having one part of it as the home of Carl Frey and his family, and the other part as the home of Christian Frey and his family, and it has been so treated by all the parties in interest. While it is true, water has been procured from a pipe running across one of these properties, for the use of the brewery, at times, and at times employés of the brewery have boarded in the families occupying these houses, and while at times empty beer barrels have been piled upon one of the lots, neither of the administrators nor the executor have regarded these lands as part of the brewery plant; and, when an order was obtained to sell the brewery plant, no effort was made to treat these lands or city lots as part of that plant. We do not think this property can in any sense be called "trade assets."

On the other hand, the fund arising from the sale of the brewery plant and the personal property was doubtless trade assets, that could be reached by trade debts.

The decree of the court below should be reversed, and

one entered here enjoining the defendants from selling the land described in the bill of complaint, and confirming the title therein as now determined between the widows and minor children. Inasmuch as it was necessary to file this bill to decide the rights of the respective parties to the real estate, costs will not be granted to either party.

The other Justices concurred.

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PERKINS *v.* GROBBEN.

1. CONDITIONAL SALE—RESERVATION OF TITLE—RETAKING PROPERTY—ACTION FOR PURCHASE PRICE.

   Under a contract for the sale of personal property which provides that title shall remain in the vendor until the full purchase price is paid, and that, in case of the vendee's default in the payment of either of three purchase-money notes, the vendor may retake the property, in which case all payments previously made shall be deemed to be for the use, wear, and tear of the property up to the time of retaking, and that the commencement of suit upon the notes shall not be deemed a waiver of the right to retake the property, the vendor is entitled, on the vendee's default, either to retake the property, and treat the payments up to that time as for the wear and tear thereof, or to sue on the notes, and take and retain possession of the property until the judgment is paid; but he cannot retake the property, apply the invoiced price, less a stated per cent. for alleged depreciation, upon the notes, and bring suit for the balance.[1]

2. SAME—VOLUNTARY PAYMENT—GARNISHMENT—ESTOPPEL.

   A payment enforced by garnishee process is not a voluntary payment such as will estop the debtor from asserting that the creditor had previously satisfied his claim by taking possession of property on a conditional sale of which the claim was based.

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[1] The rights and liabilities of the vendor and purchaser on default of payment on a conditional sale are considered in an extensive note to *Cole* v. *Hines*, (Md.) 32 L. R. A. 455.

Error to Kent; Grove, J. Submitted January 5, 1898. Decided March 15, 1898.

Assumpsit by Willis J. Perkins, doing business as Perkins & Co., against Louis J. Grobben and William Hitchcock, upon promissory notes. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Wolcott & Ward, for appellant.

Pratt & Davis, for appellees.

MOORE, J. In 1893 plaintiff received from defendants, and filled, an order for shingle-mill machinery to the amount of $2,600. Defendants paid thereon $800 in cash, and gave their notes for $300, $700, and $800. These notes all read alike, except the amounts and times of payment. The first one reads as follows:

"$300. No. 1. GRAND RAPIDS, MICH., Aug. 1, 1893.

"June 15, 1894, after date, we promise to pay to the order of Perkins & Co. three hundred dollars, at Old National Bank, Grand Rapids, Mich.; value received; with interest at eight per cent. per annum until due, and thereafter at eight per cent. until paid.

"This note is one of three notes of even date, given for part of purchase price of two Perkins & Co. Michigan Favorite shingle machines. * * * It is expressly agreed that the title and ownership of all said property shall remain in Perkins & Co. until the full purchase price is paid; and, in case of any default in the payment of this or any or either of said notes, all said notes shall, at the option of Perkins & Co., notice of which is hereby waived, become and be at once due and payable, and said property may be taken back by said Perkins & Co., and in such case all payments made, and amounts collected, on this or any of said notes, shall be deemed to be payments for the use, wear, and tear of the said property up to the retaking thereof. It is further expressely agreed that, upon default in the payment of this or any or either of said notes, Perkins & Co. may commence suit upon the same, which shall not be a waiver of Perkins & Co.'s title to said property, and the same may be retaken by them under this note, or any of said notes, upon default thereon, as herein-

before provided. It is further agreed that no agreement in regard to said property made after this date, or new notes, collateral or additional security, taken by Perkins & Co., shall in any way waive, transfer, or release their title to said property, it being expressly agreed that the title to said property shall, under all circumstances, remain in Perkins & Co. till this and all of said notes are canceled, delivered up, or assigned by Perkins & Co. After maturity of any of said notes, Perkins & Co. may keep said property insured at makers' expense, premium of such insurance to be added to this note.

"GROBBEN & HITCHCOCK,
"Per William Hitchcock."

Afterwards a chain was returned by consent of the plaintiff. The defendants not paying the notes, the plaintiff took possession of the machinery, and returned it to Grand Rapids. Plaintiff sent a statement to defendants, crediting them with the amount of the machinery taken, at inventory price, less 50 per cent. on account of being depreciated, the statement showing a balance due plaintiff of $1,176, accompanied by a letter reading as follows:

"July 9, 1895.

"GROBBEN & HITCHCOCK,
"Leland, Mich.

"*Gentlemen:* We have received and unloaded the shingle machinery, and carefully inspected the same, and inclose you herewith credit memorandum for the valuation we have placed on same. We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement for balance due? Owing to the ill treatment that we have received at your hands in regard to settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to the payment of this balance. We should therefore be pleased to hear from you regarding same by return mail, awaiting the favor of which we remain,

"Very respectfully yours,
"PERKINS & CO.,
"Per Everhart."

Some statement is made in the brief of counsel as to

what became of the machinery after it passed into the possession of plaintiff, but we are unable to find from the record what became of it. The defendants paid no attention to the letter of July 9, 1895. In August, 1896, this suit was begun by plaintiff, who declared upon all the common counts in *assumpsit*, with notice that under the money counts he would give in evidence the three notes in question. After the testimony was all in, the court directed a verdict in favor of the defendants, assigning as a reason that the exercise of the option to take the property was a satisfaction of the debt, the judge expressing himself as follows:

"But the simple question to be determined now is whether or not the plaintiffs, having pursued one remedy, namely, by taking the property, resuming possession of it under their title, have waived all claims to enforce the notes. That is the sole question that is to be determined now. I think it is proper to consider the other question in the same connection as bearing upon what should be the true interpretation of the contract. Then the contract further provides that: 'Upon default in the payment of this or any or either of said notes, Perkins & Co. may commence suit upon the same, which shall not be a waiver of Perkins & Co.'s title to said property, and same may be retaken by them under this note, or any of said notes, upon default thereon, as hereinbefore provided.' Now, there is a stipulation that the plaintiffs may commence suit upon these notes, and not thereby waive their right to resume possession under their title. But the converse of that proposition is not stated. It is not provided that they may take the property, and that shall not be any waiver of their right to sue and collect upon these notes. Now, is there not an implied waiver by virtue of the provision that is contained in it that covers the agreement in relation to the title to the property and the remedies under the contract? Now, the plaintiffs have taken possession of this property under a contract of this nature, which provides expressly that the title remains in them, and that they may take possession on default, and that all payments previously made shall be applied as compensation for the use, wear, and tear. Is it not a proper inference, and is it not a proper conclusion of law, to say that when they exercise that right under that contract to take the

property, and apply what has been paid in that way, it determines the whole matter?

"The law does not favor the enforcement of two remedies. The law recognizes the right of a party to secure his claim by as many securities as he can get; but it does not recognize his right to enforce more than one to complete satisfaction. I think the true interpretation of this contract is that the parties reserved the right to commence a suit, and provided that it should not be a waiver of their right to take the property, but they did not reserve any right to sue and collect upon these notes after repossessing themselves of the property. And to allow that to be done would be to allow them to take the property, which the law conclusively presumes, under their contract, was full payment, I think, of any balance that might be due after such time as the plaintiffs might see fit to make the application of prior payments for the use, wear, and tear of the property. Here they had a contract that might have been enforced five months before, and applied the payment on the wear and tear and use of the property. They saw fit to let it run five months, and then, when they took the property, that application is made. 'Up to the time of the retaking' is the language of the contract. Then, by the very terms of the contract, the money paid prior to the retaking went to the plaintiffs as compensation for the use, wear, and tear of the property. They selected the time of taking it. They might have taken it earlier, and the fact that they took it so much later I think is quite conclusive that they deemed that the prior payments were adequate for the use, wear, and tear of the property up to that time, and that the property at that time was of sufficient value to pay the balance of the claim."

The case is brought here by writ of error.

Some controversy arose about the question of estoppel because of a payment of $60 claimed to have been made by defendants after the letter of July 9, 1895. That payment resulted from a garnishee process. The circuit judge was of the opinion that it was not a voluntary payment by defendants, and did not affect the other questions in the case. We think he was right, and shall not discuss that feature of the case further.

It is the contention of the plaintiff that, notwithstanding he has received back the machinery after it had been used

about 60 days, which was billed at $2,600, and has received a payment of $800, he is still entitled to a judgment for the face of the notes and interest, and he urges that this would not be unjust, because the parties have so agreed, and they must be presumed to know the effect of their agreement; and it is also said:

"That the proper construction of the contract is that, under such circumstances, plaintiff cannot lawfully retain the property on being tendered his money, and that, therefore, the mere retaking of the property cannot be treated (as was done by the trial court) as an application of all prior payments towards the use, wear, and tear, etc., of the machinery, and as an election of remedies so as to prevent his maintaining an action on the notes."

This was not the construction put upon the contract by the plaintiff when he credited the defendants with the inventory price of the machinery taken back, less 50 per cent. for depreciation, and wrote them July 9, 1895:

"We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement for balance due? Owing to the ill treatment we have received at your hands in regard to the settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to the payment of this balance."

There was nothing in this letter indicating that plaintiff recognized any obligation to return the property upon a tender of the amount due upon the notes, or that he was holding it for the purpose of enforcing the lien he had upon it for the amount of his debt.

Does the law give the contract any such construction as is now claimed by counsel? Counsel do not call our attention to any cases directly in point, but cite *Hays* v. *Jordan*, 85 Ga. 741; *Preston* v. *Whitney*, 23 Mich. 260; *Johnston* v. *Whittemore*, 27 Mich. 463; *New Home Sewing Machine Co.* v. *Bothane*, 70 Mich. 443; *Thirlby*

v. *Rainbow*, 93 Mich. 164; *White* v. *Solomon*, 164 Mass. 516 (30 L. R. A. 537); and other cases,—claiming that the reasoning employed by the court tends to support their contention. So far as these cases are in point at all, we think they are against the position of the plaintiff. In the last-named case Chief Justice Field wrote an opinion, which was joined in by two of the other judges, in which he said:

"The contract, I think, is, in effect, a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiffs are authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is that, if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant, and retain what he has paid on account of the price, or they may leave the manikin in the possession of the defendant, and sue him for the installments of the price which remain unpaid; but the plaintiffs cannot collect the whole price, and also retake the manikin. They cannot hold the title to the property, and also recover the price of it."

It is not agreed in the contract that, if the property is retaken, and the payments made up to that time are treated as payments for the use, wear, and tear of the said property, that the vendor may also sue for the amount due on the notes. After the vendor has taken possession of the property, the contract does not give the vendees any further interest in it. The character of the contract, and the results which may be worked out under it, are not such as to make it desirable to read into it provisions it

does not contain. The contract provides for two ways of enforcing it. The plaintiff might sue on the note, and retain the property until the judgment was paid, or might retake the property, and treat the payments up to that time made as payments for the use, wear, and tear of the machinery, but he cannot do both. The plaintiff has taken possession of the property as the owner thereof. What have the defendants had as the consideration of the note? They acquired no title or interest in the property, and could not until they paid the notes. They could not call the plaintiff to account for a disposition of the property, if he has made any, because they had no interest whatever in it, having made default in the payment of the notes, the vendor having exercised his right, under the contract, to take possession. The defendants have simply had for the notes the use of the property, and for that use they have paid the $800, which the contract gives the vendor the right to so apply. The vendor is not entitled to the title and possession of the property, and to be paid for it also. *Seanor* v. *McLaughlin*, 165 Pa. St. 150; *Bailey* v. *Hervey*, 135 Mass. 172; *Earle* v. *Robinson*, (Sup.) 36 N. Y. Supp. 178; *Campbell, etc., Manfg. Co.* v. *Hickok*, 140 Pa. St. 290; *Scott* v. *Hough*, 151 Pa. St. 630; *Hine* v. *Roberts*, 48 Conn. 267; *Green* v. *Sinker, Davis & Co.*, 135 Ind. 434. See, also, *Vaughn* v. *McFadyen*, 110 Mich. 234.

Judgment is affirmed.

The other Justices concurred.

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e138 555
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d146 1 3
j146 1 6

ROBINSON *v.* FINCH.

1. WILLS—CONSTRUCTION—ABSOLUTE GRANT—SUBSEQUENT LIMITATION.

A devise which, standing alone, would confer an estate in fee, may be modified by a subsequent provision of the will which discloses an intent to limit the estate granted.

2. SAME.

Thus, a devise absolute in form to A. is effectually limited by a subsequent provision that, in the event of A.'s death without wife or children, such of the estate as should not have been used by A. should go to B.

3. SAME—OMISSION OF WORDS OF INHERITANCE.

In such a case, upon the death of A. without wife or children, the heirs of B., who had died in the meantime, became entitled to the property, to the exclusion of the heirs of A.; the omission of the word "heirs" in the devise to B. not operating to defeat the manifest intention of the testator to grant an estate of inheritance.

Appeal from Van Buren; Buck, J. Submitted January 5, 1898. Decided March 15, 1898.

Bill by Elizabeth Robinson, for herself and in behalf of others similarly entitled, against Mary Finch, for a construction of the will of Jane Korth, deceased. From a decree for defendant, complainant appeals. Reversed.

T. J. Cavanaugh, for complainant.

William N. Cook and *Osborn, Mills & Master*, for defendant.

MOORE, J. This case involves the construction of a will reading as follows:

"I, Jane Korth, of South Haven, Van Buren county,

Michigan, do make, publish, and declare this, my last will and testament, in manner following:

"*First.* All my debts existing at the time of my decease, my funeral expenses, and the cost of executing this, my last will and testament, and all other expenses necessarily incurred in the settlement of my estate, are to be paid out of the proceeds of a certain note and mortgage given by Anne Reynolds to me, dated June 13, 1879, for two hundred dollars, and out of any other personal property I may die possessed of.

"*Second.* After the payment of my just debts and expenses as expressed in the first paragraph herein, I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal, to my grandson, Thomas Weldon.

"*Third.* In case my said grandson, Thomas Weldon, shall die leaving no wife and children, then it is my desire that the property herein bequeathed to my grandson, Thomas Weldon, and not used by him or for his education and benefit, shall, after the decease of my said grandson (in case he shall die leaving no wife and children), be disposed of as follows: To Jane McGinnis, my niece and daughter of my sister Mary McGinnis, the sum of one hundred and fifty dollars, and the remainder of my estate I will to go to Thomas Robinson, son of my sister Betty Robinson, in the county Meath, in town Betooth, Ireland.

"*Fourth.* I hereby appoint Samuel P. Wilson, of South Haven, Van Buren county, Michigan, the trustee to take full charge and control of the property herein bequeathed to my said grandson, Thomas Weldon, until my said grandson shall become twenty-one years of age."

Thomas Robinson was dead when this proceeding was begun. The bill was filed by his daughter in her own behalf, and on behalf of her brothers and sisters, and her mother, the widow of Thomas Robinson, and on behalf of Jane McGinnis, named in the will. Thomas Weldon, previous to the commencement of the suit, died, leaving no wife or children, without having disposed of the property mentioned in the will. It is claimed by the defendant that the second clause of the will conveys the title in fee to Thomas Weldon, and it now belongs to the mother of Thomas Weldon, Mary Finch, the defendant, and the

judge so found in the court below, from which decree complainant appeals.

It is the contention of the complainant that the meaning of the testatrix must be gathered from reading all of the instrument, and that, when this is done, the title of Thomas Weldon is a defeasible one, and upon his death the property must be disposed of according to the third paragraph of the will. The first thing to determine is, What was the intention of the testatrix, as expressed in the instrument, taking it in its entirety, giving to the words used the meaning which it is evident the testatrix gave to them? for it is the cardinal principle of interpretation of wills to carry out the intention of the testator, if it is lawful and can be discovered. *Bailey* v. *Bailey*, 25 Mich. 185; *Eyer* v. *Beck*, 70 Mich. 181; *Glover* v. *Reid*, 80 Mich. 233; *Schehr* v. *Look*, 84 Mich. 263; *Cousino* v. *Cousino*, 86 Mich. 323; *Jones* v. *Deming*, 91 Mich. 481. If the construction given to the will by the defendant and the circuit judge is to prevail, it has the effect of expunging the provisions of the third paragraph of the will. If, however, the will is read as an entirety, it undoubtedly means that the testatrix intended, after payment of her debts and expenses, to give all the rest of her estate to Thomas Weldon, subject to the limitation that, if he died unmarried or without issue, such of the property as he had not used was given, $150 to Jane McGinnis, and the remainder to Thomas Robinson.

Counsel for defendant contend:

"It is the settled rule that when an interest is given or an estate conveyed by one clause of an instrument, in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent, meaning, and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate;" citing a good many cases in support of this proposition.

We think, however, the true rule is as stated by Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, where the will disclosed a bequest to the wife which, standing alone,

would give the estate to her absolutely, but other words in the will indicated that the testator intended to place limitations upon the legacy to the wife. The opinion reads:

"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."

In *Hamlin* v. *United States Express Co.*, 107 Ill. 443, it is said: "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." See, also, *Barnes* v. *Marshall*, 102 Mich. 248; *Gadd* v. *Stoner*, 113 Mich. 689.

It is urged that Jane Korth did not evince an intention to will any portion of her estate to the heirs at law of Thomas Robinson. It is true, the word "heirs" was not used in the third bequest, but it is also true the word was not used in the second bequest, and the same reasoning would lead to the conclusion that the testatrix did not intend to will any portion of her estate to the heirs at law of Thomas Weldon. A more liberal rule prevails in construing wills than in construing deeds. The language used in the second paragraph of the will, if standing alone, would doubtless convey an estate in inheritance; but, as we have already seen, the instrument, read as an entirety, indicates that limitations were put upon the estate conveyed to Thomas Weldon. It also indicates that, in case Thomas Weldon died without a wife or children, it was intended by the testator to convey, by paragraph 3, an estate of inheritance.

The decree is reversed, with costs of this court, and a decree may be entered in accordance with the prayer of the bill.

The other Justices concurred.

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FLANAGAN *v.* FLANAGAN.

DIVORCE—ALLEGATION OF MARRIAGE—SUFFICIENCY—AWARD OF ALIMONY.

A bill for divorce, alleging that complainant and defendant lived together as husband and wife until defendant deserted and abandoned complainant, and that, some years before such desertion, defendant informed complainant that he had a former wife living, but had obtained a decree of divorce from her, of which he showed a copy, and that, after consultation, they deemed it unnecessary to have another marriage ceremony performed, and continued to live together as husband and wife until the husband's desertion,—does not show the nonexistence of the marital relation, so as to render illegal a commitment for failure to comply with an order for temporary alimony based thereon.

Certiorari to St. Clair; Vance, J. Submitted January 6, 1898. Decided March 15, 1898.

Bill by Charlotte Flanagan against Howard Flanagan for a divorce. Defendant was adjudged guilty of contempt in refusing to comply with an order for temporary alimony, and was committed to the county jail until such alimony should be paid. He brings *certiorari*. Affirmed.

Charlotte Flanagan filed a bill for divorce from defendant December 16, 1896, in which she alleged that she was married to him September 22, 1885; that they lived together as husband and wife until December 3, 1896, when he deserted and abandoned her; that October 16, 1893, defendant informed her that he had a former wife living, but that he had obtained a decree of divorce from her, and showed complainant a copy of it; that this was the first knowledge she had that he had been married before; that, after consultation, they deemed it unnecessary to have another marriage ceremony performed, as it would subject

both to suspicion, ridicule, and disgrace; that defendant informed her that such ceremony would be unnecessary; that they continued to live together as husband and wife till the date above mentioned, when he went through a ceremony of marriage with another woman; that he now claims that complainant is not his lawful wife; that he is seeking to drive her from the home where she lives, and gain possession for himself; that he has neglected and refused to support her, and has cruelly treated her. The bill describes the real estate owned by him, prays for a divorce, and that he be enjoined from interfering with her possession, and from incumbering or disposing of his property. An injunction was issued. December 24th she presented a petition for alimony. Due notice of its presentation was given, and on the hearing an order was made granting alimony. Before this hearing defendant filed an answer, in which he denies his marriage to complainant; admits his living with her, but alleges that their relations were unlawful; that she knew he had a wife living; admits his marriage with another woman, and asserts that she is his lawful wife. Upon his refusal to comply with the order for alimony, proceedings were taken against him for contempt. He was found guilty, and committed to jail. These proceedings are before this court for review.

O'Brien J. Atkinson and *W. E. Leonard*, for appellant.

Avery Bros. & Walsh (*Sparling, Law & Moore*, of counsel), for complainant.

GRANT, C. J. (*after stating the facts*). Counsel for defendant claim that the bill itself shows that complainant is not his lawful wife, and insist that the case is within *Clancy* v. *Clancy*, 66 Mich. 202, *Rose* v. *Rose*, 67 Mich. 619, and *Van Dusan* v. *Van Dusan*, 97 Mich. 70.

In *Clancy* v. *Clancy* the relation of the parties was

evidenced by a written agreement, which the court held not to constitute a marriage, but only a state of concubinage. In *Rose* v. *Rose* the bill did not aver a marriage, or that defendant ever promised to recognize complainant as his wife. Their relation was an unlawful one. In *Van Dusan* v. *Van Dusan* a marriage was alleged in the bill, but upon the proofs the court found that there was none. Mr. Van Dusan was married when complainant and he entered into their unlawful relations. He afterwards obtained a divorce from his wife, and it was held that the parties did not, after that, change their unlawful relations.

In the present case, complainant alleges that she and defendant did change their relation after he had informed her of his former marriage and his divorce, and recognized the marriage ceremony which had been performed as binding upon them. We are not prepared to say that under these allegations the marital relation did not exist. Proofs are necessary to determine what the relation of the parties actually was, and this was the course pursued in two of the cases above cited.

The order of the court below is affirmed.

The other Justices concurred.

BAXTER *v.* DETROIT RAILWAY.

1. TRIAL—REMARKS OF COUNSEL.

   A judgment for a railroad company in an action to recover for personal injuries will not be reversed because counsel for defendant said to the jury in his argument that they had evidently learned that damage suits for personal injuries had developed into quite a business.

2. SAME.

   A judgment for defendant will not be reversed because the trial court allowed counsel for defendant in his argument to the jury to comment on the fact that counsel for plaintiff had objected to the admission of a writing signed by one of plaintiff's witnesses.

Error to Wayne; Frazer, J. Submitted January 6, 1898. Decided March 15, 1898.

Case by Lillie Baxter against the Detroit Railway for personal injuries. From a judgment for defendant, plaintiff brings error. Affirmed.

Ralph Phelps, Jr. (*William B. Jackson*, of counsel), for appellant.

Thomas T. Leete, Jr., for appellee.

HOOKER, J. The plaintiff's action was brought to recover for personal injuries received when alighting from the defendant's street car. Testimony was adduced upon her behalf tending to prove that, after the car had stopped, she attempted to alight, when the car was started with a sudden jerk, and she was thrown upon the pavement and injured. Upon the part of the defense, witnesses testified that she attempted to alight before the car stopped, and in disregard of a warning given to her at the time by the conductor "not to get off until the car stopped." The questions of negligence and contributory negligence were

left to the jury, who returned a verdict for the defendant; hence, it is unnecessary to discuss those points which involve only questions pertaining to the measure and amount of damages recoverable.

Upon the argument, counsel for the defendant made use of the following language:

"*Mr. Leete:* During your experience, gentlemen of the jury, on this panel, for two or three weeks, you have evidently learned that the damage suits for personal injuries has developed into quite a business.

"*Mr. Jackson:* I object to that statement as entirely immaterial and incompetent, and I ask an exception.

"*The Court:* Note an exception.

"*Mr. Leete:* As I said a moment ago, and I will repeat it now,—I don't think it needs to be called to your attention very prominently,—you have already learned, from your experience in the court-room, that the pressing of damage suits has become quite a business. It was only a few days ago, I think, that if we made the rounds of the court-rooms, we would have found four or five cases of the same kind. (Objected to by plaintiff's counsel.)

"*The Court:* That is not proper. (Plaintiff's counsel excepts to the remark of defendant's counsel.)"

The court ruled the second statement out as improper. We see nothing in the former that would be likely to prejudice the plaintiff. The most that it can be construed to mean is that these cases should be scrutinized carefully by reason of their character. Had he said this in terms, which we are of the opinion would have been the better way, no objection would have been made.

"*Mr. Leete:* A written statement was made in Mr. Saxton's own parlor as to how this matter happened, and that statement was not satisfactory to him, and it was interlined, and he wrote it in, and this gentleman said he remembered that statement; these interlineations being made. We could not get that statement in evidence because the other side objected to it."

On cross-examination of this witness, it had appeared that, soon after the accident, he made a written statement of the circumstances, and afterwards some changes were

made at the request of the witness. He was asked why the words, "And I myself thought the car had stopped, until I saw the lady had fallen," were put in. On the trial he had testified that the car had stopped before she attempted to alight. This paper was offered in evidence, but was objected to. The witness admitted the making of the paper, and this interlineation, and the plaintiff's counsel did object to the introduction of the writing.

It is said that counsel had no right to comment on a paper not in evidence. We do not understand that he did so. What he did was to comment on the fact that counsel for the plaintiff objected to the admission of a writing signed by one of the plaintiff's witnesses. We think there was little force in the comment, inasmuch as the identity of the paper was not established, and it was therefore properly excluded. The learned circuit judge refused to allow comment beyond the bare mention of the fact that a statement was made. We have repeatedly said that these matters can usually be safely left to the discretion of the trial judge, and the rule is applicable here.

Error is assigned upon the refusal of the eighth and ninth requests to charge upon the part of the plaintiff. We think they were sufficiently covered by the general charge.

The judgment is affirmed.

The other Justices concurred.

CULVER *v.* NESTER.

1. ATTORNEY AND CLIENT—AGENT FOR SALE—COMMISSIONS FROM PURCHASER—GOOD FAITH.

   Where an attorney who had been employed to bring about a judicial sale of his clients' property, the title to which was in dispute, with their knowledge and consent executed a contract with a prospective purchaser whereby he was to receive from the latter, in case he should be the successful bidder at a stated amount, a commission upon the purchase price, such commission being in lieu of direct compensation from the clients, the agreement was not invalid as violating the clients' interests.

2. CONTRACTS—CONSTRUCTION.

   Defendant agreed to bid up to $4 per M. for timber of which plaintiff, an attorney, undertook to procure a judicial sale, and to pay to plaintiff, if such bid should be accepted, a commission of $1 per M. Defendant further agreed that, "at the option of the second party," he would bid any sum named by him less than $5 per M., and pay as commissions the difference between the sum so bid and $5 per M. *Held*, that the defendant was not liable to pay the full commission of $1 per M. upon timber bid in by him at a price exceeding $4 per M., although the bid accepted was not made at plaintiff's suggestion.

3. SAME—JUDICIAL SALE—PREVENTION OF COMPETITION—PUBLIC POLICY.

   There was nothing in such contract which contravened public policy, as it had no tendency to prevent free competition at the sale, but merely imposed an obligation upon defendant to bid up to a certain amount, leaving it optional with him to bid as much more as competition should make necessary without incurring any penalty under the contract.

4. SAME—REPORT OF ARBITRATOR—CONCLUSIVENESS.

   An estimate of the quantity of standing timber, made by the arbitrator named in a contract looking to its purchase, is not conclusive, where there was no such separation of varieties as the contract contemplated, and one of the parties had no part in directing the estimate, and it was not reported to him.

5. APPEAL—DAMAGES.

A party cannot complain that the method of computing damages adopted by the court resulted in an inadequate award, where such method was the only one open upon the testimony because of the failure of such party to introduce the necessary proofs.

Error to Baraga; Haire, J., presiding. Submitted January 6, 1898. Decided March 15, 1898.

Assumpsit by Rush Culver against Frank P. Nester to recover commissions on a sale of timber to defendant. From a judgment for plaintiff for less than the amount claimed, both parties bring error. Affirmed.

C. F. Button (*Kingsley & Kleinhans*, of counsel), for plaintiff.

T. E. Tarsney and *W. G. Fitzpatrick*, for defendant.

MONTGOMERY, J. In March, 1896, a controversy as to the ownership of certain timber lands in the Upper Peninsula existed. Several parties claimed homestead rights in the lands, and the Michigan Land & Iron Company claimed title thereto. These lands had been burned over, and the timber thereon, consisting mainly of white pine, was in danger of being ruined if not cut. Plaintiff was the attorney for the homesteaders, and with their assent he made a contract with the defendant. By the terms of this contract, plaintiff undertook to use his best endeavors to cause proceedings to be commenced, and to employ and pay counsel; such proceedings having the purpose of conserving the timber, and causing a sale of it to be made. The agreement then proceeds as follows:

"Now, therefore, this agreement witnesseth: That, in consideration of the premises, the party of the first part agrees to bid for all the said timber, up to the amount of four dollars ($4.00) per thousand feet, board measure, that shall be ordered sold by the court in such legal proceed-

ings, payment to be made therefor in cash at the time and times when said timber shall be cut and scaled, as ordered by the court. And if the bid of said first party be accepted, and he shall become the purchaser of said timber at such sale, either directly or indirectly, and as such entitled to enter without delay, and cut and remove said timber, and have said pine timber, then the party of the first part hereby agrees to pay to the party of the second part, or his order, a commission of one dollar ($1.00) per thousand feet, board measure, on all the white pine timber which the said first party shall so purchase, up to fifteen million (15,000,000) feet, board measure, provided that a legal title to said timber be acquired on such purchase. If said timber purchased hereunder exceed in quantity fifteen million feet, board measure, the sum of fifteen thousand dollars ($15,000.00) commissions, and no more, shall be paid said second party by said first party.

"It is agreed that Ed. Dorgan shall estimate said timber as it stands, or, in the event of his refusal or inability to act, then Henry St. Arnold shall act as alternate; and it shall be the duty of the estimator to estimate the quantity of all the timber sold under the order of the court up to at least fifteen million (15,000,000) feet, board measure, which estimate shall be made as soon as the court approves the bid of said first party and confirms the sale. In case he is the successful bidder, and acquires title, said estimate shall be the basis on which said commission shall be paid, and on the completion of said estimate such commission shall be due and payable at the First National Bank of Marquette, Michigan, as follows: One thousand dollars ($1,000.00) in cash, and the balance within six months thereafter, without interest.

"It is also agreed by said first party that he will bid a reasonable figure for the Norway pine that may be sold by the court on said lands, in connection with said white pine timber. It is also further agreed by said first party that, at the option of said second party, he will bid any sum named by him less than five dollars ($5.00) per thousand feet for said white pine, and his commission shall be the difference between said sum and five dollars ($5.00) per thousand feet for said timber. No commission to be paid on Norway pine timber."

Such proceedings were later instituted, and resulted in a sale of the timber. Defendant became the purchaser of a

portion of the same, and, on his refusal to pay any commission to the plaintiff, this action was brought. The plaintiff recovered a verdict of $186.50, and both parties bring error.

It is contended by defendant's counsel that the contract was void, on the grounds of public policy: (1) That it was calculated to restrain free competition in bidding; and (2) because plaintiff placed himself by the contract in a position where his interests conflicted with those of his clients. It is conceded by counsel for plaintiff that any agreement entered into for the purpose of preventing free competition at a public sale is absolutely void, but it is contended that the agreement in question had no such necessary tendency. On the other hand, it is contended that, if the contract be given the construction contended for by plaintiff's counsel, it gave the plaintiff a power over defendant's bid inconsistent with free bidding. There would be some plausibility to this contention if the construction of the contract contended for by plaintiff be adopted; but, if the contract be construed as imposing an obligation upon the defendant to bid up to four dollars, and leaving him at liberty to bid as much more as the competition of the other bidders should make necessary without incurring any penalty under the contract, we think the agreement was valid, as it did not discourage bidding. *Wicker* v. *Hoppock*, 6 Wall. 97. In the view we take of the case, it is unnecessary to decide as to the validity of such a contract as plaintiff's counsel contend this should be construed to be, as we do not adopt their construction, as will be shown later on.

We do not think the contract void on the second ground stated. It appears that certain services were necessary to be rendered in order to induce the bringing about of a sale, and the clients of plaintiff understood, if they did not request, the agreement entered into. Apparently they preferred that this provision should be made for compensating plaintiff, rather than that they should undertake the payment direct for his services.

This brings us to a consideration of the contention of the plaintiff, which is that the contract between the parties should be construed as providing a commission to plaintiff of $1 per 1,000 on all white pine purchased, whatever the price paid, except in the event that plaintiff should request the defendant to bid in excess of $4 per 1,000, and up to $5, in which case the commission to plaintiff was to be correspondingly reduced, but that, if defendant saw fit to bid a price in excess of $4 on his own motion, the plaintiff became entitled to his own commission. We think this is not the correct construction of this agreement, and that the circuit judge correctly interpreted it. The amount of the bid is referred to in two places. In the first, Nester agrees to bid up to the amount of $4 per 1,000, and it is provided that, if the bid of the first party be accepted, and he become the purchaser, directly or indirectly, then the party of the first part agrees to pay to the party of the second part a commission of $1 per 1,000. What bid is here referred to? Evidently, a bid not exceeding $4 per 1,000. No other bid is mentioned, and, so far as this clause indicates, the parties did not have in mind the contingency for a higher bid. By the subsequent provision it is agreed by said first party that, at the option of said second party, he will bid any sum mentioned by him less than $5 per 1,000, and said second party's commission will be the difference between said sum and $5 per 1,000. The purpose of this provision was, doubtless, to give to plaintiff the power to set defendant in motion, and require him to bid up to $5 per 1,000, and to provide what the commission should be in case of a bid in excess of $4. No other provision had been made for any such bid.

Two other questions remain to be noticed. Defendant's counsel claim that an estimate made by Ed. Dorgan should be treated as conclusive, as he was named as arbitrator in the contract. It appears, however, that the estimate included white pine and Norway, and that they were not separately estimated; that Mr. Culver had no part in directing this estimate, nor was it reported to him. Under

these circumstances, we think this estimate was not conclusive.

The circuit judge directed the jury that, in ascertaining the price per thousand bid, the gross price should be divided by the number of thousand feet of white pine. Under this instruction no allowance was made for the 100,000 feet of Norway. This instruction was inaccurate, and would constitute error if the record disclosed that the plaintiff had furnished any basis on which to estimate the value of the Norway; but the record is silent on this point.

The judgment will stand affirmed. Neither party will recover costs in this court.

The other Justices concurred.

MOORE *v.* FLINT & PERE MARQUETTE RAILROAD CO.[1]

CONTRACTS—EVIDENCE.

Plaintiff voluntarily prepared and submitted to the general solicitor of the defendant railroad company a plan for new terminal and depot facilities in a certain city. In the course of sundry correspondence and conversations with the solicitor, who, to plaintiff's knowledge, had no authority to bind the company by a contract to buy the plan, plaintiff was given to understand that, in case his plan should be adopted, he would be given employment in the way of negotiating for the required lands, on a basis of compensation which would guarantee to him a sum corresponding with the value placed by him upon the plan. The plans were afterwards submitted to the defendant's president, and he, while engaged in their examination, either by word or nod indicated acquiescence in plaintiff's statement as to the substance of the previous negotiations with the general solicitor. *Held*, not to amount to an agreement by the company to pay plaintiff for the plan if used.

[1] Rehearing denied June 28, 1898.

Error to Wayne; Hosmer, J. Submitted January 7, 1898. Decided March 15, 1898.

Assumpsit by George William Moore and George Whitney Moore against the Flint & Pere Marquette Railroad Company for services rendered. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

Elliott G. Stevenson, for appellants.

Hanchett & Hanchett (*H. M. Campbell*, of counsel), for appellee.

MONTGOMERY, J. The plaintiffs' bill of particulars is as follows:

"For services rendered to defendant in the preparation of a plan for securing for it an independent entrance into the city of Detroit, and for a union depot in connection with the Canadian Pacific, Detroit, Lansing & Northern, and other railroads	$10,000
"For the value of plan submitted and accepted by the defendant for securing an independent entrance into the city of Detroit by the Flint & Pere Marquette Railroad Company, in connection with the Canadian Pacific and Detroit, Lansing & Northern and other railroads, and for joint terminal and depot facilities in connection therewith	$10,000"

At the close of the testimony, the circuit judge directed a verdict for the defendant, and the plaintiffs bring error.

The plaintiffs' testimony tended to show the following state of facts: The defendant company had, prior to the opening of the correspondence between the parties, been running trains into Detroit over the track of the Michigan Central Railroad Company, and it was considered desirable that terminal facilities independent of that company be secured. The defendant's board of directors had considered the subject, and had had some negotiations with the officials of the Detroit, Grand Haven & Milwaukee

Railroad Company looking to that end, but nothing had come of the negotiations. Prior even to this—*i. e.*, October 14, 1881—a committee on independent Detroit terminals had been appointed, which committee, it would appear, had been continued up to and including the transactions with plaintiffs. Plaintiffs' testimony tends to show that in 1885 or 1886 they had talked with Mr. Webber, the general solicitor of defendant, and told him that they were figuring on a plan for getting his road an independent entrance into the city. The various routes into the city suggested by plaintiffs were not adopted, but the plaintiffs' claim is that the idea or plan of plaintiffs as to the manner of securing terminal facilities was adopted; that this plan included co-operation with other railroads, and the building of a union depot to the terminal finally settled upon; and that, while the precise route was not followed out, the general plan was.

It becomes necessary to consider somewhat at length the communications which passed between the parties, and, when letters appear, they are referred to as more reliable than the recollections of witnesses. On February 12, 1887, plaintiffs, having had, as before stated, some talk with Mr. Webber, wrote him at New York, where he then was attending a meeting of the directors, inclosing a map, and in the letter elaborating somewhat the plans which they had, including the suggestion of a route, and uniting the Flint & Pere Marquette with the Wabash, Canadian Pacific, Detroit, Lansing & Northern, and Toledo, Ann Arbor & North Michigan railroads in constructing a union depot. This letter concluded as follows:

"If the substance of this plan is adopted, we shall expect to do such portions of the work as come in our line."

On March 3d, plaintiffs again wrote Mr. Webber, suggesting the purchase of five blocks at the place designated in this plan, and saying:

"We have an appraisement of all the property needed, the grade of all the different streets by and over which it

is proposed to pass, and a crude plan for entering the city, including the railroad grade to and in the new depot. * * * Should you desire it, we should be pleased to go with you over the ground, show you the location, and explain our plan in detail."

To this Mr. Webber replied as follows:

"On my return home, I find your letter of March 3d. Can you give me an approximate idea of the area embraced in the property you mention, and the price at which it can be purchased? What would be your charge if you should undertake this for us, and secure options, as suggested?"

Two things are apparent from this correspondence, namely, that up to this time neither party had understood that the plaintiffs were employed by defendant, and that Mr. Webber understood that the employment contemplated by them was to be in the work of making purchases of property necessary to carry their plan into effect if their scheme were adopted. It would appear that the plan had been freely exhibited with that end in view. This is emphasized by plaintiffs' next letter, under date of March 8th, in which they say:

"Regarding our charge, we would prefer to take that in the shape of an interest in the enterprise. We will furnish you with all the facts upon which we made our estimate of values, and show you the land and the plan, from which you can judge of the cost, and determine the desirability."

Again, on the 29th of March, plaintiffs wrote Mr. Webber as follows:

"We have been informed in a somewhat confidential manner that your road has or is about to close a contract for permanent terminal facilities here. How accurate our information is, or why the party who gave us the information did so, we are unable to state. But, if we are correctly informed, your people would doubtless not care to interest themselves in any other terminal. We do not wish to be understood as urging you to make any decision in regard to our proposition, but if your decision has been made, or when made, we would be pleased to learn of it as soon as it may suit your convenience."

This letter was referred to Mr. Potter, the vice-president and general manager of the defendant, who wrote in reply:

"Yours of 29th to Mr. Webber is referred to me. I think he showed me some previous correspondence from you on the same subject. The policy of the company is not yet decided as to Detroit terminals; but it is likely to be within 30 days. The map you sent to Mr. Webber opened some troublesome questions, such as the crossing of the Michigan Central Railroad, either at grade or over if practicable. I will see you before anything is done."

Not having heard further from Mr. Potter, plaintiffs again wrote him, on June 2d, as follows:

"We would like to ascertain whether the question has been settled or not, and, if not, would your company feel disposed to consider further the combination suggested.'

In reply to this, Mr. Potter wrote, on June 3d:

"On account of the absence of our president, Mr. Crapo, who is on the Pacific Coast, no meeting of the directors will be held prior to the last week in June, and then in New York, when, if you will send me details of your plan, I will submit it."

Plaintiffs replied, inclosing map, and giving details of this plan, and saying that a member of plaintiffs' firm would probably be in New York the last week in June, and that, if desired, he would appear before defendant's board, and explain the plan in detail. This meeting was not arranged, and here the correspondence dropped until August 10, 1888, when plaintiffs again wrote Mr. Webber as follows:

"We would like to see you at your earliest convenience. We think we have something that would be of interest to your railroad. About when will you be in the city, and could we have a short interview with you at that time?"

Mr. Webber replied:

"I will be at the Russell House at 9 o'clock tomorrow morning. Would like statement in writing to take East with me."

Mr. George William Moore was at this time in New

York, and, the contents of Mr. Webber's letter having been telegraphed to him, he wrote a brief sketch of his plan, and sent it to Mr. Webber, at the Windsor Hotel, New York. To this Mr. Webber replied on August 16th:

"Letter rec'd. Favorable consideration. Make lists of descriptions for sale, with estimates of cost. Will return home Saturday, and call on you if possible."

On the 17th he telegraphed:

"Will call on you Saturday, at 3, standard time."

It will be noticed that up to this date the plaintiffs had put Mr. Webber and Mr. Potter in possession of their plan, and their negotiations had been with reference to inducing defendant to join a combination in which the plaintiffs should take an interest, or, in case the defendant should propose to carry out the scheme, to obtain employment in the work of securing the necessary property. The negotiations had not included any proposition to buy or sell the plan. The plaintiffs were working to promote an enterprise on joint account, or an enterprise which, if undertaken by defendant alone, should furnish them employment. For the purpose of doing this, and not under any promise, express or implied, that they should be compensated for the plan, they had freely exhibited it. There were no fiduciary relations between the parties. There was nothing which precluded the defendant from adopting the plan, which consisted in the main of a proposition to run its road at grade or above grade to a desirable terminus, buy the property necessary to do so, and induce other railroads to join in building a union depot. Had the negotiations ended here, it would have been too clear for discussion that the defendant was left at liberty to join in such an enterprise with any persons or corporations whom it might choose, and that the plan of plaintiffs did not stand in the way. If any promise or undertaking of the defendant whatever can be implied, it was a promise to furnish employment or to join plaintiffs in the enterprise, neither of which promises is counted on or within the bill of particulars.

Shortly after the 17th of August, 1888, Mr. Webber called on Mr. George William Moore, and it is contended that at this time there was an agreement made by him to pay for the plan in case it was used by defendant. The testimony of Mr. Moore on his direct examination is as follows:

"We went over the matter somewhat in detail, and then he said: 'The board wanted me to ask you what your charges would be in cash.' I said: 'If our plans are adopted, I think we ought to have $10,000.' He said: 'Well, we, as directors, are trustees for our stockholders, and we have to give an account of what we do; and the board think they would rather pay you by having you extend your work, or by way of negotiating for the land; and we would like to know what you would charge us in case we extend your work, and have you negotiate for purchasing the necessary land for a station.' I replied: 'That, of course, would depend on the value of the land you buy.' He said he would like to have us fix our compensation as a percentage upon the assessed value of the land, adding as his reason that in that way the compensation could be definitely fixed, and we would not then be interested in the price they might have to pay. He explained that, if our compensation was fixed by the amount paid, we would be interested in increasing the price. He said: 'Of course, we know you would not do that; if we thought you would, we would not suggest your acting for us; but it would impair, to some extent, your usefulness, because, if you should disagree with us as to what we ought to pay as a settlement, we could not, perhaps, disimbue our minds entirely of the fact that you would get a greater compensation if your suggestion was adopted. Besides, it relieves you and ourselves from any embarrassment, and enables us to go forward with the work without any idea on the part of anybody that it made any difference what prices were paid.' I told him that would be satisfactory, but that a percentage on the assessed value would be necessarily higher than the percentage based upon the price paid for the land. He said, 'Certainly.'

"We looked over the papers there, and I had at that time the list of quite a large amount of property, and we ran it over together to see how much the depot company would probably take, and I said to him: 'I should think, Mr. Webber, you would probably want this property that

is assessed somewhat over $300,000. I think it is $330,000, or in that neighborhood.' And I said: 'If we negotiate for this land, I think we ought to have 4 per cent. of the assessed value.' He said he did not know but that would be fair enough. I said: 'Mr. Webber, you have your own attorneys and your own landmen, and perhaps you would not want our services.' I told him that 'at first we were inclined to think that we ought to have the conducting of these negotiations, but, upon reflection, we thought perhaps that you would prefer to do it yourself.' 'Well,' he said, 'our present impression is that we would like to have you take hold of it. However,' he said, 'that will be a matter of the future.' I said: 'Mr. Webber, if you want us to negotiate, we will be at your service; but we will expect you to take land enough so that 4 per cent. of the assessed value will amount to $10,000. If you take land that the commission exceeds $10,000, we will expect an increased compensation.' He said, 'Certainly.' The conversation lasted perhaps an hour and a half. I am giving it very briefly. Before going away, the ultimate agreement was that, if we did not negotiate for the land, we were to have $10,000. If we did negotiate for the land, we were to have 4 per cent. of the assessed value, and they were to take land enough so that our commission would amount to $10,000. It might amount to more than that, and, if it did, we were to have the increased sum."

We have quoted this testimony at length for the reason that we think, taken as a whole, the statement of the conclusion at the close of the testimony is shown by the text of the conversation to have been inaccurate. Mr. Webber's testimony is that he made no agreement to pay for plans, and that he had no authority to make such an agreement, and plaintiff's testimony, as a whole, indicates that limitations of the authority of Mr. Webber were brought home to him. He says Mr. Webber stated:

"We, as directors, are trustees for our stockholders, and we have to give an account of what we do; and the *board think they would* rather pay you by having you extend your work, or by way of negotiating for the land; and we would like to know what you would charge us in case we extend your work, and have you negotiate for purchasing the necessary land for a station."

That plaintiffs understood that this was the limit of Mr. Webber's authority, and that, if any contract was made, it was in the line of that talk, is *evident* from the following letter written by Mr. Moore, September 23, 1889:

"HON. WILLIAM L. WEBBER,
"East Saginaw, Mich.

"*Dear Sir:* We originated a plan for a railroad station at Detroit, upon which we spent a great deal of time and some money, and presented it to you, and you told us, if adopted, we should have the business of purchasing the land that should be selected, and our commission to be 4 per cent. on the assessed value of the land purchased, which we both thought would amount to about $10,000. We see from the papers our plan has been adopted, and we hope to hear from you very soon in regard to that portion of the understanding in which we are personally and financially interested.

"Very truly yours,
"MOORE & MOORE."

As before stated, Mr. Webber testified that he had no authority to make such a contract as plaintiffs now allege. The only other person with whom they are said to have negotiated is Gov. Crapo. Mr. Moore testifies on his direct examination that he told Mr. Crapo briefly the talk he had with Mr. Webber, and then testifies as follows:

"I do not think Mr. Crapo made any remark to that, except he just nodded his head, and said, 'Yes, yes,' or something of that kind. He paid very little attention to that part of it. He simply was watching these maps, and he asked, I should say, 500 questions."

On cross-examination he testified as follows:

"*Q.* What did Mr. Crapo say to you when you related to him the conversation which you say you had with Mr. Webber?

"*A.* I don't think he made any reply except, 'Yes, yes;' just 'Yes,' and nodded his head, and went right on looking at the maps. I did not have any discussion. Mr. Crapo did not seem to be particularly interested in the question of compensation. He was very much interested in the plan.

"*Q.* Then you did not understand him to say anything on the subject?

"*A.* All he said was, when I told him, he said, 'Yes.' That is all. He entered into no discussion with me about compensation, but he did enter into a very extended discussion of the plan.

"*Q.* What was it he said 'Yes' to?

"*A.* Why, I told him what I had told Mr. Webber.

"*Q.* And, when you told him that, he says, 'Yes, yes, yes?'

"*A.* He said, 'Yes.' That is my recollection now. Just nodded 'Yes,' and went right on.

"*The Court:* Did he nod 'Yes,' or say 'Yes?'

"*A.* Well, I think he did both,—would be my recollection now. Of course, it is a long time ago. I remember the acquiescence in the statement, but I don't remember the details of it. It would be impossible."

We do not think this conversation can be construed as a promise to pay by the railroad company. There is nothing in the language employed or the nod of the head showing any more than acquiescence in the statement of the fact that such a conversation had occurred between Mr. Webber and plaintiff. We think no such agreement as counted on was shown, and that the judgment should be affirmed.

The other Justices concurred.

SCHAFER *v.* SCHOOL DISTRICT NO. 1 OF BARAGA.

SCHOOLS AND SCHOOL DISTRICTS—BOARD OF EDUCATION—SPECIAL MEETINGS—NOTICE.

Under section 6 of the statute relating to township school districts in the Upper Peninsula (Act No. 176, Pub. Acts 1891), which authorizes special meetings of the board of education to be called by giving at least three days' notice to each member of the board "if within the district," action taken at a meeting called upon a shorter notice, which was not attended by one of the members, is invalid, even though the absent member was not within the district when the meeting was called or held.

Error to Baraga; Hubbell, J. Submitted January 25, 1898. Decided March 15, 1898.

Assumpsit by William C. Schafer against School District No. 1 of Baraga for the breach of a contract of employment. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

S. W. Shaull (*Thomas & Collingwood* and *Ellis & Nichols*, of counsel), for appellant.

Allen F. Rees, for appellee.

MOORE, J. Plaintiff sued to recover for a breach of contract made March 1, 1893, which he claims authorized him to teach the school of defendant for the school year commencing September 4, 1893. In the circuit court a verdict was directed in favor of the school district. Plaintiff appeals.

The resolution authorizing the making of the contract was adopted at a special meeting of the board of education, called upon a two-days notice, held March 1st. This notice was served upon four members of the board, all of whom were present. It was not served upon the

fifth member of the board, who was absent from the school district the day the notice was issued, and did not return until the day after the meeting was held. The resolution authorizing the making of the contract received the votes of but two of the members of the board who attended the meeting. The record does not show that the other two members voted at all. The statute authorizing the holding of special meetings of the board required at least a three-days notice to be given. Act No. 176, Pub. Acts 1891, § 6. If the three-days notice required by the statute had been given, the fifth member of the board would have been at home when the meeting was held. In 1 Dill. Mun. Corp. § 264, it is said:

"Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice."

It is conceded that the notice was insufficient, and that one member of the board was not present. The board had no authority, in the absence of one of the members, to authorize the making of this contract at this meeting.

It is not necessary to discuss the other questions presented in plaintiff's brief, for the reason that the argument proceeds upon an assumption of facts shown by the record not to exist.

Judgment is affirmed.

The other Justices concurred.

COLBY WRINGER CO. *v.* COON

1. PRINCIPAL AND SURETY—INDEMNITY BOND—CONSTRUCTION—DEFAULT.

   The surety upon a bond of indemnity conditioned for the faithful performance by the principal of an agreement whereby he was to act as agent for the handling of the obligee's goods in certain territory, and was to account weekly, in specified sums, for all wringers and clocks sold by him, and for "other articles as per price list," and whereby the obligee was bound to furnish, not only wringers and clocks, but "such other goods" as might be further agreed upon,—is liable for the principal's default with respect to goods other than wringers and clocks which were furnished in accordance with the terms of the contract.

2. SAME—RELEASE OF SURETY.

   The surety upon such a bond is not relieved from liability because the obligee failed to notify him that the agent was not remitting the full amounts shown to be due by his weekly reports, even though it subsequently develops that the deficiency was underreported, if the obligee had no notice of such dishonesty.

Error to Wayne; Frazer, J. Submitted January 25, 1898. Decided March 15, 1898.

Assumpsit by the Colby Wringer Company against Edward S. Coon, as surety upon a bond of indemnity. From a judgment for plaintiff, defendant brings error. Affirmed.

Suit on a bond of indemnity. Plaintiff, a Vermont corporation, made a contract with one Havens, by which he was appointed sole manager or agent for plaintiff in the city of Detroit to sell, upon terms and conditions fixed by it, and collect payment for, such goods as should be furnished to him. The defendant executed a bond to plaintiff in the sum of $2,000 upon condition that—

"Said Havens shall well and faithfully discharge his duties as such agent or manager, and the trust reposed in him, and shall keep and perform each and all the conditions, covenants, and obligations on his part entered into and contained in a certain agreement by and between him and said company [giving the date], * * * and shall also well and truly pay or cause to be paid to the said company, on demand, any and every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred, on the part of said Havens to said company."

Havens agreed to make weekly payments for collections and goods sold. He made reports from time to time of the business, the amount due, and remittances, but failed to pay over all that was due according to his reports. The amount due from Havens gradually increased, though he often remitted the amount due for goods sold during the period of the report. The first and second reports showed no amounts unremitted. The third report showed a balance unremitted of $15.88. This report was dated May 14, 1892. His last report was dated July 14, 1894, and showed a balance in his hands unremitted of $3,025.80. Shortly after this last report, plaintiff's agent came to Detroit, and took charge of the business, and upon investigation found that Havens was in fact indebted for goods sold and moneys collected and unaccounted for in a sum largely in excess of the amounts reported. He thereupon notified the defendant of this fact, and, upon refusal to pay, brought suit, and recovered verdict and judgment for the amount of the bond.

Walter Barlow, for appellant.

George W. Bates, for appellee.

GRANT, C. J. (*after stating the facts*). 1. Defendant contends that he is not liable for anything but wringers and clocks specified in the contract. The third clause in the contract provides that Havens should pay $3 for each

No. 3 Colby wringer sold on installments, and $2.50 for each one sold for cash; $4 for each clock sold on installments, and $3.50 for each clock sold for cash. If the contract did not expressly cover other articles, the defendant's contention would be sound. The second clause, however, expressly provides that the plaintiff should furnish not only the goods mentioned in the third clause, but also "such other goods as may be further agreed upon by the parties hereto." The fourth clause, providing for payment, specifies the articles in the third clause, and also "others as per price list." The terms of the bond cover every obligation under the contract, and made the defendant liable for everything furnished in accordance with its terms. All the goods were so furnished.

2. It is urged that the court erred in instructing the jury that, if defendant understood the situation, there was no occasion to notify him. The objection is that there was no evidence to show such knowledge on the part of the defendant. Mr. Havens died soon after this suit was commenced. Defendant was not sworn as a witness. On March 5, 1894, plaintiff wrote Mr. Havens, asking if it would not be possible for him to arrange with his bondsman to raise an amount sufficient to square off his cash balance as it stood on his reports. It is fairly to be inferred from Havens' reply that he had informed defendant of the situation, and had attempted to borrow the money from him. This letter was produced by the defendant, and introduced in evidence without objection. No claim is made that the letter is not competent evidence of the matters therein stated. The only claim made is that, if Havens did apply to Coon for a loan of money to pay his indebtedness to plaintiff, this was not such a notice as would make him responsible on the bond. It cannot, therefore, be said that there was no evidence tending to show knowledge on the part of the defendant that Havens was running behind. The question, however, becomes immaterial in view of our holding on the next point.

3. The principal question in the case is, Was the defend-

ant relieved from liability by the failure of the plaintiff to notify him that Havens was behind in his payments? There is no evidence that plaintiff had any knowledge, or intimation even, that the accounts rendered by Havens were not correct. Still the court left that question to the jury, instructing them that, if plaintiff had knowledge of dishonesty on the part of Havens, it was its duty to notify defendant, and that the failure to so notify him would be a complete defense, but that, if the plaintiff "allowed Havens to run along in a negligent manner, simply permitting him to go on, and was trying to get these amounts from him, this would not be sufficient to release the security, because the bond was given to cover just such a contingency." The circuit judge correctly stated the law. *Ætna Ins. Co.* v. *Fowler*, 108 Mich. 557, and authorities there cited.

Judgment affirmed.

The other Justices concurred.

FINGLETON *v.* KENT CIRCUIT JUDGE.

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1. PROBATE COURTS—JURISDICTION—EQUITY.
   Under 2 How. Stat. § 6760, providing that the judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of deceased persons, the probate court has authority to determine whether a promissory note given by an executor to a legatee was accepted by the latter in payment of her legacy, upon a petition by the legatee to require the executor to account for her interest in the estate, even though the circumstances of the case are such that equity would also have jurisdiction of the controversy.

2. SAME—APPEAL.
   An order denying such petition is appealable, under 2 How. Stat. § 6779, giving a right of appeal to any person aggrieved by any order, sentence, decree, or denial of a judge of probate.

Mandamus by Maryette Fingleton to compel William E. Grove, circuit judge of Kent county, to vacate an order dismissing an appeal from probate court. Submitted January 25, 1898. Writ granted March 15, 1898.

McKnight & McAllister, for relator

E. J. Doyle, for respondent.

MOORE, J. The relator filed a petition in probate court stating, in substance, that her aunt, Margaret Fingleton, had died, leaving a will by which the relator was entitled to the larger share of her estate, and that the estate amounted to about $1,000. The petition stated that Bernard Fingleton was appointed executor of the will, filed his bond, took possession of the property, and converted it to his own use; that he had never filed any inventory of the property, and had never paid the petitioner; and asking that he be required to file an inventory and to proceed in carrying out the trust. Later she filed an amended petition, setting up, in addition to the facts stated in the original petition, that said Bernard Fingleton perpetrated a fraud upon her by representing that she was not the legal heir of Margaret Fingleton, and was entitled to nothing under the will, but that he was willing to give her part of the estate when it was settled, and that it would be fully three years before anything could be realized out of the estate, and that he would give her a note, showing the amount she had in the estate, and that it should be paid when the estate was probated; that he did give her a note for $663.87; and that she believes he now claims it was payment for the amount, but that the petitioner did not receive it as payment. The petition also states that Mr. Fingleton represented that he was solvent when he gave the note, but that he was not solvent, and is converting the property willed to the petitioner to his own use; that petitioner has never been paid her legacy, and did not receive the note as payment, and that the note is worthless; and charging fraud on the part of the executor.

The executor was cited to appear before the court, and did appear. He admitted the making of the will, and that petitioner was a legatee; denied any fraud; admitted the amount due the legatee; and stated that he gave the note mentioned in payment thereof, and that it was received as payment, and is not yet due; that he was solvent when he gave the note, and is yet solvent. A hearing was had before the probate judge, who found that a settlement had been made between the petitioner and executor, and that the note was given and accepted as payment of said legacy, and that the probate court did not have jurisdiction to set aside said settlement. The probate court dismissed the petition. From this action relator took an appeal to the circuit court in due form. The trial of the case was commenced in the circuit court, and a jury sworn, when, upon motion, the circuit judge dismissed the appeal, upon the ground that the question of the giving of the note as payment and settlement, and the allegations of fraud and deceit, must be determined in equity. This is a proceeding to vacate the order dismissing the appeal.

Was the order an appealable one? The will had been probated. The executor had entered upon the trust. There was no dispute about the amount due the petitioner. If the legacy had not been paid, the legatee had a right to ask that the executor be required to administer the estate; but, if the legatee had been paid in full, she had no further interest in the estate, and her petition would be properly dismissed. No account of the executor had been made to the court of his administration of the estate. A legatee insisted that she was entitled to a share of the estate, and had not been paid. The executor insisted that she had been paid. 2 How. Stat. § 6760, provides: "The judge of probate shall have jurisdiction of all matter relating to the settlement of the estates of such deceased persons," etc.; and it has been repeatedly held that probate courts are not courts of inferior jurisdiction, but have general jurisdiction in testamentary and other probate matters. *People* v. *Wayne Circuit Court*, 11 Mich. 393; *Church*

v. *Holcomb*, 45 Mich. 29; *Schlee* v. *Darrow's Estate*, 65 Mich. 373. What the relator was asking was for a settlement for her interest in this estate by requiring the executor to account to her for the legacy given by the will, and we think the court had jurisdiction to require this. We are not indicating that equity would not also have had jurisdiction, if the proceeding had been commenced there. 2 How. Stat. § 6779, provides in what cases appeals may be allowed. In *Grady* v. *Hughes*, 64 Mich. 540, it was held that an appeal from an order made upon accounting by an administrator was allowable under the statute. In this case the appeal was properly taken, and should be reinstated.

The writ will issue as prayed.

The other Justices concurred.

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HAVILAND *v.* CHASE.

1. TRESPASS—JUSTIFICATION—WRIT OF ASSISTANCE—HOMESTEAD.
   One who forcibly ejects a wife from her homestead cannot justify under a writ of assistance issued in a proceeding against the husband alone, instituted at a time when the wife was also in possession.

2. SAME—EVIDENCE—ADMISSIBILITY OF WRIT.
   In a suit for trespass to the person based upon the forcible removal of plaintiff from premises which she was occupying with her husband as a homestead, a writ of assistance directed against the husband, under which the defendant assumed to act, is admissible in evidence, not as a justification, but as a part of the *res gestæ*, and as bearing upon the question of damages.

3. SAME—PUNITORY DAMAGES.
   An instruction in trespass *vi et armis* that the jury may award damages "by way of punishment," if defendant, in the commission of the trespass complained of, was actuated by malice or a reckless disregard of plaintiff's rights, is erroneous; compensatory damages being the limit of recovery in civil cases, —at least where unaffected by statute.

Error to Livingston; Smith, J. Submitted January 25, 1898. Decided March 15, 1898.

Trespass *vi et armis* by Edith Haviland against Almon L. Chase, Chauncey M. Wellman, and Thomas Gordon, Jr. From a judgment for plaintiff, defendants bring error. Reversed.

William P. Van Winkle and *Dennis Shields*, for appellants.

Louis E. Howlett and *Watts, Bean & Smith*, for appellee.

MONTGOMERY, J. The plaintiff brought suit for trespass to the person, and gave evidence tending to show that while she was living in a house in Iosco township, Livingston county, where she had resided for some 11 years, with her husband, Charles J. Haviland, defendants forcibly removed her from the premises; that she was not at the time in good health; and she also offered testimony to show some other circumstances of aggravation. The defendants attempted to justify under a writ of assistance in the hands of defendant Chase, who was at the time sheriff. This writ was issued in a proceeding against Louis A. Haviland, Louis J. Haviland, and Charles J. Haviland, which was instituted in 1888, at the time when plaintiff was occupying the premises with her husband. The case really presents but few questions.

It is contended that there was no evidence connecting Gordon with the trespass, but we think the testimony was ample both as against him and the defendant Wellman.

Error is assigned upon the refusal to admit the writ in evidence. This writ was no justification, but we think it was admissible as a part of the *res gestæ*, and as bearing on the question of damages, within the holding of this court. *Sutherland* v. *Ingalls*, 63 Mich. 620. We think it clear that the writ could afford no authority as against the plaintiff. She had such a right in this homestead as

entitled her to be made a party. *Spalti* v. *Blumer*, 56 Minn. 523. We have held that in ejectment the wife in actual occupancy of the homestead is a necessary party (*Sessions* v. *Sherwood*, 78 Mich. 234; *Kalkes* v. *Storms*, 93 Mich. 480), and that this is equally necessary in a case where the plaintiff is proceeding after the foreclosure of a purchase-money mortgage. *Gibbs* v. *O'Neil*, 85 Mich. 633. The reason for this is clear. The fact that the homestead right may be subordinate to the lien of the mortgage does not bar the right of the wife to reedeem from such mortgage in protection of her homestead right. See *Spalti* v. *Blumer*, *supra*.

We feel constrained to hold that the learned circuit judge erred in the instruction given to the jury on the sub ject of damages. The court charged:

"I have already given you some general instructions relative to the question of 'actual damages;' that is, the amount of the actual loss suffered or sustained by the plaintiff by reason of the trespass complained of. There is in the law another element of damages designated as 'exemplary' or 'punitive' damages. Such damages, if given at all, are only given by way of punishment of the defendants in case that, in the commission of the trespass complained of, they were actuated by malice or a reckless disregard of plaintiff's rights."

The rule has obtained in this court for many years that damages in civil cases should be limited by some rule of compensation. This rule was announced, upon full consideration, in *Scripps* v. *Reilly*, 38 Mich. 10, and has been adhered to since. It is true, charges have been sustained where exemplary damages have been referred to as "punitory" or "vindictive" (*Ross* v. *Leggett*, 61 Mich. 452); but the court has in no case not depending on statute given sanction to the distinct instruction that the jury may award a sum by way of punishment to the defendant, by whatsoever term such sum may be designated. The law recognizes that acts of indignity to the person or reputation may give an added smart or injury to the feelings if actuated by malice or committed in wanton disre-

gard of plaintiff's rights; but the theory upon which damages are increased because of these motives is that the injury is deemed to be greater. Therefore it has been held that an instruction that the jury may award damages by way of punishment is improper. *Stuyvesant* v. *Wilcox*, 92 Mich. 233; *Stilson* v. *Gibbs*, 53 Mich. 283; *Wilson* v. *Bowen*, 64 Mich. 133; *Lucas* v. *Railroad Co.*, 98 Mich. 5.

The only apparent exception to this rule is created by statute,—section 2283*b*8, 3 How. Stat., which provides for the recovery of actual and exemplary damages. In my own view, the recovery under this statute ought not to include smart money, but should be limited to such increased compensation for injury to feelings as could fairly be said to follow from wanton or willful invasion of rights (see *Ford* v. *Cheever*, 105 Mich. 679); but the statute has not always had this construction. The present case does not, however, arise under the statute.

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

The other Justices concurred.

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ALBION MALLEABLE IRON CO. *v.* FIRST NATIONAL BANK OF ALBION.

1. EQUITY—DISMISSAL OF BILL WITHOUT PROOFS.

Complainants filed a bill to obtain a construction of certain instruments whereby the property of their debtor became vested in one of the defendants as trustee for creditors, certain of whom were preferred. The bill prayed that the instruments be decreed to amount to a common-law assignment and the preferences be declared void, that the trustee render an account as to his doings, which were alleged to have been fraudulent, and that a receiver be appointed to take charge of the property. Before any proofs were taken, the court, upon the hearing of a motion for an injunction and a receiver, entered a decree dismissing the bill, based upon a finding that the instruments were merely securities, and could not be construed as a common-law assignment. *Held*, that the court was in error, as complainants were entitled to be heard, in any event, upon the question of the fraud of the trustee.

2. SAME—APPEAL—RECEIVER.

Where a bill of complaint was dismissed, without the taking of proofs, under a misapprehension of the rights of the parties, and the property in controversy was already in the hands of a receiver, and all charges of fraud were denied by the answer, the appellate court, upon reversing and remanding the cause, refused to pass upon the matter of the appointment of a new receiver, but left the same for determination by the lower court.

Appeal from Calhoun; Smith, J. Submitted January 26, 1898. Decided March 15, 1898.

Bill by the Albion Malleable Iron Company and others, as creditors of the Elms Buggy Company, against the First National Bank of Albion, Henry M. Dearing, and others, for the construction of certain instruments whereby the property of the debtor became vested in defendant Dearing as trustee, and for an accounting. From a decree dismissing the bill, complainants appeal. Reversed.

The bill in this case is filed by a number of creditors of the Elms Buggy Company of Albion, Mich., whose claims aggregate in amount about $15,538, for and in their own behalf and in behalf of such others of the creditors of said Elms Buggy Company as might wish to come in under said bill. The substance of said bill, so far as necessary to state it herein, is as follows:

(1) The Elms Buggy Company is a manufacturing corporation formed under the laws of the State of Michigan, and engaged in the manufacturing and selling of buggies. And it continued in business until May 22, 1896, when it had on hand property of various kinds of the value of about $100,000.

(2) At the date last mentioned, the Elms Buggy Company was indebted to complainants for goods and material put into its manufactory in about the aggregate sum of nearly $16,000, all of which is now due, but a considerable part of which was not due at the date before mentioned.

(3) The Elms Buggy Company purported to have a paid-up capital of $45,000, and so continued to state in its annual reports, and complainants believed that such was the case during the time and all the time until after said 22d day of May, 1896, and dealt with said company relying upon the supposed truth of that statement. They have recently discovered that, instead of said company having had $45,000 of actual cash capital, as a matter of fact said $45,000 was made up largely of the old Albion Manufacturing Company's plant, which consisted of some old sheds, engine, boiler, and shafting of insignificant value, and the balance of the capital was $7,500 which was borrowed by the stockholders of the First National Bank of Albion, and their stock put up as collateral to secure its payment; and, aside from said $7,500 borrowed, the capital put in did not exceed $10,000.

(4) The First National Bank, defendant herein, has been, ever since the organization of the Elms Buggy Company, the financial agent of said company, and to a certain extent has had charge of the financial part of its business; and while the Elms Buggy Company had been holding out to complainants that it had a paid-up capital of $45,000 which had been paid for in cash or its equivalent, the said bank all of said time knew that said buggy company had not received from its $45,000 of stock to exceed $10,000.

(5) On May 22, 1896, said buggy company was indebted to others besides complainants, aggregating, including complainants' claims, the sum of $34,000, all for goods and material bought by said company, the greater part in January, February, March, and April, 1896, and much of said indebtedness was not due on May 22d aforesaid; and said corporation was also at the last-mentioned date indebted to Maria C. Blanchard for $1,600 and to Lucina Sheldon for $3,400, as they believe.

(6) On May 22, 1896, the First National Bank pretended that said buggy company was indebted to it in the sum of $41,000 direct indebtedness, besides a large amount of contingent indebtedness arising on indorsed paper (the amount complainants being unable to state), and the defendant the Commercial & Savings Bank claimed said buggy company was indebted to it $5,000 on a note.

(7) On said 22d day of May, 1896, said buggy company pretended to be unable to pay its debts in full, and, for the purpose of disposing of its property, and distributing the same among its creditors, executed and delivered to defendant Henry M. Dearing a general assignment for the benefit of all its creditors, said assignment being embraced in two instruments, copies of which are annexed to the bill.

(8) As advised and believed, complainants say the making of said assignment was brought about by said First National Bank, and that said buggy company was no more insolvent then than in September, 1895, before any of said $34,000 of goods were bought, and the First National Bank knew this; and that it was understood between the Elms Buggy Company and the First National Bank that the former should buy largely, and, after said goods had been put in, then the company should put the bank in a position of priority of claim as against the persons from whom said goods were bought; and that the making of said assignment was to carry out the above-mentioned design, and to give said bank a priority of claim on said goods above that of the persons from whom they were bought; and that said Dearing was made trustee or assignee in said written assignment in order to carry out the scheme, he being the cashier of said bank.

(9) Immediately after making said assignment, Dearing took possession of the property covered by it, began to sell the same, and run the business of said buggy company, and has since so continued. It was not the intent of said

buggy company, when said instrument was made, to redeem from it, or to pay the debts mentioned in it, but it was always its intention that Dearing should run it to pay up debts; and, the next day after said assignment was made, the manager of the company hired out to said Dearing to assist him in running the business, and the said company carried out its intent to have all of said property sold to pay its debts, and both it and said Dearing construed said instrument as an assignment.

(10) Said First National Bank and the Commercial & Savings Bank now pretend said instrument is a chattel mortgage, and that they and said Blanchard and Sheldon are entitled to priority over complainants and the other creditors representing $34,000 of claims. But complainants allege that because of the provision put into said instrument by which Dearing was given the absolute right to dispose of said property at either public or private sale, as, in his judgment, he saw fit, and because said Elms Buggy Company never intended to pay said debts or redeem said property, and because of the construction put on it by the parties, the said instrument was a common-law assignment, and the alleged preferences contained in it are void under the statutes of the State of Michigan.

(11) Of the $41,000 mentioned in said instrument as owing said First National Bank, complainants are advised that only $15,000 is legitimately the debt of the buggy company, and all above that is on notes on which the buggy company is only indorser, and is not its indebtedness, and not within its power to become surety on it.

(12) The First National Bank and Dearing well knew, while the Elms Buggy Company was purchasing of complainants, that such purchases were being made, and property changed by painting, etc., so that complainants could not replevy, and, if they got the property back, it would be worthless to them in its changed condition, and they knew that complainants equitably should have a lien on said property prior to said bank, and they permitted and advised said Elms Buggy Company to purchase and get said property in its factory for the purpose of obtaining a lien thereon ahead of complainants.

(13) Said Dearing has not properly carried out his trust. He has not disposed of said property, and applied the proceeds thereof to the debts of said corporation. He has collected $26,000, the greater part of which he has paid to the First National Bank, and has paid no other creditors of said Elms Buggy Company, except $1,600, which he claims

to have paid Blanchard, and $600 to the Gale Manufacturing Company, which was one of the $34,000 creditors mentioned in said assignment. He has given, or pretended to give, security on some of the Elms Buggy Company property to the Commercial & Savings Bank of Albion to secure a large amount of alleged indebtedness claimed by it against said buggy company, but which was not, in fact, a legitimate indebtedness, and such security was given for the purpose of giving said Commercial & Savings Bank priority over complainants.

(14) Said Dearing, the First National Bank, and the Commercial & Savings Bank have combined together for the purpose of barring out complainants' claims and the claims of other creditors, amounting to $34,000 aforesaid. Dearing has had placed in his hands sufficient to pay nearly all the buggy company's debts,—property amounting, as reported by him August 24th, to $118,000, subject to $85,000 of debts, which reported amount accompanied a letter by Dearing, calculated to keep creditors quiet, so that their plans could be carried out, and to keep complainants from resorting to the courts to obtain their rights, and thus led complainants to believe that, if they kept quiet, they would get their pay in full. After paying over to said First National Bank a large amount of money, Dearing caused another circular to be sent out by Wolcott, agent, offering 20 per cent. for their claims, followed by a discouraging letter by Dearing, and still later by another by Wolcott, calling a meeting of creditors for February 4, 1897, to inspect affairs of company and property. Some of complainants went to said meeting, and found Dearing had no statement of what had been done by him, and said company was then alleged to be represented by Wolcott, a director of the Commercial & Savings Bank, and newly-elected president of the buggy company. It was impossible for complainants to obtain any information as to the past management of said Dearing, or what the condition of the property of the buggy company was, sufficient to enable them to judge whether it was best to accept the 20 per cent. offer. Dearing was requested to furnish a statement of what he had done under his trust, but he failed and refused to do it, and this was a part of the scheme to obtain to themselves the property of said buggy company.

(15) Instead of furnishing any such statement or information, said Dearing, on February 23, 1897, filed a bill in chancery in this court for an alleged foreclosure of what

he claims to be a mortgage on real estate and a mortgage on personal property, being the instrument which complainants claim to be an assignment as aforesaid, in which said two banks before mentioned and Blanchard and Sheldon are parties defendant, and none of the creditors embraced in said $34,000 of claims were made defendants. Said bill, among other things, prayed for appointment of a receiver over said property, and, after bill was filed, application was made to court for appointment of receiver. The defendants in said suit consenting to it, the court, on February 24, 1897, appointed one John Johnson as such receiver, he being a stockholder and one of the directors in the Commercial & Savings Bank, and a stockholder in the Elms Buggy Company. He filed a bond, signed as sureties by stockholders of the Commercial & Savings Bank and by the president and stockholders of the First National Bank. If the parties made defendants in such suit were necessary parties, then complainants were also. Said bill set forth no grounds whatever for the appointment of a receiver, and the court was imposed upon by said parties in making such appointment, and complainants believe such appointment would not have been made had the court not believed that it was desired by all persons in interest. The failure on Dearing's part to make complainants defendants in such bill, and to give them notice of application for receiver, was a part of defendants' scheme (said banks and said Dearing) to obtain the property of said buggy company through such foreclosure, and prevent complainants from getting anything out of it, and prevent them from applying for and getting a receiver who was disinterested between the parties.

(16) It would be a great sacrifice to sell the personal property coming to Dearing through said assignment at a forced sale, as it consists of unfinished vehicles and parts thereof, and twice as much could be realized from the same goods at private sale rather than by foreclosure sale; and the attempt to force said stock to said foreclosure sale by said Dearing and said banks, and this through the decree and sanction of the court, is another step in the attempt to get the property from complainants, and to apply the proceeds of such sale to other than complainants' claims; and by such scheme, if successful, said two banks will get all of said property, except such as Blanchard and Sheldon may get. Said property as heretofore manipulated by Dearing has very much depreciated in value, and much good and collectible commercial

paper is now claimed by him to be worthless; but same is not worthless, and said banks expect to get it through said foreclosure proceedings.

(17) Said Dearing and Johnson are both antagonistic to complainants, and are now managing said property in the interest of said two banks and against complainants' interest. Dearing is attempting to shield himself from his failure in carrying out his trust in a proper manner by having Johnson appointed receiver, and shifting the responsibility upon him. Johnson is only an agent and tool of Dearing and said banks, and complainants claim the right to have a receiver appointed who has no personal interest to subserve, who will take charge of the insolvent buggy company without prejudice or bias as against any one interested, and who will dispose of said property in a manner which will be for the best interests of all beneficiaries; and that Dearing should be restrained from forcing said property to a public sale, and said Dearing and Johnson should be ordered to turn over all of said property to a receiver to be appointed by this court.

(18) The prayer of the bill is:

"*First.* That the court should decree that the said instrument made by the Elms Buggy Company, and now denominated a chattel mortgage, is in fact a common-law assignment for the benefit of all the creditors of the Elms Buggy Company, and that all the creditors of said company are entitled to share proportionately in its property, and that the preferences therein mentioned are void.

"*Second.* That Henry M. Dearing be required to account to this court for his acts and doings as trustee under said instrument, and to render an account of all moneys received by him and paid out by him, stating the particulars in regard thereto; that he be required to account for and pay in all moneys received by him, and which may have been improperly paid out by him.

"*Third.* That the rights of all the creditors of said Elms Buggy Company in and to the property of said Elms Buggy Company should be adjudicated upon by said court.

"*Fourth.* That the court decree that the proceedings brought by said Henry M. Dearing for the foreclosure of the two instruments mentioned in the bill, and the appointment of defendant Johnson, were collusive as between the parties mentioned in the bill, namely, the two banks and Dearing and Johnson, and that the same were commenced without any right or authority, so far as complainants'

rights are concerned; that the court had no jurisdiction to appoint Johnson as receiver; and that the bill on which such appointment was made be made a part of the proceedings in this case so far as is necessary.

"*Fifth.* That a receiver be appointed in this suit, and Dearing and Johnson be required to turn over to such receiver all property, books, etc., of the Elms Buggy Company

"*Sixth.* Prayer for general relief."

Answers and replications were duly filed, and notice given by the various parties to take the testimony in open court. After all these proceedings, complainants made a motion for an injunction and the appointment of a receiver. Upon the hearing of this motion the court refused an injunction and the appointment of a receiver, and entered a decree dismissing the bill.

Adelbert Culver, *Boudeman & Adams*, and *Bowen, Douglas & Whiting*, for complainants.

Herbert E. Winsor, *Monfort D. Weeks*, and *Parkinson & Campbell*, for defendants.

GRANT, C. J. (*after stating the facts*). The court based its conclusion upon the finding that the mortgages or trust deeds were merely securities, and could not be construed as common-law assignments.

1. The court was in error in dismissing the complainants' bill. The cause was at issue, and ready for the introduction of proofs. The sole question for determination was whether a receiver should be appointed and a temporary injunction granted. If the instruments are held to be assignments, the complainants are not seeking to set them aside, but to have the trust enforced with the preferences declared void, so that all the creditors may share equally. This is the proper and equitable course to pursue in case of assignments with preferences. If the instruments are held to be securities, and valid, the complainants are entitled to be heard upon pleadings and proofs as to the

alleged violation of the trust by the assignee, Mr. Dearing. By the express terms of the mortgages—if held to be such—the complainants are interested, and entitled to call the trustee to an account. He filed a bill, which is claimed to be collusive, and did not make these complainants parties. Under either aspect of the case the court should not have dismissed the bill until after a hearing upon the proofs. It is proper to add that the answers deny all the material allegations of the bill.

2. The conveyances are between the Elms Buggy Company and Mr. Dearing as trustee. They state that they are made for the purpose "of securing the payment of all its [the buggy company's] debts to all its creditors." They cover all the property of the company, and say that said company "does sell, assign, transfer, set over, and mortgage unto said second party as such trustee," etc. They then prefer certain creditors, and, after they are paid, the avails of the residue are to be divided among the other creditors. It is not stated therein when the debts are due, but they contain the usual provisions for taking possession upon default in payments. The instrument called the "chattel mortgage" closes with these provisions:

"It is believed by said first party that it is for the benefit and advantage of the creditors for it to continue the business of manufacturing until such time as it shall have used up all its stock now on hand for the purpose of transforming the raw material into manufactured stock, and, in case some certain lines should be exhausted, that it should buy sufficient new material of any kind not on hand necessary to complete the working up of any other available for that purpose. For this reason said first party contemplates the continuance of its said business, and of selling said product for the benefit of those secured. And it is expressly understood that said first party shall keep a true and accurate and detailed account of all the expenses of so operating the business, and of all receipts, and shall render such account and statement to the said trustee, who shall have the right to examine into the said business and said work; and if, at any time, he shall believe that the continuance of said business is not for the in-

terest of the creditors secured hereby, he shall have full power and authority to stop the operation of said factory, and take possession of the said property, if he deems it necessary, and at maturity of this mortgage dispose of the said property in accordance with the terms of this mortgage. And said party of the second part, as such trustee, is also authorized and empowered, by himself or his agent, to receive into his custody all proceeds of sale, and all remittances, and all orders for manufactured goods at all times; and for that purpose he shall have access to all correspondence and letter books of said first party to such extent as, in his judgment, is necessary for the full and complete discharge of his duties hereunder."

The bill alleges that the trustee immediately took possession, and conducted the business until he filed the bill above referred to, and that the parties by their acts construed the conveyance to be a general assignment for the benefit of creditors. It is unnecessary to now determine the character of these instruments upon their face. Fraud is charged, and we are not prepared to say that they may not be shown by proofs to in fact constitute an assignment. Upon this we express no opinion, but prefer to leave it to the final determination of the case. We can only dispose of the question now as if it were before us on demurrer.

3. Counsel for complainants strenuously urge that this court should appoint a receiver, or direct the court below to appoint one. All allegations of fraud are denied by the answers. The property is already in the hands of a receiver, who presumably has given a good and sufficient bond. Upon ascertaining the view of this court upon the law of the case, the court below will, of course, take such action as it shall deem advisable to preserve the property for the benefit of those who shall eventually be entitled to it. We think that this question should be left to the determination of that court.

The decision is reversed, with the costs of this court, and the case remanded for further proceedings.

The other Justices concurred.

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150 [1]149

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PEOPLE *v.* WARNER.

1. SWAMP LANDS—GRANT OF 1850—ISLANDS IN GREAT LAKES.
   A marshy island in one of the Great Lakes, not in existence at the time of the swamp-land grant by Congress to the State in 1850, belongs to the State, by virtue of its ownership of the soil beneath the waters of the Lakes.
2. SAME—CERTIFICATION BY SECRETARY OF INTERIOR—EFFECT OF OMISSION OF LANDS.
   A marshy island in one of the Great Lakes, existing as unsurveyed land at the time of the certification by the secretary of the interior of the list of swamp lands covered by the grant, will not, because of its being omitted from such list, be deemed to have been determined by the secretary not to be within the grant, unless there is evidence tending to show that the question as to such land was actually considered and passed upon.
3. SAME — CHARACTER OF GRANT — SUSPENSION OF RIGHT OF ENTRY.
   The swamp-land grant was a grant *in præsenti*, conveying to the State the title to such lands as came within its terms, but suspending the right of entry until the lands covered thereby should either be determined by the secretary of the interior, or he should refuse to act.
4. SAME—ADJUDICATION.
   Where the secretary of the interior refuses to make the determination as to particular unsurveyed lands claimed by the State under the terms of the grant, the State may cause a survey to be made, and have the matter adjudicated in the courts.
5. SAME—ADVERSE POSSESSION AS AGAINST STATE.
   Possession of such lands under claim of title would not be adverse to the State until its right of entry became complete under the terms of the grant.
6. SAME—RECLAMATION.
   The swamp-land grant of 1850 covered all swamp and overflowed lands, and not those alone which were susceptible of profitable reclamation by drains and levees.
7. RIPARIAN RIGHTS — GREAT LAKES — LIMIT OF PRIVATE OWNERSHIP.
   The limit of private ownership of islands in the Great Lakes is

the water line, regardless of the fact that adjacent land is submerged only to a slight depth, and is grown up to aquatic plants

8. SAME—ACCRETIONS—SUBMERGED ISLAND.
Additions to the land of a littoral proprietor by the action of the water become a part of the land, and belong to the owner, where they are so gradual as to be imperceptible; but if an island arises out of the water, and afterwards becomes connected to the land of the littoral proprietor, it belongs to the State.

9. SAME—ACCESS TO NAVIGABLE WATER.
The owner of an island in one of the Great Lakes has no such right of access to navigable water as will support a claim of title in fee, as against the State, to an intervening island.

Error to Huron; Beach, J. Submitted January 28, 1898. Decided March 15, 1898.

Ejectment by the people against Hulbert H. Warner and John D. Weeks. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Reversed.

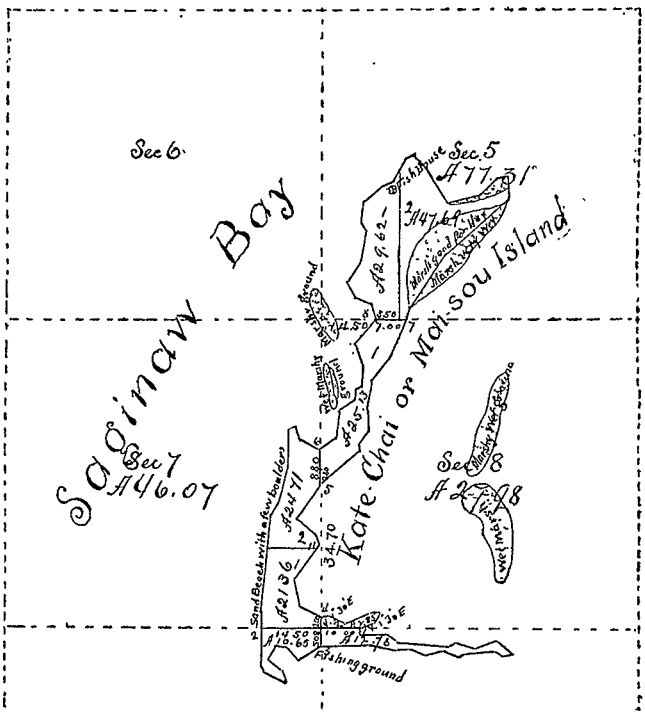
Cyrenius P. Black (*John G. Milburn*, of counsel), for appellants.

Fred A. Maynard, Attorney General (*Avery Bros. & Walsh*, of counsel), for appellee.

HOOKER, J. In 1853 there existed in Saginaw Bay an island called "Maisou," which had never been surveyed. In that year a survey of this island was made by the government, and it was sold in 1868. A copy of the plat which was made by the surveyor is attached to this opinion,[1] whereby it is shown that the surveyor found land lying to the eastward of Maisou island, which he denominated "Wet Marsh," and apparently did not survey. It appears upon the plat as two small islands. These islands now constitute a part of a somewhat extensive stretch of land and shallows, known as the "Middle

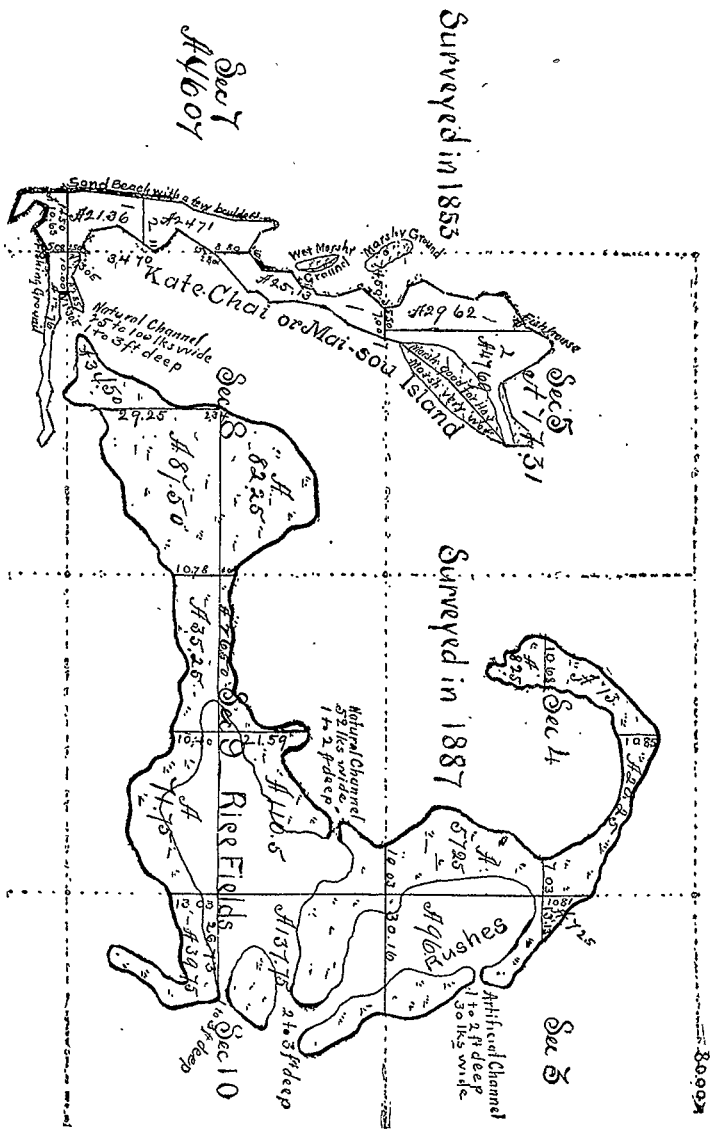
[1] Page 230.

Ground," shown by a map filed herewith,[1] and which is claimed by the State, but occupied by the defendant Warner, who is the admitted owner of Maisou island.



By Act No. 66, Pub. Acts 1891, the Middle Ground is made a public hunting and shooting ground. An effort was made by the State, in 1885, to induce the authorities at Washington to survey this Middle Ground, and issue a patent to the State, under the swamp-land act of 1850; and a survey of some sort was made by a federal surveyor, named Strudwick. The defendant Warner intervened, and made claim to the Middle Ground as an accretion to Maisou island; and, upon the other hand, the State claimed title to the newly-found land as accretions

[1] See opposite page.


Surveyed in 1853
Sec 7
A1607
Sand Beach with a few bushes
A2136
A2471
Marshy Ground
Wet Marshy Ground
Kate Chai or Mai-sou Island
Natural Channel 150 lks wide 1 to 3 ft deep
A2962
Rushes
Sec 5
A1731
Surveyed in 1887
Sec 8
A6250
A6225
A3526
A4110.5
Sec 9
RIFF Fields
A4175
A1315
Sec 10
Sec 4
A4251
A5725
A4961
Rushes
Artificial Channel 1 to 2 ft deep 30 lks wide
Sec 3
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to the two islands mentioned as "Wet Marsh." The commissioner of the general land office determined that the Middle Ground was an accretion to Maisou island. The matter was finally disposed of by Vilas, secretary of the interior, by a decision reported in 7 Land Dec. Dep. Int. 255 (*The Middle Grounds*). This decision reversed that of the commissioner. We infer from the decision that the survey was completed in 1887 by Strudwick, and was duly filed; that it included the "swamp and overflowed grounds called the 'Wet Marsh,' and other land then apparently lying between them and Maisou island, * * * now known as the 'Middle Grounds.'" The controversy appears to have related to the territory between Maisou and the original Wet Marsh; Warner claiming it as an accretion to Maisou, and the State claiming it as an accretion to the Wet Marsh. To determine this, it became necessary to locate the Wet Marsh as it was in 1850, and investigate the nature, condition, and extent of the alleged accretion. This the secretary refused to do, upon the ground that the department was "not equipped with the proper means of ascertaining these facts." He therefore directed the discontinuance of the proceedings *under the surveys*, and that the parties be left to the maintenance of their rights in the courts. The State thereupon proceeded to make a survey, and, after its completion, brought ejectment against Warner and his tenant, who have appealed from a directed verdict in favor of the State. Their first contention is that the State has not proved its own title.

If the land which was denominated "Wet Marsh" in the plat of 1853 was in existence in 1850, it was included in the grant to the State, provided it was of the character described. If it was not then in existence, it became the property of the State by virtue of its ownership of the submerged land at the bottom of the lake. *People* v. *Silberwood*, 110 Mich. 103. Assuming its existence in 1850, and that it comprised only such land as the act sought to convey, it then became the duty of the secretary of the

interior to so determine, and list it as such. The defendants maintain that it was determined not to be swamp land within the act, inasmuch as the interior department made and filed a list embracing lands within the township of which both surveys show that this is a part, which list did not include these islands. Failing in this contention, it is said that there has never been a determination that any of these lands were covered by the act. We will pass the first contention with the remark that if the inference is warrantable that particular lands in a township are not covered by the act, because not included in the list or patent of lands made by the interior department in furtherance of the law, it should not apply to lands which, though within the township, have never been surveyed, unless there is evidence tending to show that the question as to such lands was actually considered and passed upon. It is evident that these lands were not considered when the list was made. What evidence there is indicates that the department considered these islands the property of the State, when they were brought to the attention of the secretary. The case of *Chandler* v. *Mining Co.*, 149 U. S. 79, applied to a claim to lands which had been surveyed previous to the time that the list was made. This might reasonably justify the presumption of exclusion. The decision of the secretary of the interior referred to would indicate that it was his understanding that unsurveyed land is not treated as excluded because not in certified lists of the township. Until the islands were surveyed, it could not be told whether or not they would be within the township, which until that time had not been extended to them. No list of lands or patent has been made of territory in this locality since 1853. On the contrary, when it was demanded, it was refused, not because the department could not determine that these islands were the property of the State, but because it had not the means, or (as the secretary held) the power, to determine where they were located. In other words, while he conceded the right of the State, he was unable to determine what portion of the

land for which the State asked a patent constituted these islands, and could not know that some part of the land asked for was not an accretion to Maisou island, and therefore no part of or accretion to the property granted to the State.

We cannot accede to the contention that the government has made no survey of this Middle Ground. There is not only the original survey, the plat at least of which shows the Wet Marsh, but there is the Strudwick survey, whatever it was, upon which the commissioner determined the Middle Ground to be an accretion to Maisou, and the secretary determined that it was at least a doubtful question. There is significance in his statement that—

"The plat of the government survey also shows that at some considerable distance, a mile and a half to two miles, to the northeast, two small marshy islets of land appeared, of such inconsiderable size and so wet that no distinct plat of them as parts of any section was made, but the surveyors simply marked them as 'Wet Marsh.' Necessarily, therefore, if this survey was any indication of the fact, these small plots of wet marsh passed to the State under the swamp-land act of September 28, 1850. That act was a present grant, and vested the title to all the swamp and overflowed lands of this character within the limits of the State in the State upon its passage. Whether or not a tract of land passed to the State by virtue of that grant depends simply upon the question, What was the character of the land at the time, as being swamp or overflowed? A special agreement has been made with Michigan (1 Lester's Land Laws, 542), as with some other States, whereby the field notes of the government survey are to be conclusively taken as the basis of determination of swamp and overflowed land in that State, and of adjustment under the grant. * * * This recital of the facts shows that all of the title of the United States to the swamp and overflowed lands mentioned, being such as were shown by the plat and field notes of the survey, passed to the State in 1850, and that all the title of the United States to Maisou island passed to the patentee in 1868." *The Middle Grounds*, 7 Land Dec. Dep. Int. 256.

May we not reasonably understand that this land was all surveyed, and that the secretary was satisfied, and has

determined by this decision, that the Wet Marsh passed to the State in 1850? And does it not follow, as the secretary practically says, that all of this Middle Ground, whether wet or dry, high or low, that has appeared above the water since, must belong to the State, unless it may be lawfully considered an accretion to Maisou? What element is it that is lacking in the State title? Simply an inability to designate the particular legal subdivisions that cover the original "Wet Marsh." Apparently, that can never be done authoritatively by a survey. The only evidence by which it may now be established is the recollection and testimony of men.

If the secretary is correct in his opinion that his department cannot determine this question, it is manifest that only the courts can. If wrong, it is plain that he has refused to do so. In such case the courts may, as to each parcel, after it is brought within a legal subdivision by survey. Two cases are cited by counsel for the State as authorizing an inquiry by a court in an action brought to recover the land. The first of these is *Railroad Co.* v. *Smith*, 9 Wall. 95. This case sustained the admission of oral proof of the character of the land, offered by the defendant in possession under a patent from the State, which purported to convey the premises as swamp land, to establish the proposition that they were not within a subsequent grant to a railroad, from which the plaintiff derived its claim of title, because within the exception in the later grant, which excluded lands conveyed under the swamp-land act. This was upon the theory that the swamp-land act constituted a grant of land *in præsenti*, passing the title to the lands,—a proposition which is sustained by numerous State and Federal cases. This was not a unanimous opinion, and has since been discussed in several cases, where prominence has been given to the fact that this evidence was admitted, not to establish a title, but to show that the particular land could not be considered within the railroad grant. Stress was also laid upon the fact that the secretary of the interior had

neglected or refused to do his duty, and, as the courts had no power to compel performance, the State would be remediless, and might lose an entire grant through the contumacy or neglect of an officer, if the courts could not settle the question. In this case there was a federal survey. In the later case of *Wright* v. *Roseberry*, 121 U. S. 488, Mr. Justice Field had occasion to review this question, in a case where the plaintiff, who was a patentee of the State of swamp lands, undertook to recover possession from an occupant claiming title under a patent from the United States issued after 1850. The land had never been surveyed by the general government, nor had the lists mentioned been made or filed, nor had a patent issued to the State. We will not attempt a lengthy discussion of this case. It reviews the former cases, and contains the following significant language:

"The result of these decisions is that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible where the secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

We understand the effect of this decision to be that where the secretary of the interior has neglected to perform his duty under the act, by identifying the land, a person who claims under the State may prove his title in a collateral action by showing, by any evidence that will prove it, that the premises in dispute were necessarily included in the grant, according to its terms. It is true that the decision in that case might have been planted solely upon subsequent legislation, wherein Congress authorized

another mode of identification, but it was not. We understand it to enunciate the doctrine that, when the means provided by the act for adjudicating the question of what particular lands are actually within the terms of the original grant fail, the State or its grantee may identify the land conveyed by the usual methods of identification, and by proving that it is within the description of the deed. And if counsel are correct in saying that it is admitted that the government never made a survey of this territory, and therefore that we cannot find that the secretary has determined that these islands were "swamp or overflowed lands," and that they became the property of the State, then we should merely say that these facts also were not determined, and are yet open questions, and may be determined by a survey by the State and adjudication by the courts. From the cases cited, we understand that the swamp-land act was a grant *in præsenti;* that it conveyed the title, but suspended the right of entry until it should be determined by the statutory tribunal what subdivisions of land it applied to, or it should refuse or fail to do so. When this tribunal failed and refused to act, the suspension was at an end, and the State or its assignee was at liberty to identify and take possession or bring an action to recover the land, upon the theory that the grant was certain because it could be made certain, as in any other case.

Here, then, we have, at the worst, a case where two islands are known to have belonged to the State, or may be shown to be within the grant. Through natural causes, it has become impossible for them to be definitely located with reference to any legal subdivision, or, if that is possible, the tribunal erected to determine the question has no jurisdiction, or has refused to act in the premises, and convey the land by patent to the State. We think it is competent for the State to survey the premises, and to prove the facts regarding the nature of the land, and thus establish title in the State. Practically, however, it is of little importance in the case to know in what particular

legal subdivision those original wet marshes should be located. Wherever they were, so long as within the territory described, it is sufficient if they were all swamp. It is the other and additional land that gives rise to the actual dispute. But for this, there could be no claim that the premises were an accretion to Maisou, and it only becomes important to know where the wet islands were situated when it becomes necessary to find that some of this land was an accretion to them; and this only becomes necessary in case there is a possibility of its being an accretion to Maisou, because upon this defendant Warner's title depends, and, if the land is not his, it must, under the evidence, belong to the State, if the two islands were swamp lands.

It is urged that the islets were not swamp or overflowed lands, within the act, because they could not be profitably reclaimed. We think the act should not be construed to grant only such parcels as were specifically and individually susceptible of profitable reclamation by drains and levees. All swamp lands were granted, that the State might thereby acquire a fund for general drainage purposes. The act applies to islands as well as the main land, and, if we cannot say that the evidence indisputably shows that the islets were swamp and overflowed lands, we must, at the least, say that was a question for the jury.

Being convinced that the State has proved a *prima facie* title to, at least, a portion of the premises, we will discuss the case from the standpoint of the defendants. There are four subjects to which our attention is directed:

1. Whether the evidence conclusively shows that no part of the Middle Ground is an accretion to Maisou.
2. Whether, under the law, the defendant Warner's title extends eastward from Maisou to the deep water beyond the Middle Ground.
3. Whether, as owner of Maisou, he has any riparian rights which justify a reversal of the case.
4. Adverse possession.

The most comprehensive claim of title on the part of the defendant Warner is that his purchase of Maisou

island gave him title of all land and water to the center of the main channel between the Middle Ground and the east shore of the bay. This would include the Wet Marsh and all of the Middle Ground. We have already intimated that the rule by which such a result is reached does not apply to the Great Lakes. The title to the fee in the submerged land belongs to the State. *People* v. *Silberwood*, 110 Mich. 103.

The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation. The right of navigation is not the only interest that the public, as contradistinguished from the State, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the State adjoining that portion of the water known to be adapted to their sustenance and increase.

Upon the subject of accretions, we understand the law to be that additions to the land of a littoral proprietor by the action of the water, which are so gradual as to be imperceptible, become a part of the land, and belong to the owner of the land, but, when not so, they belong to the State. So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the State, would be the owner; but if an island should first arise out of the water, and afterwards become connected to that of the private proprietor, it would not thereby become the property of such person, but would belong to the State. See 1 Am. & Eng. Enc.

Law (2d Ed.) 467, *et seq.*, and cases cited. It will be seen by the map that the point at which Maisou island and the Middle Ground approach each other nearest is on the S. W. ¼ of section 8. If the Middle Ground or any part of it is an accretion to Maisou island, it is by reason of the growth of the former from this point; and it becomes important to know whether the land was washed up against Maisou, and gradually extended that point eastward and northward, or whether land arose from the water to the northward and eastward, and gradually approached Maisou, until a gradually-narrowing water passage was obliterated at times of low water. In the former case there may be force in the claim that there was an accretion to Maisou, and it would then become important to know how far it extended. We are of the opinion that this was a question for the jury, and should not have been taken from them. We have here, therefore, a question of fact as to whether any, and, if so, what, portion of the Middle Ground is an accretion to Maisou. As to such extent the defendants would be entitled to a verdict.

It is contended that the defendant Warner, as littoral proprietor, has a right of access to navigable water to the eastward of Maisou. If this is true (which we do not intimate), it is merely a right to use the intervening land for the purpose, which does not interfere with the rights of the public, and does not support a right to take full possession, and exclude both the State and the public from a large area of land and water, under a claim of title in fee. There is nothing in the case to indicate that any such access has ever been sought, or that it is likely to be. It is not clear that, with the exception of a very small portion, the entire shore of Maisou is not accessible to vessels; and it is obvious that this is not a meritorious defense in an action brought to determine the ownership of land, where each party claims an absolute title in fee simple.

It remains to allude to the question of adverse posses-

sion. The claim is made, and some evidence appears in support of it, that the defendant Warner and his grantors have enjoyed the exclusive possession, under claim of title, of the whole or some portion of the land in controversy from the year 1870. This possession, such as it was, does not appear to have been unquestioned. As early as 1885, we find the State claiming it, and from that time to this it has steadily attempted to acquire possession; and, as appears, the right of entry to the two islets and their accretions did not accrue until the failure of the secretary of the interior to list and convey the land.

We think the court erred in taking the case from the jury. The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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WIGHT v. ROETHLISBERGER.

1. EQUITY PLEADING—PARTIES—WARDS.

   A bill to restrain the sale of land on execution by one who obtained a judgment as guardian is not demurrable on the ground that the ward is not made a party, where it does not show that the ward is interested.

2. SAME—SUIT AGAINST SHERIFF—OFFICIAL CAPACITY—SUFFICIENCY OF ALLEGATION.

   A bill to restrain the sale of land on execution, which alleges that defendant levied "as sheriff," sufficiently shows that the suit is against the defendant in his official capacity, although he is not described as sheriff in the prayer for relief.

3. SAME—JURISDICTION—AMOUNT INVOLVED.

   The jurisdiction of equity over a suit to enjoin the sale of land on execution depends upon the value of the land, rather than upon the amount of the judgment.

4. SAME—PRESUMPTION OF VALUE.
The court will assume, in support of the jurisdiction over a bill to restrain the sale of 44 lots located in a thriving and populous city, that they are worth more than $100, in the absence of any allegation of value.

5. SAME.
Whether a bill would lie to restrain the unlawful interference with the owner's enjoyment of property worth less than $100, —*quære.*

6. SAME—MULTIFARIOUSNESS—RELIEF.
The fact that the statute providing for the maintenance of bills to remove clouds from title does not authorize the assessment of damages in such a suit does not render such a bill multifarious because it embodies a claim for damages, since complainant would be entitled to such relief only as is consistent with the case stated in the bill.

7. SAME—ESTATES BY ENTIRETY—ACTIONS—PARTIES.
A wife is a proper party to a bill to restrain the sale, under an execution directed against her husband, of lands held by them as tenants by the entirety.

8. SAME—TENANTS IN COMMON.
But a tenant in common with them, whose interest is not affected, no levy having been made thereon, is not a necessary party to such a bill.

9. SAME—GENERAL DEMURRER—QUESTION OF FRAUD.
The claim that the husband took title in himself and wife for the purpose of defrauding his creditors cannot be considered on a general demurrer to the bill, where there is nothing upon its face denoting such fraudulent purpose.

Appeal from Kent; Adsit, J. Submitted January 27, 1898. Decided March 15, 1898

Bill by Henry T. Wight and wife against Frederick A. Roethlisberger and Irving Woodworth to enjoin an execution sale. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

The material averments of the bill are as follows: Complainants are owners in fee, as tenants by the entirety, of 44 lots of land in the city of Grand Rapids. The deed to them was executed August 31, 1895. Defendant Roeth-

lisberger, as guardian, obtained a judgment against complainant Henry T. Wight, caused an execution to be issued out of the circuit court for the county of Kent, and defendant Woodworth, sheriff of said county, by virtue of said execution, levied on said lands. Said lands are held by complainants for the express purpose of sale and exchange. Said levy operates to prevent them from selling or disposing of said lots, was intended to so operate, and has caused them damage to exceed $100. Defendant Roethlisberger refuses to release said levy, and says that he shall in a short time proceed to sell, and has furnished to said sheriff a bond of indemnity, and he refuses to release the levy. Complainants allege on information and belief that Roethlisberger does not intend to file a bill in aid of his execution, but is holding the same thereon for the express purpose of causing damage to them, and to force them to pay the amount of said execution. They fear that Roethlisberger, without filing a bill in chancery in aid of his execution, will proceed to sell said lands. They pray for an injunction to restrain the sale, and for a decree to remove the cloud from their title, and for damages. Defendants demurred. The demurrer was overruled, and they appeal.

Wolcott & Ward, for complainants.

Cutcheon & Swarthout, for defendants.

GRANT, C. J. (*after stating the facts*). 1. The first ground of the demurrer is that the ward of Roethlisberger is a necessary party. Where the interests of an infant are involved, he must be made a party, and a guardian *ad litem* appointed. It is unnecessary to cite authorities to sustain this proposition. But this bill does not show that the ward is interested. When the judgment roll is introduced, it may show that the ward has such interest as to require the interposition of a guardian *ad litem* to protect his interest. If it should then appear that such appointment is necessary, it will be time for the court to take action.

2. It is urged that the suit is not planted against Woodworth in his official capacity. The bill alleges that he has levied as sheriff, and this is sufficient. The fact that in the prayer for relief he is not described as sheriff does not determine that he is sued individually. All the allegations must be considered.

3. It is next urged that the bill does not show affirmatively that more than $100 is involved. We think it fair to assume that 44 lots in the city of Grand Rapids are worth more than $100. This question must be determined by the value of the lots, and not by the amount of the judgment in the suit at law. *Fuller* v. *City of Grand Rapids*, 40 Mich. 395. Where the jurisdiction depended on the amount of the interest involved, and there was no allegation of the value of such interest, the court refused to dismiss the bill on general demurrer, and said, "We will not assume that a debt to secure which the debtor turned out 1,500 tons of No. 1 iron ore was not over $100." *Glidden* v. *Norvell*, 44 Mich. 206. If, however, the lands were not worth $100, still it does not follow that a bill will not lie to prevent the unlawful interference with the owner's enjoyment. The contrary view seems to have been taken by the court in *White* v. *Forbes*, Walk. Ch. 112. Upon this question we express no opinion at the present stage of the controversy.

4. It is insisted the bill is multifarious, because it prays for the removal of a cloud from title, and for damages. The point is that the right to maintain a bill to remove a cloud from title is statutory, and the statute does not authorize the assessment of damages in such a suit. Complainants, then, have prayed for relief to which they are not entitled. They would be, in that case, entitled to such relief as is consistent with the case stated. *Hammond* v. *Michigan State Bank*, Walk. Ch. 214; *Varick* v. *Smith*, 5 Paige, Ch. 137. See, also, 15 Am. & Eng. Enc. Law, 947.

5. We think that Mrs. Wight is a proper party, and that the tenant in common with complainants is not a

necessary party. His interest is not affected, and no levy is made upon it. There is no injury to the common estate.

6. Defendants claim that the object of complainant Wight in taking title to this land in himself and wife was to defraud his creditors. There is nothing upon the face of the bill to show any such purpose. It does not appear that Mr. Wight was at that time indebted to defendant Roethlisberger or his ward, whoever he may be. Defendants can only take advantage of this by proper suit to establish the fraud and secure relief. Whether this can be done by an answer in this suit is not before us. We only hold that there is nothing now before the court to justify this conclusion.

Decree affirmed, with costs, and case remanded for defendants to plead or answer according to the rules and practice of the court.

The other Justices concurred.

GERMAIN v. CENTRAL LUMBER CO.

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1. LOGGING CONTRACTS—CONSTRUCTION—PAROL EVIDENCE.

A contract between a logger and a sawyer was evidenced by two papers delivered at the same time, the one, a letter offering to sell the logs for a stated price per M., payments to be made in advance in negotiable paper of specified amounts, upon which letter the sawyer's acceptance was indorsed; the other, a letter bearing date one day later, offering to buy back the lumber manufactured from the logs at the same price per M. that was paid for them, and to pay a stated amount per M. for the sawing, which likewise contained the sawyer's written acceptance. The logger agreed to take care of the sawyer's paper whether or not the logs were delivered as agreed *Held*, that it was competent for the sawyer to show by parol that the transaction was not a purchase and resale, but that it merely provided a security for advances.

2. SAME—SAWYER'S LIEN—RELEASE.

The fact that the logger was to take up the sawyer's notes on or before a certain date "from proceeds of sales of lumber," that the time for the payment of the saw bill was extended beyond such date, and that shipments of lumber were in fact made from time to time, would not deprive the sawyer of his lien for the saw bill upon lumber remaining in his possession.

3. SAME—ACCEPTANCE OF NOTE—PAYMENT—INTENT.

Taking a note for a saw bill does not release a lien on the lumber for sawing, unless it is shown to have been accepted in payment of the bill.

4. EVIDENCE—CUSTOM.

A sawyer's lien for his saw bill cannot be affected, while he retains the actual possession of the lumber, by any custom which relates merely to the method of removing lumber from the sawyer's docks when no lien rights are involved.

5. SAME—INSTRUCTIONS.

The admission of evidence as to such custom in a case involving a sawyer's lien is prejudicial error, where the jury are instructed that they may consider "all the evidence in the case" in determining whether or not the lien had been waived.

6. SAME.

The exclusion of competent testimony, offered to show the real character of an ambiguous instrument, is prejudicial, although the court afterwards construes the instrument in accordance with the contention of the party offering such testimony, where the testimony might have aided the jury to a better understanding of the matters involved.

7. SAME—WAIVER OF LIEN—INTENT.

Upon an issue whether a sawyer waived his lien on lumber for a saw bill by receiving notes in payment or by surrendering possession of the lumber, his testimony that he did not intend to waive his lien is inadmissible.

8. SAME—BURDEN OF PROOF.

The burden is on the purchaser of lumber in possession of a sawyer to show that his lien for sawing had been terminated.

Error to Saginaw; Snow, J. Submitted January 27, 1898. Decided March 15, 1898.

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

Hanchett & Hanchett, for appellant.

Weadock & Purcell, for appellee.

LONG, J. This is an action of replevin for a quantity of lumber which defendant claimed to hold to secure the payment of certain bills for sawing it. Plaintiff contended that defendant had delivered the lumber to him, and had thereby released its lien for the saw bill, which claim was denied by the defendant. It was the contention of the defendant that, while the lumber remained on the dock, it was in its possession, and that the lien for the saw bill remained upon the lumber which was replevied. On the trial, the defendant waived return of the lumber replevied. The questions submitted to the jury were whether the defendant had a lien on this lumber at the time of the commencement of the suit, and whether the testimony tended to show that this lien had been waived and released by the defendant. The jury found in favor of plaintiff, and defendant brings error.

It appears that defendant operated a saw mill on Saginaw river. In April, 1895, and for some time before that, J. W. Howry & Sons were engaged in lumbering in Saginaw and Canada, and they owned in Canada several million feet of pine saw logs. On April 5, 1895, Howry & Sons wrote defendant as follows:

"We will sell to you seven million feet of our Georgian bay logs, marked crescent or scroll, delivered to your mill, for $12 per M. feet, and commence delivering the same during the month of June, 1895, unavoidable delays excepted; you to give us $40,000 of your paper on account this date, and $25,000 more in amounts $5,000 each a few days previous to the maturity of the $25,000 paper given us by A. T. Bliss, same being in exchange for our paper; measurement of logs and lumber to be hereafter mutually agreed upon; you to keep the lumber fully insured, and loss, if any, payable to us as our interest may appear."

The defendant, on the same day, indorsed the letter as follows:

"We hereby accept the above proposition of J. W. Howry & Sons."

The following receipt was thereupon signed by J. W. Howry & Sons:

"Received of the Central Lumber Company, April 6, 1895, their paper as follows, all dated April 5, 1895: Due four months, $5,000; August 20, 1895, $5,000; five months, $5,000; six months, $5,000; seven months, $10,000; November 20, 1895, $10,000,—total, $40,000."

On the same date as giving this receipt, J. W. Howry & Sons also wrote the defendant as follows:

"We hereby agree to buy back from you the lumber manufactured from logs sold you April 5, 1895, at the same price you paid us for logs, viz., $12 per M., and agree to pay you $1.75 per M. for sawing same; terms of saw bill to be six months from completion of each million feet, but notes to be made for each two million feet cut, and time averaged. We will take up your paper given us on account of purchase of logs on or before July 1, 1896, from proceeds of sales of lumber, and agree to keep the lumber insured; you to manufacture the logs in good and workmanlike manner, and subject to our instructions. You will also give renewals of your notes from time to time, but such renewals not to extend beyond July 1, 1896. The paper you give us shall be taken care of by us, whether the seven million feet of logs are delivered to your mill or not. You are to cut up to eight million feet of our logs if we have them."

The terms of this writing were also accepted by the defendant in writing. There was also written on the margin of this writing the following:

"You to saw four million feet of our logs when they arrive. Then we agree to allow you to saw 30 days on your own, and after that time you will turn back on our logs, and finish them."

After these contracts were made, the logs described therein were delivered to defendant's mill, and by it sawed into lumber during the season of 1895. The saw bills amounted to something over $14,000, and notes were given from time to time for them. These notes were paid or renewed; so that at the time of plaintiff's purchase from Howry & Sons, as hereinafter stated, there remained several of them outstanding.

On April 23, 1896, Howry & Sons made a written

proposition to plaintiff to sell him this lumber, situated at defendant's mill, estimated at 1,641,000 feet, also to sell him certain lumber situated at Hargrave & Sons' docks, for $11 per M. for common, and $7 per M. for mill culls. This proposition was accepted. It appears that this lumber, as it was cut by defendant, was piled on its docks at its mill in the usual manner of piling lumber when sawed for other parties, and the piles were marked "J. W. Howry & Sons." Lumber was sawed for other parties, and piled upon the same docks, and designated by marks. The Howry lumber was not all piled in one body on the same part of the dock, but other lumber was piled between portions of the Howry lumber; and the testimony shows that the Howry lumber was so marked by the bookkeeper of defendant, to distinguish it from other lumber.

A short time after the plaintiff purchased from Howry & Sons, while the lumber thus remained on the dock, he went to the defendant's dock, and saw A. J. Linton, who was defendant's manager, and had active control of the business done at the mill in sawing the lumber, and of the details of the business. Plaintiff testified that he notified Linton that he had bought the balance of the Howry lumber unsold upon defendant's docks; that Linton expressed satisfaction, as the removal of the lumber would give the company more dock room. Witnesses Corcoran, Alverson, Little, and Holihan all testified, in substance, that Linton pointed out the lumber plaintiff had bought, assisted or was present at marking up to him piles of the Howry lumber that there was any uncertainty about, saw the lumber shipped away to him, and received inspection bills of shipment as made. Linton denied that he had any knowledge of the plaintiff's purchase until he commenced to ship, and denied the testimony of Corcoran, Alverson, Little, and Holihan.

It appeared that, before the sale to plaintiff, Howry & Sons had sold to Randall & Boyd, February 14, 1896, about 2,000,000 feet of its lumber sawed under the contract.

of April 5 and 6, 1895; to Thompson, Lamb & Co., in December, 1895, between 1,000,000 and 2,000,000 feet; and had made a sale to L. C. Slade, before the sale to Randall & Boyd, in February, 1896, and to Jackson & Co., in 1895. Linton, on cross-examination, after testifying as to above sales, said:

"This Howry lumber was sold to Thompson, Lamb & Co., Lewis C. Slade, Randall & Boyd, Thomas Jackson & Co., and Germain; and Germain got what was left of the merchantable lumber, after all the other sales had been made.

"*Q.* Yes; and the other sales made by the Howrys had been chiefly shipped before Germain commenced shipping?

"*A.* Yes, sir.

"*Q.* There was little, if any, of this Howry lumber on the docks, except some that belonged to Randall & Boyd, when Germain commenced shipping the lumber?

"*A.* There was some of the Thompson, Lamb & Co. lumber on the dock.

"*Q.* A small portion of that, and a small portion of the Randall & Boyd?

"*A.* Yes, sir.

"*Q.* Now, all of this lumber which was shipped up to the 15th of July included all these parties' and included Mr. Germain's? You hadn't protested to the shipment made on the 15th?

"*A.* No.

"*Q.* So that the first protest you ever made was on the 15th of July, when Germain sent down to take the balance of this lumber?

"*A.* Yes, sir.

"*Q.* And after you had heard of the suspension of J. W. Howry & Sons?

"*A.* Yes; I had heard of it. * * *

"*Q.* You knew there had been inspection bills of the lumber shipped to Germain furnished you?

"*A.* Yes.

"*Q.* You knew it meant it had been sold to Germain?

"*A.* No, I did not,—only from hearsay.

"*Q.* You have been in the lumber business how many years?

"*A.* Thirty.

"*Q.* And did you—your company—receive that inspection bill?

"*A.* Yes, sir.

"*Q.* And that informed you that lumber had been shipped—this Howry lumber—to Germain?

"*A.* I knew that Germain was getting that lumber.

"*Q.* You knew it from the time, at least, that you got this inspection bill?

"*A.* Yes, sir; I knew he was getting the lumber.

"*Q.* And that continued up to July 15th, when you refused to let him have any lumber?

"*A.* Yes, sir.

"*Q.* You said this morning you had heard some rumor before any shipments of this lumber that he had purchased it?

"*A.* It was common talk. I don't know how I heard it.

"*Q.* That Germain had bought the balance of the Howry lumber?

"*A.* That he had bought some of the Howry lumber; not the balance, but some of it.

"*Q.* That came to your knowledge before any of this lumber was shipped?

"*A.* I think so.

"*Q.* So that, with that information, from whatever source you got it, you permitted Mr. Germain's men to remove the lumber up to the 16th of July, when you heard that Howry & Sons had suspended payment?

"*A.* Yes, sir.

"*Q.* You never claimed, up to that time, to any one, that you had any lien for saw bill or anything else, did you? I mean to Germain or any of his men.

"*A.* No, sir."

Upon the close of the testimony, plaintiff's counsel asked the court to direct a verdict for the plaintiff upon the grounds:

1. That by the contract of April 6, 1895, between the defendant and J. W. Howry & Sons, it was not contemplated that the defendant should retain a lien for the saw bill, because by its terms it was contemplated that the lumber should be sold by Howry & Sons, and the proceeds applied upon the payment of certain notes described therein.

2. That, by the terms of the contract, it was contemplated that the saw bill should be paid by Howry & Sons giving their promissory notes for it, which they did, thus paying and discharging any lien on the lumber for saw bill.

3. That the notes given for the saw bill and the renewal thereof extended the period of the payment of the saw bill beyond the time when it was contemplated that the lumber should be sold and delivered by Howry & Sons.

4. That the terms of this contract are inconsistent with defendant's having any lien upon the lumber sawed by it for saw bill.

This request the court denied, and permitted the case to go to the jury. Plaintiff now contends that the court should have directed verdict in his favor. His theory is that the letter of April 5, 1895, and the acceptance, together with the letter of April 6th and the written assent to its terms, constitute a complete contract, clear and free from ambiguity, and that it is not competent to vary its terms by parol evidence; that, by the terms of the letter and acceptance of April 6th, it was clearly provided that the defendant was selling the lumber to be manufactured from the logs purchased from Howry & Sons under the contract of April 5th, and that the price was to be $12 and $1.75 for saw bill, or $13.75 per M.; that if this, then, was the lumber of the defendant, it could have no lien upon it for its own bill, but that, if the whole transaction was what the trial court held it to be,—an arrangement to secure the defendant for certain advances made to Howry & Sons,—this fact would not aid the defendant, for, by the terms of the agreement, Howry & Sons were to take up the paper given on account of the purchase on or before July 1, 1896, from proceeds of sales of lumber, and keep the lumber insured; that the term of the saw bill was to be six months, and defendant's notes to be renewed until July 1, 1896; that it is therefore clear that it was within the contemplation of the parties, by their own contract, that Howry & Sons were to sell this lumber, and from the proceeds pay the purchase-price notes; that the lumber could be sold at any time, especially after it was marked with Howry & Sons' name, on defendant's docks; that all these arrangements make it clear that the court should have directed the verdict in favor of plaintiff. It is therefore contended that—

1. When the terms of the contract from which the alleged lien springs are inconsistent with the intention of retaining a lien, no lien attaches.

2. When the party claiming a lien has accepted promissory notes for the amount claimed, payable at a time in the future beyond the time at which the owner can remove the property, the lien is lost, and, when once lost, is lost forever.

The attention of the court below was called to these claims by requests to charge, and the court stated:

"I think it was simply security for advancements. At the first reading, it would appear that it was a sale of the logs, and agreement afterwards made to purchase back the lumber to be manufactured from the logs; but taking that with the other ingredients, and considering it as one obligation,—one contract,—delivered at the same time, it is different, and I will take a different view of it. As I remember the proofs in regard to those two papers, there was no dispute but that these two papers were delivered at the same time."

The defendant called its manager, Mr. Linton, with whom Howry & Sons made the contract, and he testified substantially that there was no agreement between the defendant and Howry & Sons that their notes given on the saw bill should be received in payment of the bill.

Counsel for plaintiff cite, in support of their above contention, *Au Sable River Boom Co.* v. *Sanborn*, 36 Mich. 358. In that case, however, it was found by the court that, from the terms of the contract, the owners of the logs had a right to remove them at any time, subject to the payment only of any sum then due, and that no understanding could be implied that the logs on hand should be retained as security for the payment at a future time of a sum not presently payable; that the owners of the logs therefore must have had a right to remove them after the acceptances were given, and consequently no lien attached. There the acceptances were taken at the request of the owners of the logs, and for their accommodation, and discounted by the plaintiff. The court found specially in that case that the usual custom of the plaintiff was to require payment for

the running, etc., of logs, on delivery of the same to the owner; and in taking these acceptances, payable at a future time, the transaction was found not to be one in which the acceptances were taken as payment, the court saying: "The taking of acceptances, according to the well-settled doctrine in this State, was not payment of the demand, in the absence of evidence of an agreement that they should be received in payment;" citing *Gardner* v. *Gorham*, 1 Doug. (Mich.) 507, and *Hotchin* v. *Secor*, 8 Mich. 494. The court further said: "There is no evidence of such an agreement here. It does appear, however, that the acceptances taken were payable at a future day, and we understand from the finding that they covered the whole amount then due." It will appear at once in that case that the owners had the right to take the logs from the boom at any time, and that no understanding could be implied that it was the intention that the plaintiff should hold them as security for the payment at a future time of a sum not presently payable.

In the present case, the court below was correct in the interpretation given by him of the arrangement between the parties. The logs were turned over to the defendant as security for advances. It is true that, by the terms of the contract, Howry & Sons were to take up these notes before July 1, 1896, from proceeds of sales of lumber. They did take up certain of them from time to time as sales were made. The saw-bill notes amounted to just $14,000. The sawing amounted to something over that. But it cannot be said that Howry & Sons had the right to demand and receive the lumber at any time without payment of the saw bill, unless the notes were received by defendant as payment. Whether they were so received was a question of fact for the jury, under all the circumstances of the case. The mere taking of the notes was not evidence of this, and there is no agreement shown that the notes were to be so treated. *Craddock* v. *Dwight*, 85 Mich. 587. In *Hughes* v. *Tanner*, 96 Mich. 113, it was held that, in the absence of a reservation in a sawing con-

tract of the right to ship the lumber before payment of the saw bill, the shipment of a portion of the lumber without protest will not prevent the contractor from claiming a lien upon the remainder for the whole saw bill. The court was not in error in refusing to instruct the verdict for the plaintiff.

The defendant contends that the court erred in admitting the following testimony of the witness Corcoran:

"*Q.* Do you know the custom as to the delivery of lumber on saw-mill docks along the Saginaw river in July, 1896, during that season?

"*A.* I do; yes.

"*Q.* State what it was.

"*A.* Well, any customer we do business for would direct its shipment. We would go to the dock with our lighter or vessel or cars, and load it on. Then, when we got through, we would send an inspection bill to the purchaser, one to the seller, and, if sawed at a custom mill, one to the custom mill, showing the total amount of lumber shipped. * * *

"*Q.* Tell us what the custom was in reference to the delivery of lumber from the saw-mill dock, after the purchase, to the purchaser.

"*A.* When directed by the purchaser to remove the lumber, either the shipper or some one in his employ is sent to the dock with his vessel or lighter or car; and if the lumber was plainly marked up, and we knew exactly the number of piles that went, and there was no question about it, we would direct him to go to such a place, and take such lumber. If there were any link in the chain lacking that we might be in doubt about as to where to place the lumber and place it right, we would ask them—ask the mill men, or some one in charge there—to show us the lumber, to put them right. I don't remember that we have ever dealt with the Central Lumber Company in the delivery of lumber in that manner outside of the Germain case. Lumber is not loaded any differently from their dock than from any other dock on the river. * * * In this case I sent an inspection bill to the Howrys, and one to Mr. Germain, showing the inspection of the lumber; the better lumber in one lot, and the mill culls in another. We sent to the Central Lumber Company an inspection bill showing the total amount. * * * The purpose of sending an inspection bill to the

saw mill, the seller, and the purchaser, is to give the saw mill the record of the amount sawed, and to the seller and purchaser the amount of property shipped."

Defendant's counsel contend that the lumber remained under defendant's charge, and in its actual possession, until it was removed from the dock onto lighters for shipment, and that there is no evidence of any acts showing a parting with the actual possession of the lumber by defendant, except as the lumber, which was from time to time loaded on the scows for shipment, was loaded and taken away; but that as to the lumber not so loaded, and which was replevied, it remained in the possession of the defendant precisely in the same condition as when first piled on the docks. It is also contended that there is no evidence in the case tending to show any agreement between the defendant and the plaintiff that any other act than the shipment of the lumber should be or constitute a change of possession of it. Therefore it is claimed that the custom which the court permitted plaintiff to inquire into by the testimony above set forth was wholly immaterial and incompetent to show any delivery by defendant to plaintiff of the lumber which was replevied, or any parting with the possession by defendant, whereby it abandoned or released its lien; and that such testimony was misleading to the jury, as, under the charge, they were directed to consider it. The court charged the jury that—

"The question of delivery is one of fact, and it is mostly governed by the intention of the parties; and if, from all the evidence in the case, you find, from the conduct of the parties, as described by the witnesses, that it was the intention of the defendant company to deliver the lumber to Mr. Germain, then this conduct would amount to a delivery, and the defendant thereby waived all lien upon the lumber, and the plaintiff is entitled to recover."

The court also charged:

"In considering the question of whether or not the defendant has a lien upon the lumber in question, you are at liberty to take into consideration all the evidence tend-

ing to show that no claim of lien was made upon said lumber by said defendant company up to the time when it was made known that Howry & Sons had suspended payment."

It is contended that by these instructions the jury understood that they were to take into account the custom which was testified to by witness Corcoran, which custom was in fact nothing but a method of removing lumber from the dock by inspectors when they were sent for it; that the lien of the saw bill is preserved by retaining the actual possession of the lumber, and a parting with such possession is a termination of the lien; that custom has nothing to do with the facts which constitute an actual possession, and such custom as the witness was inquired of and testified to had no bearing upon that point.

It appears that there was no evidence of any act showing a parting with the actual possession of the lumber by the defendant, except that some lumber was from time to time loaded for shipment and taken away. The custom testified to was nothing in fact but a method of removing lumber from the docks by inspectors when they were sent for lumber. The lien of the saw bill is preserved by retaining the actual possession of the lumber sawed, and the custom of shippers could not destroy the right of the sawyer to such possession; nor is it any evidence of an intent to deliver all the lumber, and thus waive or terminate the lien. It had no bearing upon the facts which constitute the lien. It has been repeatedly held that custom cannot change a definite contract. *Lamb* v. *Henderson*, 63 Mich. 302, and cases there cited. Under the charge of the court, the jury were directed to take into consideration all the evidence in the case in determining the intention of the defendant to deliver the lumber, and if, from such evidence and the conduct of the parties, they found it was the intention of defendant to deliver it to plaintiff, the lien was waived, and plaintiff entitled to recover, etc. The jury may well have understood that this

included the custom testified to by Mr. Corcoran. We think the testimony may have misled the jury.

Testimony was offered by the defendant to show the actual purpose and character of the contract between defendant and Howry & Sons; that is, to show that the actual title to the logs remained in Howry & Sons, and that defendant only had a lien. This the court refused to receive. We think the contract not so plain in its terms that it was not susceptible of explanation by parol evidence; not for the purpose of contradicting or varying its terms, but to show what the understanding was as to the lien which defendant claimed, and that it was but a mere security for advancements made by defendant. The court, it is true, did charge the jury that it stood as security for these advancements. But the testimony offered by defendant was competent to show that the logs were held as such security (*Seligman* v. *Ten Eyck's Estate*, 74 Mich. 525); and such testimony might have aided the jury in a better understanding of the matters involved.

Claim is also made that the court erred in refusing to permit the witness Linton to answer several questions put to him by defendant's counsel. He was asked: "*Q.* Have you at any time done or said anything by which you waived or intended to waive or release the saw-bill lien upon the lumber replevied? *A.* No, sir." After this answer was given, it was objected to as incompetent, etc. The court said: "The question as to whether he had done anything to release any lien would be calling for a conclusion, but the facts—what was said and done—would be competent." Witness was then asked: "Have you at any time intended to waive or release the lien of the saw bill on this lumber?" "State whether, so far as you know or intended, the lien has been kept on the lumber which was replevied." "Have you ever given your assent to the release or waiver of the lumber to either Mr. Germain or the Howrys?" These questions were objected to as incompetent, and objections sustained. It appears that, in the earlier part of Mr. Linton's examination, he was

asked: "What consent did you at any time give to the removal from the dock of the lumber that was replevied? *A.* None whatever." It is contended by counsel for plaintiff that this last question stated and answered was substantially an answer to the other questions, and for that reason no error was committed, even if the questions were proper. The contention of plaintiff's counsel further is that this testimony was not admissible under the facts in the case—*First*, because it was in contradiction of, and varied the terms of, the contract of April 5 and 6, 1895; *second*, because the question was one to be determined by the jury, and the witness could not upon this fact declare his opinion or conclusion that he had a different intent than what his actions and conduct indicated, or that he had a different intent from that which would be the natural, reasonable, and only inference from his acts and declarations.

The first point made against the introduction of this evidence has no force. The contract was open to parol evidence to determine whether it was made for the purpose of securing the advances. But, upon the other ground, we think the court was not in error in refusing to permit the witness to testify to his intention in reference to the waiver of the lien. The defendant had a lien for saw bill, and unless something had been done by Mr. Linton, as manager of the defendant company, to waive it, the defendant had the right to its enforcement. If the notes for the saw bill were given and received as payment, it was a waiver of the lien. If Mr. Linton surrendered possession of all the lumber to the plaintiff, and agreed that he might remove it, Mr. Linton at that time knowing that plaintiff claimed to have purchased it from the Howrys, that would be a waiver of the lien. These were questions for the determination of the jury. The intention of Mr. Linton was not the controlling feature of the case, as suggested by the court in its charge. There were two questions for the jury: *First*, whether the notes for the saw bill were received as payment for the sawing; *second*, whether

there was suc a surrender of the lumber by Linton, and taking possession of it by the plaintiff, as amounted to a delivery of the whole lumber purchased by plaintiff. There are cases in which the intent is an important element in the transaction, some of which are cited by counsel for defendant. We think the present case comes within the rule of *McKinnon* v. *Gates*, 102 Mich. 621, in which it was held that neither party was entitled to testify to his understanding.

We think that the court was also in error in charging the jury that they might go back of the time of the sawing of the logs to find something to show an abandonment of the lien.

The defendant substantially asked the court to charge the jury to find the verdict in its favor by its requests numbered 4, 6, 7, 9, and 10, and now insists that the same should have been given. We think not. The question was one for the determination of the jury under all the circumstances. Notes had been taken for the saw bills, and there are some other circumstances which the jury might consider.

The court charged the jury that the plaintiff made a *prima facie* case by showing that he bought the lumber of Howry & Sons, and that he made a demand upon defendant for its possession before bringing suit. In this the court was in error. The defendant was in possession of the logs for the purpose of sawing them into lumber. When the lumber was manufactured, the defendant had a lien upon it for the saw bill. The burden was upon the plaintiff to show that this lien had been terminated.

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

The other Justices concurred.

116 261
123 353
116 261
147 353

MICHIGAN BEEF & PROVISION CO. *v.* COLL.

1. HUSBAND AND WIFE—WITNESSES—ESTATES BY ENTIRETY.
   A husband has no such separable interest in lands held by himself and wife as tenants by the entirety that his testimony may be received "as against his portion" of the estate, over the wife's objection, in a proceeding to subject the lands to the claims of his creditors.

2. SAME—RIGHTS OF JUDGMENT CREDITORS.
   A husband's undivided interest in lands held by himself and wife by entireties may be subjected to a judgment against him, where moneys were applied by him to the purchase of the lands after the debt had been incurred, notwithstanding the lands were contracted for prior to such indebtedness; and, in the absence of a contrary showing, it will be presumed that one-half of the payments made upon the contract were made by the husband.

Cross-appeals from Wayne; Haire, J., presiding. Submitted January 27, 1898. Decided March 15, 1898.

Judgment creditor's bill by the Michigan Beef & Provision Company against John Coll and wife and the Wayne County Savings Bank. From a decree subjecting an undivided one-half interest in certain lands to the payment of complainant's judgment, both parties appeal. Affirmed.

O. E. Angstman, for complainant.

Peter E. Park, for defendants.

HOOKER, J. A judgment was rendered in January, 1896, for $857.60, including costs, in favor of the complainant, upon an account which commenced in May, 1893, against John Coll. Execution was returned unsatisfied, and the bill in this cause was filed to reach certain real estate in Detroit, held by Coll and his wife as joint

tenants under a conveyance dated July 10, 1895, made in pursuance of certain land contracts dated in 1887 and 1891, respectively. To prove the case, the complainant called as a witness John Coll. His wife objected to his testifying against her. The circuit judge expressed the opinion that the objection was good as to her estate, but that the testimony should be received "against the husband's portion" of the estate. The difficulty is that the husband has no portion in such an estate that is separable from that of the wife. It is but one estate, and it is impossible to carve anything out of it during the joint lives, without affecting the interest of the wife. *Vinton* v. *Beamer*, 55 Mich. 559; *Speier* v. *Opfer*, 73 Mich. 39 (2 L. R. A. 345). See *Chandler* v. *Cheney*, 37 Ind. 391, 396. In *Newlove* v. *Callaghan*, 86 Mich. 297, 301, this court did not consider the testimony of the husband, taken under objection, and thus was not called upon to determine whether it was admissible or not. The case of *Blanchard* v. *Moors*, 85 Mich. 383, seems to be decisive of the question, if we are right in saying that her interest is necessarily affected by the testimony, of which we are convinced.

It is necessary, therefore, for the complainant to establish its case by other evidence. This consists of the two contracts with payments indorsed, the deed, and the judgment, with execution returned unsatisfied. From these we find the lands were contracted before the debt was made, but that large payments were made afterwards. It is not shown who made them, or from whence the money came. In the case of *Newlove* v. *Callaghan*, *supra*, it is said that it is proper to presume that the husband made one-half of the payments, where no showing is made to the contrary. We may properly infer that all of Coll's property is in this land, and that considerable was paid upon the contracts which he should have paid to his creditor, suit being then pending. This was not justified by the fact that he had outstanding contracts, and we think should be no more beyond reach than as though

the entire title had passed to the wife, as said in *Newlove* v. *Callaghan*.

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

The other Justices concurred.

PEOPLE *v.* ABBOTT

116 263
122 424

1. MANSLAUGHTER—UNDESIGNED KILLING AS RESULT OF UNLAWFUL ACT—ABORTION.

   A person who, while doing or attempting to do an unlawful act dangerous to human life, undesignedly kills another, is guilty of manslaughter at least, even though the act attempted was not unlawful at the common law. So *held* where the death of a woman pregnant, but not with a quick child, resulted from an attempt to procure a miscarriage by means of instruments, made punishable as a misdemeanor by 2 How. Stat. § 9108.

2. SAME—INFORMATION AND PROOF—VARIANCE—IMMATERIAL ALLEGATION.

   An information for manslaughter, which clearly apprises the respondent that he is charged with causing the death of a pregnant woman through an unlawful attempt to procure a miscarriage, but alleges that the act was committed "with force and arms," will support a conviction under proof that the deceased consented to the attempt; the question of consent being immaterial.

3. SAME—EVIDENCE—HEARSAY.

   The testimony of a physician summoned to attend a woman upon whom a criminal operation had been attempted, that he understood that certain money paid to him was paid on behalf of respondent, charged with manslaughter in causing the death of the woman by means of such attempt, is hearsay, and inadmissible.

4. SAME—HOSTILE WITNESS.

   The fact that such witness is adverse to the prosecution does not justify the introduction of such evidence.

5. SAME.

Upon a prosecution for manslaughter in causing the death of a pregnant woman by procuring a miscarriage by means of instruments, statements made in the absence of respondent, by the midwife who was alleged to have performed the operation, that she was in the habit of performing them for the purpose of abortion and miscarriage, and describing the methods adopted, are inadmissible.

Error to Hillsdale; Lane, J. Submitted January 28, 1898. Decided March 15, 1898.

Remus M. Abbott was convicted of manslaughter. Reversed.

Noah P. Loveridge and *Corvis M. Barre*, for appellant.

Fred A. Maynard, Attorney General, *W. H. Frankhauser*, Prosecuting Attorney, and *Guy M. Chester*, ex-Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of manslaughter, as an accessory before the fact, in causing the death of Viola Stevens through the use of an instrument in an attempt to cause a miscarriage.

To understand the points raised, reference should be had to the statutes relating to the subject. 2 How. Stat. § 9106, provides that the willful killing of an unborn quick child, by any injury to the mother which would be murder if it resulted in the mother's death, shall be manslaughter. Section 9107 makes an attempt to destroy an unborn quick child through medicine administered to, or instruments used upon, the mother, manslaughter when followed by the death of the child or mother, unless necessary to preserve the life of the mother, or so advised by two physicians. Section 9108 punishes as a misdemeanor the willful employment of drugs, etc., or instruments upon a pregnant woman, with intent to procure a miscarriage, subject to the exceptions mentioned in the preceding section. See 2 How. Stat. § 8438; *People* v. *Olmstead*,

30 Mich. 431. The information contained separate counts for murder and manslaughter, and also a count upon the last-mentioned section, viz., 9108. In his charge to the jury the learned circuit judge said that the defendant could not be convicted of murder, and that he could not be convicted of statutory manslaughter under section 9107, because Viola Stevens was not shown to have been pregnant with a quick child, in the sense that such term is used in the law. He instructed them that the defendant might be convicted of a misdemeanor, under section 9108, or that he might be found guilty of manslaughter, upon the theory that death to the mother resulted from the act, which was made unlawful and punishable by section 9108, under the well-established rule that "if a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful,—*malum in se*,—but not amounting to a felony, the killing is manslaughter; if lawful,—that is, not being *malum in se*,—homicide by misadventure merely." See *People* v. *Scott*, 6 Mich. 293.

The defendant's counsel take the position that under these statutes there can be no conviction of the offense of murder where death is caused by any of the acts therein made punishable; that there can be no conviction of manslaughter in such cases except when the woman was, at the time of the commission of the act, pregnant with a quick child, as provided in sections 9106, 9107; and that it necessarily follows—the judge having determined and instructed the jury that Viola Stevens was not shown to have been pregnant with a quick child—that the defendant could be convicted, if at all, only of the misdemeanor created by section 9108. This contention rests upon the proposition that such act was not unlawful at the common law, it being no offense to attempt to produce an abortion upon a woman pregnant, but not with a quick child, with her consent, and upon the theory that the legislature has, by section 9107, shown an intention to reduce the offense from murder to manslaughter in cases where a woman

pregnant with quick child comes to her death in this way, and upon the fact of its failure to provide in section 9108 additional punishment where the woman upon whom a miscarriage is sought to be produced dies in consequence thereof, from which it is said that it must be inferred that the intention was to make the penalty prescribed by that section the limit in all cases.

We think this theory should not prevail. If we could say that the law recognizes the lawfulness of attempts to produce miscarriages, there would be more force in the contention that a fatal result to the mother would be excusable homicide, though we do not mean to intimate such an opinion; but the legislature have been to the trouble to make the mere attempt to cause a miscarriage punishable by a year's imprisonment, and we cannot believe that they intended that the death of the mother should be treated as a misadventure. It is more reasonable to believe that they left that subject to be governed by existing rules of law. Upon this theory it was reasonable for the circuit judge to say that the defendant could not be convicted of murder, because that would have been the extent of the offense had the child been quick; and it is not to be supposed that the law would be more severe in a case where the child had not quickened than where it had, even if, under existing rules, the passing of section 9108 would otherwise have made such offense murder. See *Com.* v. *Railing*, 113 Pa. St. 37. Without deciding this question, however, —it being unnecessary,—we must determine whether the conviction of manslaughter can be upheld. It may be, unless it can be said (1) that at common law a conviction could not be based on accidental killing through an unlawful act less than a felony, or (2) that it cannot be based on an act made unlawful by statute.

Mr. Bishop asserts that "if the act be both wrongful and in its nature dangerous to life, even if it be a misdemeanor, yet, if the element of danger concurs with the element of the unlawfulness of the act, the accidental causing of death thereby is murder." 2 Bish. Cr. Law, § 691.

See Tiff. Cr. Law, 815. Counsel contend that this is not a dangerous act, basing the contention upon the evidence of physicians, which is said to show that not more than 1 per cent. of cases are fatal to the woman, where the child has not quickened. We doubt if the effect of this statute is to depend upon the opinions of witnesses upon the question of the degree of danger. But, however that may be, the act was a misdemeanor, and accompanied by some danger to life, and we shall find much authority for holding that an indictment for manslaughter will lie in such a case.

"If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt by wounding or beating him, or in the willful commission of any unlawful act which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other,—as by committing a riot, robbing a park, etc.,—he shall be adjudged guilty of murder." 1 Hawk. P. C. (Curw. Ed.) p. 86, § 10.

Again, Bishop says:

"And if the act were not directly dangerous, yet done with the motive of committing a misdemeanor, the offense would be manslaughter; but if, still not being dangerous, the motive were merely the commission of a civil trespass, the unintended death would not be indictable under all circumstances, though under some it would be manslaughter. To lay down, as to this, an exact rule, sustained by authorities, seems impossible. But, to illustrate, when a man discharges a gun at another's fowls, in mere wanton sport, he commits, if he accidentally kills a human being, the offense of manslaughter, while his intended act is only a civil trespass; and the same is the result when the firing of the gun which produces death is with intent simply to frighten another, or when one carelessly discharges the contents of firearms into the street. And where a lad in a frolic, without meaning harm to any one, took the trap-stick out of the forepart of a cart, in consequence of which it was upset, and the carman, who was in it, putting in a sack of potatoes, was thrown backward on some stones and killed, the lad was held to be

guilty of manslaughter. Where one covers another with straw, and sets fire to it, if the intent is to do a serious bodily harm, and death follows, the offense is murder; if merely to frighten, it is manslaughter. (Errington's Case, 2 Lewin, Crown Cas. 217.) * * * Giving one physic in sport, if it kills him, is manslaughter." 2 Bish. Cr. Law, § 692, note 4; Id. § 693.

See *People* v. *Scott*, 6 Mich. 292.

Thus it appears that the unlawful act need not always be criminal, and, where the act done is not of dangerous tendency, the offense, when death accidentally follows, may be manslaughter. 2 Bish. Cr. Law, §§ 670, 694. Again, Mr. Bishop says:

"Though the intent of the wrong-doer is not to take human life, and the thing which he does is not of the dangerous sort contemplated in the last few paragraphs, still, by accident, it may result in death. And if it does, and if the thing intended was *malum in se* and indictable, whether as felony or misdemeanor, a discussion in our first volume shows that a felonious homicide is committed." Id. § 694.

See, also, 1 Bish. Cr. Law, §§ 323–336.

In *Com.* v. *Parker*, 9 Metc. (Mass.) 265, it was said:

"The use of violence upon a woman, with an intent to procure her miscarriage without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where, in like manner, there is the consent of the parties."

In this case it was held necessary to aver and prove that the woman was quick with child, and the indictment was held bad. The following language is significant:

"There being no averment, in the first count in this indictment, that the woman was quick with child, or any

equivalent averment, and the judge who tried the case having instructed the jury that it was not necessary to prove such averment in the third count, the court are all of the opinion that, although the acts set forth are, in a high degree, offensive to good morals and injurious to society, yet they are not punishable at common law, and that this indictment cannot be sustained." Id. 268.

From this and the foregoing authorities we may infer that, had the act been a misdemeanor at the common law, it would have supported an indictment for manslaughter. We are not advised of any authority which limits the application of this rule to acts which were misdemeanors at common law, nor do we see any good reason for so limiting it. In *Yundt* v. *People*, 65 Ill. 374, it was held that manslaughter would lie in a case closely analogous to the one before us.

A further contention is that, granting that the act was indictable, the information would not support a conviction under the proof, in that it alleged that the act was committed with force and violence, while the evidence showed that it was done with the consent of Viola Stevens. It is urged that this was a fatal variance. We are cited to the case of *People* v. *Olmstead*, 30 Mich. 438, in support of this claim. In that case the information is very brief, and consists of the single statement that respondent, on a day and year and at a place named, "one Mary A. Bowers feloniously, willfully, and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Michigan." There was nothing there to indicate the fact of consent, or even the nature of the act. As the court said: "He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault." Moreover, that was a statutory charge of manslaughter under section 9107, 2 How. Stat. The information in this case was more specific. It clearly apprised the defendant of the nature of the offense, unless it was necessary to allege Viola Stevens' consent, and to omit the allegation that the act was committed "with

force and arms in and upon one Viola Stevens, in the peace of the people of the State of Michigan then and there being," etc. In our opinion, this was not a fatal variance, especially as it was not necessary to allege or prove the assent of Viola Stevens to the act, and as the offense was the same whether she assented or not.

We are constrained to say that we think the testimony of Dr. Niblack, wherein he stated that he understood that certain money paid him by Mr. Shepard was paid upon behalf of Mr. Abbott, was hearsay, and inadmissible. The prosecuting officer urges that this was an adverse witness, but we think that does not justify the introduction of hearsay evidence. We think also that the statements of Mrs. Saunders, who is said to have performed this operation, that she was in the habit of performing them for the purpose of abortion and miscarriage, and her description to the witness of the method adopted, were inadmissible. It was competent to show the character of the act by proving that Mrs. Saunders was engaged in the business of committing abortions. As in the case of *People* v. *Seaman*, 107 Mich. 348, it was competent to show that others were operated upon for such a purpose by her, as it tended to establish the design with which the operation was performed. This might have been proved by persons cognizant of the fact; but the statements of Mrs. Saunders that she had done these things were but hearsay, though it would have been different had Mrs. Saunders been on trial. In that case they would have had the force of admissions. Here they have not. They were not made in the presence of the defendant, nor do they appear to have been brought to his knowledge, and acted upon.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

WHEELER v. DIME SAVINGS BANK.

1. MUTUAL BENEFIT SOCIETIES—RECEIVER FOR FOREIGN CORPORATION—LOCAL ASSETS—RIGHTS OF MEMBERS.

   A member of an insolvent mutual benefit society incorporated in another State will not be allowed, through garnishment proceedings instituted after the appointment of a receiver in such State, though before the appointment of an ancillary receiver in this State, to subject property of the society within this State to a judgment upon a membership certificate maturing after the commencement of insolvency proceedings, though before a receiver was actually appointed.

2. SAME—RES JUDICATA.

   The fact that the member was allowed to prosecute to judgment his claim upon the certificate does not render *res judicata* the question of his right to satisfy his judgment out of the local assets of the society.

Error to Wayne; McMahon, J., presiding. Submitted February 1, 1898. Decided March 15, 1898.

Garnishment proceedings by David W. Wheeler against the Dime Savings Bank, as garnishee of the Supreme Sitting of the Order of the Iron Hall. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Washington I. Robinson (*George Gartner*, of counsel), for appellant.

C. E. Warner, for appellee.

HOOKER, J. The Supreme Sitting of the Iron Hall was a mutual benefit association, organized under the laws of Indiana. For a more complete understanding of its nature, objects, powers, and methods, reference is made to the cases of *Baldwin* v. *Wayne Circuit Judge*, 101 Mich. 119 (25 L. R. A. 739), 432; *Cohen* v. *Order of Iron Hall*, 105 Mich. 283; *Wheeler* v. *Order of Iron Hall*,

110 Mich. 437. The plaintiff became a member of this society, and received a relief-fund certificate in August, 1885, maturing in seven years. In July, 1892, the society became insolvent, and on August 23, 1892, the superior court of Marion county, Ind., appointed a receiver, who qualified upon the same day, upon a bill filed in July, praying for a receiver, and the closing of the affairs of the corporation, and distribution of assets. On August 27, 1892, the plaintiff, a resident of Michigan, began an action upon his certificate, and garnishment proceedings against the Dime Savings Bank. The action against the principal debtor resulted in a judgment on March 4, 1896, which was affirmed in this court. Proceedings were then taken to obtain a judgment against the garnishee, the disclosure having shown that it had a deposit to the credit of the local branch of the Iron Hall. This was contested by the receiver, and the plaintiff appeals from a judgment in favor of the garnishee defendant.

We now return to the proceedings to distribute the assets of the society. A month or so after the commencement of the plaintiff's actions, a receiver was appointed by the Wayne circuit court, in proceedings ancillary to those in Indiana. Those proceedings were before this court twice; first in *Baldwin* v. *Wayne Circuit Judge*, 101 Mich. 119 (25 L. R. A. 739), where it was held that the fund in the possession of the local branch was the property of the Supreme Sitting of the Order of the Iron Hall, and that it was proper to direct the ancillary receiver to turn over the funds in his possession to the receiver when it was made certain that the members from this State would share proportionately with members elsewhere. That decision recognized the right of the plaintiff to try the question of his alleged superior right to the fund garnished in the garnishment proceeding. In another proceeding an attempt was made to compel the circuit court to enjoin the prosecution of similar garnishment proceedings, but this was denied upon the ground that the discretion of the circuit judge should not

be interfered with. It was also said that the plaintiff in that case had a right to try the question of a lien by virtue of his garnishment proceedings in that case. Id. 432. The circuit court, having become satisfied that members in Michigan would be permitted to receive their proportionate share of the assets, made an order that the Michigan receiver turn over the fund in his possession to the Indiana officer.

The exact question before us is whether, after the appointment of the Indiana receiver, and before he had succeeded in acquiring possession of funds in Michigan,—to which we have held that he was entitled, under the rule of comity,—the plaintiff could, by superior diligence, obtain an advantage over his fellow members, whose interests in the concern in common with his own were represented by the receiver, or whether he was obliged to content himself with the opportunity of sharing *pro rata* through the distribution to be expected from the Indiana proceedings. That it would be inequitable to allow him to appropriate the funds to the exclusion of others holding matured certificates is obvious. It may be that there are plain debts sufficient to absorb the entire fund. It may be that the only way in which he could obtain payment from the receiver would be through an assessment of the members. Were this a suit in equity, it would be easily disposed of by relegating him to the Indiana tribunal by the application of the maxim that "he who seeks equity must do equity." But in a court of law a legal reason is required for depriving him of the lien of the garnishment which he obtained before the ancillary receiver was appointed. This must rest on one of two grounds: (1) That the law of Michigan recognizes the right of the Indiana receiver to the property, from the date and by virtue of his appointment; (2) that the relation of the plaintiff to the corporation and the other members is such as to deprive him of the legal right to satisfaction of his debt from the assets after the appointment of the Indiana receiver. In a

sense, perhaps, the latter is included in the former proposition.

Passing a discussion of the former, we will examine the latter. We have shown the inequity of the plaintiff's position. Wherever such a claim has been asserted in equity, it has been denied, so far as we have been able to ascertain, upon the ground that the member has contracted with reference to the law of the State which created the corporation of which he became a member, and must therefore submit to the jurisdiction and judgments of its courts in case of the insolvency of the corporation. It would seem that this would be a defense at law as well as in equity, and it appears to be so held. See the following cases, cited by counsel: *Weingartner* v. *Insurance Co.*, 32 Fed. 314; *Fry* v. *Insurance Co.*, 31 Fed. 199; *Taylor* v. *Life Association*, 13 Fed. 493; *Rundel* v. *Life Association*, 10 Fed. 720. The last case cited goes so far as to hold that the effect is to make the receiver's powers over property co-extensive with those of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law. This would support the first proposition. See, also, *Davis* v. *Life Association*, 11 Fed. 781; *Bockover* v. *Life Association*, 77 Va. 85. It may be said that these cases are distinguishable, inasmuch as the plaintiff's policy matured before the Indiana receiver was appointed; but we think his rights depend upon his *status* when the Indiana proceeding was begun, which was before his policy became due.

But it is claimed that this question might have been and was raised by way of defense to the original action, and that it is therefore *res adjudicata*. If it be conceded that he secured a judgment to which he was not entitled, it does not follow that he is entitled to have it satisfied from property which, under his own contract, cannot be subjected to it. The decision of this question was not necessarily involved in the principal case, though it is true that, had his action been defeated upon the ground herein stated,

or, for that matter, upon any other, it would have ended these proceedings.

In our opinion, the judgment of the learned circuit judge should be affirmed, and it is therefore so ordered.

The other Justices concurred.

WOOD v. LENTZ.

116 275
157 284

1. INTOXICATING LIQUORS—SALES TO HUSBAND—CIVIL DAMAGES.
   It is not essential to the liability of a saloon keeper under the civil-damage act for injuries sustained by a wife by reason of the sale of intoxicating liquors to her husband, whereby he became an habitual drunkard, that such sales should have been made when the husband was intoxicated, or after he had become in the habit of getting intoxicated.
2. SAME—CONTINUING CAUSE OF ACTION.
   The declaration in such case may properly allege the cause of action as a continuing one.
3. SAME—WITNESSES—HUSBAND AND WIFE.
   A husband is incompetent, under 3 How. Stat. § 7546, to testify against his wife without her permission, even where she is suing for damages resulting from the sale of liquor to him.

Error to Mecosta; Palmer, J. Submitted February 1, 1898. Decided March 15, 1898.

Case by Nettie Wood against Joseph Lentz under the civil-damage act. From a judgment for plaintiff, defendant brings error. Affirmed.

John T. Clark, for appellant.

Frank Dumon, for appellee.

GRANT, C. J. Plaintiff recovered verdict and judgment for $375 against the defendant for damages alleged to have been suffered by her by the furnishing of intoxicating liquors to her husband by defendant, under Act No. 313, Pub. Acts 1887.

1. The plea was the general issue. Defendant objected to any testimony under the declaration, claiming that it did not state a cause of action. The declaration alleges sales to her husband on May 1, 1895, and on divers other days between that day and the commencement of the suit, May 15, 1896, in consequence of which he became an habitual drunkard, etc. It was not necessary to allege that the sales were made to him while he was intoxicated or an habitual drunkard. The statute makes the saloon keeper liable for all damages which result to the wife by reason of his intoxication, and any one "causing or contributing to" the intoxication is liable. 3 How. Stat. § 2283*e*3.

2. The declaration is not bad for duplicity. This is a civil, not a criminal, action, and *People* v. *Hamilton*, 101 Mich. 87, has no application. It was proper to allege the cause of action as a continuing one. The liability is not based upon a single act, but upon continuous ones.

3. The court committed no error in refusing to permit the plaintiff's husband to testify against her without her permission. 3 How. Stat. § 7546.

4. It is urged that the court should have directed a verdict for defendant because there was no evidence of any sales or furnishing of liquor to her husband, within the time alleged, with the knowledge or consent of defendant. We have examined the record, and find plenty of testimony to sustain the verdict. It is unnecessary to set it forth. The entire question of liability was left to the jury, under full and correct instructions.

Judgment affirmed.

The other Justices concurred.

ROSE v. LOCKERBY.

1. EVIDENCE — MORTGAGES — AMOUNT DUE — STATEMENTS OF DECEASED MORTGAGOR.

   Statements made by a deceased mortgagor, in his own interest, as to payments claimed to have been made by him upon the mortgage, are not admissible to prove such payments, though all the parties who knew the facts are dead.

2. SAME—TAXATION—ASSESSMENT—CUSTOM.

   The fact that a mortgage was assessed for taxation for the exact amount of the principal has no tendency to show that no interest was due at the time of the assessment, especially where it appears from the testimony of the local officers that all mortgages were customarily so assessed.

3. SAME—AMBIGUOUS INDORSEMENT—PRESUMPTIONS.

   No presumption arises that a memorandum on the back of a mortgage owned by a decedent, "No. 131. January 2. Quincy. $4,719.50,"—was made by the deceased in the year the mortgage matured, to represent the amount due at that time.

Appeal from Branch; Yaple, J. Submitted February 1, 1898. Decided March 15, 1898.

Bill by Lester E. Rose, administrator of the estate of Augustus S. Glessner, deceased, against Cornelia Lockerby and others, to foreclose a mortgage. From a decree for complainant, defendants appeal. Affirmed.

Loveridge & Loveridge, for complainant.

Lockerby & Lockerby, for defendants.

LONG, J. William Lockerby and wife, on January 2, 1886, executed and delivered to Augustus S. Glessner their promissory note in the sum of $3,916, due in 10 years from date, with interest at 7 per cent. per annum, payable annually, and, on the same date, to secure pay-

ment of this note, they executed and delivered to said Glessner a real-estate mortgage in like amount, and payable at the same time. It is conceded by all parties that the note and mortgage are a valid and existing claim. The only question involved in the case is as to the amount unpaid on the same. William Lockerby died October 19, 1895, leaving surviving him a widow and three children, who are all of age, and who, together with the executor, William H. Lockerby, are all defendants in this suit. Augustus S. Glessner, the mortgagee, died March 19, 1896, and the bill in this cause is filed by his administrator to foreclose the mortgage. The case was brought on regularly for hearing upon proofs taken in open court, and a decree was made in favor of the complainant on March 1, 1897, for $6,589.86 and costs. From this decree the defendants appeal.

The complainant offered in evidence the note and mortgage, and proved by a circuit court commissioner, who had made a computation of the note and mortgage, that there was due upon them at that date, December 16, 1896, after deducting all indorsements that appeared upon the note and mortgage, the sum of $7,681.59. Complainant then rested. The proofs offered by the defendants were, in substance, as follows: Gilbert Corless, a farm hand who lived on the Lockerby farm from 1887 to 1891, testified that he drew from 20 to 30 cords of wood to Glessner each year; that he probably drew in all 100 cords, worth on an average $3.50 per cord; that he did not know just how much he drew, and could only estimate it; and did not know whether or not Mr. Glessner applied this on the mortgage, or paid cash for a part of it. He further testified, under objection, as to some statements Mr. Lockerby, the mortgagor, made to him as to payments of interest on the mortgage in 1890 and 1891. Mrs. Cornelia Lockerby, the widow, testified, also under objection, as to some statements Mr. Lockerby had made to her as to his having paid interest on the mortgage. Fred Moore testified that he helped draw about 30 cords of 4-foot wood in

the winter of 1887-88, worth $4 a cord, and that he knew of wood being drawn other winters, but did not know how much was drawn, and could only estimate it.

Defendants offered in evidence, also under objection, the assessment and tax rolls for 1892 and 1893 for the township of Quincy, from which it appeared that in the assessments of the mortgaged premises Mr. Glessner's mortgage interest was assessed separately at $3,916, being the exact principal of the mortgage. The treasurer, J. D. Mosher, the witness through whom the rolls were offered, testified that it was the custom to assess mortgages for the amount of the principal as it appeared on the records; that he did not know the assessment was made in this case from any statements made either by Mr. Lockerby or Mr. Glessner; all he knew about it was as it appeared on the rolls. Edson Blackman testified that he was supervisor of Quincy in 1893, and that he assessed the mortgage interest of Mr. Glessner that year at $3,900; that he got the amount of the mortgage from Mr. Lockerby; that Mr. Lockerby gave in the mortgage to him at $3,900; that he could not swear whether it was interest or principal. The only other evidence offered by the defendants was a notice of a mortgage sale of the premises, dated January 7, 1896, under which Mr. Glessner, as mortgagee, was proceeding to foreclose said mortgage at the time of his death, and in which he stated that there was due and unpaid on the mortgage at that date $6,100. The complainant then called Mr. Charles Howe, Mr. Glessner's attorney, who testified that Mr. Glessner had talked with him in reference to his foreclosure of this mortgage, and had told him the whole transaction connected with the mortgage; that there was more due upon it than he had put in the notice of sale; that it was a large mortgage on the piece of land, that he would get the place anyway, and that he did not think there was any use of putting any more in the notice.

This is practically all the evidence in the case.

It is admitted by counsel for the defendants that ordi-

narily the testimony of what Mr. Lockerby said as to payments upon the mortgage would not be considered as the best evidence, but it is claimed that in this case great latitude should be given, as the only parties who could testify to the facts are dead. The statements, however, of Mr. Lockerby as to the payments made upon the mortgage are wholly incompetent, and cannot be considered. They are statements in his own interest.

The fact that the mortgage was assessed in 1892 and 1893 for the face value can have no weight in determining the amount due, especially under the admission of witness that it was usual to assess mortgages for their face value; and this mortgage was so assessed.

The notice of the mortgage foreclosure made in the lifetime of Mr. Glessner, stating the amount due January 7, 1896, to be $6,100, was taken by the court to be the true amount at that time, upon which, computed with interest, it was found by the decree that only $6,589.86 was due, although the commissioner found $7,681.59 due, deducting all indorsements upon the note. Certainly, the defendants have no reason to complain of the action of the court; and the complainant, not having appealed, cannot now complain.

The mortgage, as printed in the record, shows a memorandum on the back of it as follows: "No. 131. January 2. Quincy. $4,719.50,"—but upon the hearing below, so far as this record is concerned, the attention of the court or counsel was not called to that memorandum, and no proofs were offered in reference to it. Counsel now claim that the memorandum is in the handwriting of Mr. Glessner, and that it must be presumed it was made in the year 1896, which would be the year the mortgage became due. We cannot assume that it was Mr. Glessner's handwriting, or that it was made in 1896, and intended to represent the amount due at that time. Even if the presumption arises that it was made by Mr. Glessner, yet it might have been made in some year prior to 1896, and as well have represented the amount due in a former year.

Upon the whole record, we are satisfied the court below has not erred in the amount due on the mortgage. The decree must be affirmed, with costs.

The other Justices concurred.

SUNDERLIN *v.* MECOSTA COUNTY SAVINGS BANK.

116 281
119 420
119 670

1. BANKS—INSOLVENCY—COLLECTIONS—TRUST FUND.
Where a bank receives for collection a check drawn upon it by a depositor, and, after charging the same to his account, pending payment to the owner, passes into insolvency, the amount of the check does not constitute a trust fund in the hands of the receiver.

2. SAME—DRAFTS—EQUITABLE ASSIGNMENT—PREFERENCES.
The giving and receipt of a draft, drawn by a bank upon its correspondent, in the ordinary form, in favor of one from whom it has received certain paper for collection, does not constitute an equitable assignment *pro tanto* of an indebtedness owing by the correspondent, so as to entitle the payee, in the event of the drawer's becoming insolvent before presentation of the draft, to priority over general creditors.

Appeal from Mecosta; McMahon, J., presiding. Submitted February 1, 1898. Decided March 15, 1898.

Eugene A. Sunderlin, as acting commissioner of the state banking department, filed a bill for, and obtained, the appointment of a receiver for the Mecosta County Savings Bank. The petition of the Fourth National Bank of Grand Rapids, for the allowance of its claim as preferred, was denied, and petitioner appeals. Affirmed.

Fletcher & Wanty, for petitioner.

M. Brown, for the receiver.

HOOKER, J. On October 23, 1896, the Fourth National Bank of Grand Rapids sent by mail to the Mecosta County Savings Bank, for collection, a number of items, consisting of checks drawn by various persons upon the latter bank, amounting to $3,197.17. No money was received by the Mecosta Bank upon the checks, but they were charged upon the books of the bank against the several and respective drawers. On October 27, 1896, the Mecosta Bank sent to the Grand Rapids bank a draft for $3,194 upon its correspondent in New York, the Hanover National Bank, which, on October 28th, it forwarded to the Hanover National Bank. On receipt of this draft, the Hanover National Bank refused payment, on the ground that the Mecosta Bank had made an assignment for the benefit of creditors, and on October 30th returned the draft. At this time the Mecosta Bank had a credit of $4,638.82 with the Hanover Bank, which sum has since been paid to the receiver of the Mecosta Bank. The petitioner, the Fourth National Bank, asks that the receiver be directed to pay its claim, on the ground that it is a preferred creditor, and has appealed from an order denying the prayer in its petition. The claim is based upon two propositions: *First*, that there was a trust fund, arising from the collection of the checks, which came to the hands of the receiver; *second*, that the receipt of the draft amounted to an equitable assignment of the fund in the Hanover Bank, to that amount.

There is not entire harmony in the authorities upon this subject. Where there are circumstances of a special nature indicating an intention to make money received upon a collection a special deposit, such money has sometimes been held to be a trust fund, and the trust attaches to any actual fund into which the money received can be traced; and there have been cases which seem to go so far as to hold that this extends to all of the property of the bank, although it be evident that the actual fund into which the money was traced has been exhausted, and notwithstanding the fact that what remains could not, by

reason of its different nature, by any possibility, include it. Again, other cases hold that it is not necessary to show that there was an actual receipt of money at all, but that it is sufficient if, through a charge against a depositor, the bank takes credit for the amount, where the depositor has a credit equal to his check, a fact, by the way, which does not appear in this case. Such a case is *McLeod* v. *Evans*, 66 Wis. 401.

The question has arisen in this State several times. It was held in *Sherwood* v. *Central Michigan Savings Bank*, 103 Mich. 109, that a sum received by a bank upon a mortgage left for collection, with explicit directions not to credit the account of the creditor, who lived in the city, with the amount, when received, but to send it to him, was a trust fund; and that, when money so received by the bank was mingled with the other cash of the bank, it would be presumed that it was not paid out, so long as such amount remained in the fund. In *Sherwood* v. *Milford State Bank*, 94 Mich. 78, it was held that, where the collection was not made in money, but a check was given, which was charged against the account of the drawer, and no money was received by the bank, no trust fund was created. The question was again discussed in *Wallace* v. *Stone*, 107 Mich. 190, and there the case turned on a question of fact, viz., whether the debtor actually paid the money upon the collection, after drawing it from the bank, whose certificate of deposit she held, or merely turned in the certificate in payment of the collection. A majority of the court thought the actual payment of money established. The minority, being of a different opinion, found it necessary to discuss the question involved in this case, and adhered to the doctrine applied in *Sherwood* v. *Milford State Bank*. As this opinion contains our views of the subject, with authorities, it is unnecessary to repeat them here. The following cases, cited by counsel, support our own decisions: *People* v. *Merchants & Mechanics' Bank*, 78 N. Y. 269; *City Bank of Hopkinsville* v. *Blackmore*, 21 C. C. A. 514,

75 Fed. 771; *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237, overruling *McLeod* v. *Evans*. There is nothing to show that any tangible thing was received by the bank upon these checks, and consequently there is no such fund in the hands of the receiver. The doctrine contended for would practically be to permit the establishment of a lien upon all of the property of the bank through a mere matter of bookkeeping.

Counsel rely upon the case of *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, upon their second point. An examination of that case will show that it is exceptional, and that "a check drawn in the ordinary form does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors." Such is the case before us. There is nothing to show anything in the nature of an agreement that this check, drawn generally, should be paid out of a particular fund, or any representation regarding such fund upon which the petitioner relied, as in the case cited. *Second Nat. Bank* v. *Williams*, 13 Mich. 282; *Grammel* v. *Carmer*, 55 Mich. 201; *Brennan* v. *Merchants & Manufacturers' Nat. Bank*, 62 Mich. 343; *McIntyre* v. *Merchants' Bank*, 115 Mich. 255.

The order of the learned circuit judge is affirmed, with costs.

The other Justices concurred.

FOSTER *v.* KENT CIRCUIT JUDGE.

1. GARNISHMENT—STATUTORY RIGHTS—CHANCERY ORDER.
   An order of the chancery court permitting the complainant in a suit pending therein to commence an action at law for the same cause of action, and to sue out a writ of garnishment in aid thereof, but restraining all proceedings in the law court, after service of process, until the further order of the court, is unauthorized, as tying up the defendant's funds without giving him the rights conferred by the garnishee statutes.

2. SAME—APPEARANCE—ESTOPPEL.
   Defendant's appearance in the suit at law will not estop him from contesting the validity of such order.

Mandamus by John J. Foster and Henry N. Anderson to compel William E. Grove, circuit judge of Kent county, to vacate an order permitting the complainants in a suit in chancery wherein relators are defendants to institute certain proceedings upon the law side of the court. Submitted February 1, 1898. Writ granted March 15, 1898.

Fitz Gerald & Barry (*Francis A. Stace*, of counsel), for relators.

Crane, Norris & Stevens, for respondent.

MOORE, J. In 1896, Delos A. Blodgett and Delos F. Diggins filed a bill for an accounting in the circuit court in chancery, in Kent county, against the relators, to which bill the relators demurred, and a little later commenced a suit in the Montcalm circuit court upon the same causes of action set forth in the bill of complaint in the chancery proceedings. This action at law was enjoined by the circuit judge in chancery, upon the petition of the complainants, after which a hearing was had upon the

demurrer filed in the chancery case, and the demurrer was overruled. It was the claim of the defendants in the chancery proceeding that the matters therein sought to be litigated should be litigated in a court of law, and not in chancery. An appeal was taken to the Supreme Court, and the judgment of the court below in overruling the demurrer was sustained. A reference to the case as reported in 114 Mich. 688 (*Blodgett* v. *Foster*), makes it unnecessary to make a further statement here of what was involved in that proceeding. In December, 1897, upon the petition of the complainants, an order was made in the chancery case allowing the complainants to commence an action at law in the circuit court for the county of Kent, against the defendants, for the same causes of action embraced in the chancery case, and also authorizing them to proceed by writ of garnishment against the Kent County Savings Bank, and ordering that, after the service of said writ of garnishment, the complainants and defendants should proceed no further in said action at law and said writ of garnishment until the further order of the court. The court was asked to vacate this order, which it declined to do. This is a proceeding to compel said order to be vacated.

A great many questions are raised and argued in the long and able briefs of counsel, which, in our view of the case, need not be discussed here. Garnishment proceedings are statutory. In *Kennedy* v. *McLellan*, 76 Mich. 598, it was said: "It has been held so many times in this State that garnishee proceedings must follow the statutes strictly, and cannot be extended beyond the plain letter of them, that it is unnecessary to cite the numerous decisions so holding." See *Iron Cliffs Co.* v. *Lahais*, 52 Mich. 394; *Weimeister* v. *Manville*, 44 Mich. 408; *Ford* v. *Detroit Dry-Dock Co.*, 50 Mich. 358. It is important, then, to refer to the statutes in relation to garnishments. 3 How. Stat. § 8058, provides when the writ may issue, and that the garnishee defendant shall make a disclosure in not less than 14 days. 2 How. Stat. § 8063, provides

for enlarging the time in which to make a disclosure, but does not allow it to be enlarged, except by assent, beyond the day previous to the first day of the term at which the suit against the principal debtor may be properly returned noticed for trial. Other sections of the statute provide in detail for the method in which the proceeding is to be conducted. Section 8100 provides that a failure to recover judgment against the principal defendant shall be deemed a discontinuance of the garnishment proceedings; section 8105, that the giving of a bond operates as a discontinuance of the garnishee proceedings. Section 8106 provides that, if the principal defendant does not appear in the cause within the time fixed by the statute and rules of court, the plaintiff shall proceed to perfect his judgment as soon as he is entitled to under the rules and practice of the court; and, if he does not do so, upon motion, or in the discretion of the court, the garnishee proceedings shall be discontinued.

The practical effect of the order of the court is to tie up the funds belonging to the defendants, without giving to them the safeguards provided by the statute. Their hands are tied. They cannot proceed in the action at law in the manner provided by the statute. In effect, rights are conferred upon the complainants in the chancery case which would be denied to them in their capacity as plaintiffs on the law side of the court. The property of defendants is placed beyond their control, and the provisions of the statute are stayed until the further order of the court. This was unauthorized.

The suit at law was commenced by summons, and a general appearance was entered by defendants before they had knowledge of the order made in the chancery cause. As soon as they learned of the order in the chancery proceeding, they moved to vacate it. It is now said that, having appeared in the case, they cannot make this motion. We do not see how the entry of the appearance of the defendants in the law case will justify the

making of an order not authorized by the statute. The order made in the chancery case should be vacated.

The writ will issue as prayed, except that portion of it relating to the Montcalm county suit. The injunction as to that will stand until the further order of the court.

The other Justices concurred.

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CROSKERY *v.* BUSCH.

1. TAXES—VOID SALE—LIEN OF STATE—RIGHTS OF PURCHASER.
   A purchaser at a void tax sale does not, in the absence of statute, acquire the lien of the State by his purchase.

2. SAME—PAYMENT OF SUBSEQUENT TAXES.
   Taxes subsequently paid by the holder of a void tax title are voluntary payments, and cannot be recovered from the owner of the land.

3. SAME—COMPENSATION FOR IMPROVEMENTS—DISPOSSESSION.
   The dispossession of a claimant under a void tax deed need not be by suit, in order to entitle him to compensation for improvements under section 104 of the tax law of 1893 (Act No. 206, Pub. Acts 1893).

4. SAME—SUFFICIENCY OF EVIDENCE.
   Evidence that such a claimant cleared several acres of the premises, which were theretofore unimproved, built a brush fence around the clearing, and raised one or more crops thereon, establishes a possession sufficient to entitle him to the benefit of said section, where he was afterwards excluded from the land by the act of the original owner.

Appeal from Gladwin; Sharpe, J. Submitted February 1, 1898. Decided March 15, 1898.

Bill by Robert Croskery and James Croskery, Jr., against William C. Busch and Jane A. Busch to enforce a lien upon land for taxes and improvements. From a

decree for complainants, defendants appeal. Modified and affirmed.

Campbell & Foster, for complainants.

F. L. Prindle, for defendants.

HOOKER, J. The complainants claim to have taken possession under a purchase of State tax lands, sold for the taxes of 1889. Upon being dispossessed, they filed the bill in this suit to recover under section 104 of Act No. 206 of the Public Acts of 1893 for improvements made upon the premises, and to recover the amount paid as purchase price of said lands, and for taxes subsequently becoming a charge thereon. Three questions require consideration,—the *first* relating to the purchase price; *second*, other taxes paid; and, *third*, the right to receive compensation for improvements.

The complainants' claim is based upon the proposition that they acquired the lien of the State by their purchase, notwithstanding the invalidity of the title, which is due to the failure of the treasurer to make and file a report of sale. *Millard* v. *Truax*, 99 Mich. 157; *Jenkinson* v. *Auditor General*, 104 Mich. 34. Counsel cite the cases of *Hoffman* v. *Harrington*, 33 Mich. 392, *Nims* v. *Sherman*, 43 Mich. 45, and *Morse* v. *Byam*, 55 Mich. 594, which hold that the purchaser at an irregular foreclosure sale acquires all of the rights of the mortgagee. They say that, under the tax law, the State has a lien for the taxes upon the land, and, if the proceedings *are irregular, the State may take new proceedings to sell* the land (citing *Humphrey* v. *Auditor General*, 70 Mich. 292), and urge that, as this right accrues to the State when it has not seasonably enforced collection, it is transferred to the purchaser of the land from the State after purchase, if it turns out that the State had not acquired a title.

We have been to some trouble to collect and examine

the cases which permit the purchaser to recover the tax from the owner where his title fails. Some of them are cases where, on a bill to quiet title, payment of the taxes was made a condition of relief. Such a case is *Jenkinson* v. *Auditor General*, *supra*. Such holding rests upon the maxim that "he who seeks equity must do equity," and is not necessarily conclusive in a case where a suit is brought to declare and enforce a lien, as in this case. While in a number of States the purchaser at an irregular sale is permitted to recover the amount paid, where the sale is declared illegal, an examination shows that in nearly, if not quite, all of them, statutes are the foundation for the relief. This will be found true in Nebraska, Arkansas, Mississippi, Indiana, and Kansas. *Peet* v. *O'Brien*, 5 Neb. 360; *Bryant* v. *Estabrook*, 16 Neb. 222; *Hunt* v. *Curry*, 37 Ark. 104; *Cogburn* v. *Hunt*, 56 Miss. 724; *Flinn* v. *Parsons*, 60 Ind. 573; *Stephenson* v. *Martin*, 84 Ind. 160; *Fairbanks* v. *Williams*, 24 Kan. 19; *Russell* v. *Hudson*, 28 Kan. 100; *Arn* v. *Hoppin*, 25 Kan. 708. Not only are the above cases based upon statutes, but some of them indicate that a statute is essential to recovery. In the Mississippi case cited, it is said: "Unless, therefore, there is some provision of statute law upon which the relief prayed can be granted, it is inadmissible, under the general principles underlying the law relative to taxation,"—citing Blackw. Tax Titles (4th Ed.), 446, 493 (star p.); Cooley, Tax'n, 242; Burroughs, Tax'n, 366. And see Cooley, Tax'n (2d Ed.), 546. Again, in *Cogburn* v. *Hunt*, 57 Miss. 681, the remedy was refused where the statute had provided another. Again, in *Stephenson* v. *Martin*, 84 Ind. 161, it is said: "The remedy * * * is wholly statutory." See, also, *People* v. *Henckler*, 137 Ill. 580, and *Finegan* v. *Mayor, etc., of New York*, (Sup.) 38 N. Y. Supp. 358, cited by counsel.

The State of Iowa furnishes many cases pertaining to the subject, and the inference may be drawn from some of the later ones that the right of recovery is not statu-

tory; but we find, by looking at the earlier cases, that statutes existed giving the purchaser at irregular sales a right to recover the valid taxes. *Claussen* v. *Rayburn*, 14 Iowa, 136; *Byington* v. *Woods*, 13 Iowa, 17; *Corbin* v. *Hill*, 21 Iowa, 70; *Everett* v. *Beebe*, 37 Iowa, 452; *Light* v. *West*, 42 Iowa, 142; *Besore* v. *Dosh*, 43 Iowa, 211; *Sexton* v. *Henderson*, 45 Iowa, 160; *Thompson* v. *Savage*, 47 Iowa, 524. The last case cited indicates that all of these cases were based on statutes, as it not only mentions the statute then in force, but earlier ones, and goes so far as to apply the rule in a case where no levy of taxes had been made, and where, as said in the opinion, "the county and State had no claim for taxes for that year."

As against this apparent uniformity, we are cited to no case which sustains the proposition of the complainants; and in our own case of *Humphrey* v. *Auditor General*, 70 Mich. 292, 296, where taxes assessed, but not seasonably collected through sale, were sought to be collected by sale under a statute authorizing a sale, it was said: "The taxes assessed were allowed to become a lien against complainants' lands, *and they have so continued ever since; but, for the want of proper legislation, their collection could not be enforced until the law of 1887 took effect.*" Thus, it seems that this lien in the hands of the State could not be enforced in equity, and a statute was necessary to enable the State to enforce its existing lien. Could an assignee of the State be in any better position in this respect? This is but a recognition of the doctrine that taxes are not matters of contract, and that only statutory measures are to be resorted to for their collection. Cooley, Tax'n (1st Ed.), 300; Id. (2d Ed.) 15, 16; *Eyke* v. *Lange*, 104 Mich. 26.

It is manifest that the subsequent payment of taxes was voluntary, and cannot be recovered.

Many of the States have provided by statute that the purchaser shall acquire the lien of the State, and may enforce it if title fails. These are statutory provisions in

the furtherance of justice, and it is to be regretted that they have been dropped from our statutes. They are to be found in the tax laws of 1869 and 1885 (1 How. Stat. § 1167; 3 How. Stat. § 1169*w*7), but counsel for the complainants concede that they are not to be found in later tax laws. It is contended that this right exists under these laws by necessary implication from the fact that chancery is given jurisdiction to adjudicate upon the validity of taxes before sale, and the further provision, in section 70 of the tax law of 1893 (Act No. 206), that "the practice with reference to setting aside such sale shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages." We think this inference is not warranted. The provision last cited should be held to apply only to the procedure in the suit brought by the auditor general, where, in that proceeding, the sale is attacked.

The remaining question relates to compensation for the improvements. Section 104 of the tax law of 1893 provides:

"If any person dispossessed of lands purchased in pursuance of the provisions of this act shall have made improvements thereon, he shall be entitled to recover what such improvements are worth, and shall have a lien on such lands therefor, and may enforce the same by bill in equity where no other provision is made by law."

The evidence shows that the land purchased by the complainants was an unimproved 40-acre parcel, adjoining the defendants' improved farm, which was occupied by a tenant. The complainants cleared a few acres, and surrounded it with a brush fence, and raised one or more crops there. The tenant was aware of this, and one of the defendants saw them dragging there, as he passed by upon the cars, and is said to have remarked that complainants could clear up his land for him if they wanted to. Subsequently he caused an emyloyé of the complainants to be prosecuted for trespass, the result being a conviction. We are of the opinion that the circuit court was

right in its conclusion that the complainants had possession of a part, at least, of this parcel, and that they were dispossessed, and that they occupied and improved the same under the tax deed, in good faith. The evidence as to the value of the improvements is not as clear as we could wish, but, such as it is, it supports the conclusion of the learned circuit judge.

We are constrained to modify the decree by striking out the amount allowed for taxes and purchase price of said lands. As to the allowance of $125 for improvements, the decree of the circuit court is affirmed. The complainants are entitled to the costs in the circuit court. Neither party will be allowed costs of this court.

The other Justices concurred.

FISHER ELECTRIC CO. *v.* BATH IRON WORKS.

1. CONTRACTS—GOVERNMENT WORK—FAILURE TO PROVIDE SPECIFICATIONS—LIABILITY TO SUBCONTRACTOR.

   One engaged in building a gunboat for the government under contract is liable to his subcontractor, who has agreed to equip the boat with electric lights, for damages resulting from delay in furnishing drawings, specifications, and other information mentioned in the contract, although the delay was caused by the government inspector's failure to provide them.

2. SAME—CONSTRUCTION.

   A subdivision of a contract to install a boat with electric lights was designated as "plant." The first sentence defined the plant as consisting of two engines and two dynamos, and the other provisions in the subdivision referred to the plant in language consistent with such definition. *Held*, that it had such meaning wherever found in the subdivision, though ordinarily it has a broader meaning, and other subdivisions of the contract used it in the latter sense.

3. SAME—PUBLIC POLICY.

In a suit by an electric company upon a subcontract to install a government gunboat with electric lights, plaintiff sought to recover at the rate of $90 per week for extra labor, the actual cost of which to it was only $26.50 per week, claiming that the former amount was agreed upon because of an understanding with the contractor that the government would be "soaked" for extras. *Held*, that the agreement was against public policy, and void, and that plaintiff could recover only what the services were reasonably worth.

4. SAME—SERVICES NOT CONTEMPLATED—COMPENSATION.

By the terms of the subcontract, plaintiff agreed to furnish search-lights at a stated price, defendant agreeing to pay all of the cost in excess of that sum. Defendant wrote urging plaintiff to purchase a certain expensive light, and affirming its liability for the excess. Plaintiff's president, in order to arrange the purchase, made several trips to a distant city, but kept no account of his expenses, and rendered no bill therefor at the time. *Held*, that a charge for such services and expenses should be disallowed, as not within the contemplation of the parties.

5. SAME—PAYMENT OF EXCESSIVE SUM—DURESS.

A payment made by a contractor to a subcontractor of an excessive charge for labor in order to secure the shipment of materials which he needs, and which the subcontractor has agreed to furnish, is not a ratification of the correctness of the bill, and will not preclude an adjustment of the items upon final settlement.

Error to Wayne; Lillibridge, J. Submitted February 2, 1898. Decided March 15, 1898.

Assumpsit by the Fisher Electric Company against the Bath Iron Works, Limited, to recover a balance due for materials and labor. From a judgment for plaintiff, defendant brings error. Reversed.

Defendant, a corporation of Bath, Me., was, in 1891, constructing two gunboats for the United States. September 9, 1891, it made a contract with plaintiff to install said boats with electric lights. The contract was based

upon specifications issued by the naval department of the United States to defendant, and furnished by it to plaintiff as the basis for its bid. The contract is evidenced by a written proposition by plaintiff to defendant, and accepted by it. The specifications were attached to the proposition, and are made a part of the contract. They are divided into various subdivisions, such as "plant," "engines," "dynamos," etc. The parts of the specifications essential to an understanding of the points raised are as follows:

"Plant: The plant shall consist of two engines and two dynamos, both to be economical, efficient, and of an approved pattern. Each engine and its corresponding dynamo must be secured to the same bedplate. The latter shall be as light as practicable, and catching all waste oil. The plant must operate at all times practically without noise, and be capable of running continuously with full load without undue heating of bearings. All working parts of the plant must be accessible for examination and repair; and generally it must be the most compact, the lightest, and best adapted for marine work, particularly when at sea, of any that can be obtained at the time it is placed in the ship. It will be located as shown on the plans, and protected from the access of moisture, dust, and dirt. The general dimensions of all parts of the plant must correspond to the place assigned it, leaving ample space for the care, repair, and dismounting of the same. The dynamo room must be amply ventilated, either on the force-in or on the exhaust system, at will, by means of a fan driven by an electric motor, with two pipes independent of all others, one for exhaust and one for the supply of air. Suitable arrangements must be made so that either dynamo may be connected with any or all of the incandescent or arc light circuits. The plant must be fully completed in every respect, ready for service, and supplied with all appurtenances and appliances necessary for its care, manipulation, and repair, among which may be mentioned two volt and two ampere meters, one apparatus for measuring insulation resistance, one testing generator, one hand tachometer, tools, wrenches, oil-cups, oil-cans, feeders and tray, oil-tank with filter attached, brush-jigs, drip-pans and piping, guards, and hand-rails; all of an approved pattern. Every article of

the installation must be weighed in the presence of the inspector. The engines, dynamos, and bedplates complete must not exceed 6,000 pounds in weight."

This specification was changed by plaintiff's proposition in the following language:

"Plant: Clause No. 1. Strike out the words 'with suitable provision for securing a tachometer.' You are to furnish necessary system of piping for ventilating fan. Strike out the words 'two belted tachometers.'"

Under title "Search-Lights" is the clause:

"All switches, resistance coils, and other appurtenances necessary to connect the projector to the dynamos must be supplied and installed to the satisfaction of the inspector."

"Spare Parts: Such spare parts of the engines, dynamos, and all other portions of the plant shall be provided as will enable it to be used for a period of three years without additions. All spare parts must be tried in place, and must be to the satisfaction of the inspector in regard to amount, though based upon the supposition that the plant shall receive good and intelligent care; one dynamo always to be in operation; that the lifetime of the lamps is 600 hours, and that each lamp is in use three hours daily."

"General Information: A set of drawings of engines and dynamos on tracing cloth must be supplied. Such other information about the plant as may be required by the inspector shall also be supplied. When the construction of the ship has sufficiently progressed, the inspector shall supply a detailed list of the number of lamps, their candle-power and general location, number of sections, and candle-power on each section, various kinds of fixtures, and the number of each, number of switches, junction-boxes, receptacles, spare parts, and all other details necessary and reasonable, in order that the work of installation may be intelligently laid out and the proper materials and supplies ordered."

"Inspection and Acceptance: The work of installing the ship shall be subject to the supervision of an inspector representing the Bureau of Equipment, Navy Department."

To the specification as to engines was added this clause:

"The engines are to be of the type illustrated in blue prints submitted for examination, and we agree to make any detailed alterations or changes the inspector may require."

It was also agreed that plaintiff should, within two months, submit, for the purpose of test by the resident government inspector, one complete engine, dynamo, and switchboard, and that "supplies, appliances, or anything not mentioned in the specifications that may be required shall be paid for as extras."

The contract was performed by plaintiff, after which it brought this suit, claiming that defendant was liable for extra material furnished and labor performed, and for damages suffered through the failure of defendant to furnish seasonably drawings, specifications, and other information, required by the contract to be furnished by defendant, and essential to the plaintiff for the prompt performance of the work. A counter charge of delay on the part of plaintiff is made by defendant, but no damages are claimed in consequence thereof. The contract price was $17,300. The total claim of plaintiff is $29,148.03. The total payments made by defendant are $23,100. The verdict was $5,356.20.

Rowland M. Connor (*John D. Conely*, of counsel), for appellant.

Wells, Angell, Boynton & McMillan, for appellee.

GRANT, C. J. (*after stating the facts*). 1. Assuming that there was delay on the part of the inspector to furnish to plaintiff the drawings, specifications, and other information mentioned in the contract, is the defendant liable for such default? It is urged by counsel for the defendant that plaintiff accepted all the chances of delay on the part of the inspector, and thereby relieved it from any duty in regard to this information. There was no contractual relation between plaintiff and the government. The contract for the construction of the boats was be-

tween defendant and the government. Defendant had agreed with the government to furnish these boats with electric light plants. Whether defendant installed them itself or let the contract was immaterial to the government. The agreement to furnish these drawings, etc., was made with the defendant, and the plaintiff could look to it, and no one else, for the failure to furnish them. The original specifications were furnished to plaintiff, and formed the basis of the contract. The inspector represented the defendant, not the plaintiff. The court was therefore correct in holding the defendant liable for any damages which resulted from delay in furnishing the drawings, etc.

2. During the period from the date of the contract, in 1891, to its completion, in 1893, various improvements had been made in electrical apparatus, and plaintiff furnished some more expensive articles than those commonly known and in use at the time the contract was made. The court instructed the jury that the contract was made with reference to fixtures and appliances best known and in common use at the time the contract was made, and that, if plaintiff was required to and did furnish more expensive articles than those which were in common use at that date, it was entitled to recover for them. The correctness of this instruction depends upon the construction to be given to the term "plant," used in the specifications under the title "Plant." Houston's Electrical Dictionary defines the term as follows:

> "Plant—a word sometimes used for installation, or for the apparatus required to carry on any manufacturing operation. An electric plant includes the steam engines or other prime motors, the generating dynamo or dynamos, the lamps and other electro-receptive devices, and the circuits connected therewith."

It is insisted that the term in this contract means a plant as above defined. Defendant's position is based upon that clause of the contract which says:

"All working parts of the plant * * * must be the most compact, the lightest, and best adapted for marine work, particularly when at sea, of any that can be obtained at the time it is placed in the ship."

It is insisted that this clause includes everything in every part of the boats which is covered by the numerous specifications. But, clearly, this language is restricted to the plant as defined in the subdivision in which it is used. The parties have there seen fit to define the plant to which this language applies, and have confined it to two engines and two dynamos. All the language of this subdivision is peculiarly appropriate to the plant as described in the first sentence. The mere fact that the term "plant" is used in its broader sense in other subdivisions of the specifications does not affect the construction of the term as restricted by the subdivision in question. The court was therefore correct in holding that the plant meant the engines and dynamos.

3. All labor charges for overtime were made by the plaintiff at $1.50 per hour, or $15 a day. For most of this work plaintiff actually paid $26.50 a week. Upon this point Mr. Fisher testified as follows:

"The labor charge was agreed upon by Mr. Hanscom and myself at $1.50 per hour. I had the conversation fixing the charge for labor at $1.50 per hour with Mr. Hanscom, the superintendent of the defendant company, in December, 1891.

"*Q.* What was that conversation?

"*A.* The conversation was with reference to the extras, and Mr. Hanscom said: 'Of course, we expect to make a good deal of money out of this extra work. The government expects to be soaked on it, and we will help you get all you can for it—for anything extra.

"*Q.* What was said about the price?

"*A.* I think that I told him at that time that we should charge on all labor at the rate of $15 a day for extra work.

"*Q.* And this deal was made in accordance with this arrangement?

"*A.* Yes, sir."

On cross-examination he testified:

"*Q.* You had a positive agreement with Hanscom to allow you $15 a day?

"*A.* Yes, sir.

"*Q.* That was upon the understanding that the government would be soaked?

"*A.* Yes, sir."

The circuit judge instructed the jury that, if the parties entered into an agreement to charge an excessive price to the government, or "soak" it, such an agreement was against public policy, and void; and added:

"But, if you believe that the agreement between Fisher and Hanscom was, as counsel for the plaintiff claims, that the United States government expected to be 'soaked' in the matter, and that the agreement was that the Bath Iron Works would allow $1.50 an hour, if that agreement was made, then it is binding; and if you believe from the testimony that such an agreement was made between Hanscom and Fisher, that settles the question of extra labor, and you must allow $1.50 an hour."

The charge is grossly excessive. Under the instructions, plaintiff was permitted to recover about four times what the actual damages were. As an illustration, one Moag, plaintiff's employé, who was paid $26.50 per week, was engaged on board the boats in putting in the plant. Under the contract, defendant was to drill holes through the framework of the boats for the insertion of wires, etc. Moag testified that during the absence at various times of one Swanton, who superintended this work for the defendant, he directed the drillers, and estimated his time at 600 hours, and plaintiff charged for it $900. He "kept no track of his time, because he didn't think he had to." In the absence of a special agreement, plaintiff could only recover what such services were reasonably worth. The agreement is positively denied by defendant, and when the bill was rendered it made an emphatic protest. The contract, therefore, rests entirely upon the testimony of Mr. Fisher. The sole ground he urges to sustain such a grossly-excessive charge is that it was made "upon the understanding that the government would be soaked."

All such contracts, whether based upon an express agreement or simply an understanding, are against public policy, and void. The law does not permit the accomplishment of such an illegal purpose under the guise of an "understanding." This contract, based upon any view of Mr. Fisher's version of it, is void. The court should have so instructed the jury, and further should have instructed them that plaintiff could recover only what such services were reasonably worth.

4. By the terms of the contract, plaintiff agreed to furnish search-lights for $800. The contract contained this clause:

"If the department insist upon imported lamps, or we are unable to satisfy them with lamps of American manufacture which shall not exceed $800 in price, you are to pay the additional net cost."

On January 15, 1892, defendant wrote plaintiff:

"We believe that, if an approved type of search-light can be bought outright for a reasonable price, much delay will be saved, and should like to get the price of the 18-inch light before doing more about it."

In reply to this, January 21st, plaintiff wrote:

"Noting your remarks of January 15th, the search-light outfits will cost, according to quotations made us by the Thomson-Houston Electric Co., $1,715 each, and we, ourselves, consider delay would be avoided if they are purchased outright. Under the contract, you are to pay all in excess of $800. We think the search-lights can be duplicated for not more than $1,200. If you wish to authorize the additional expense, kindly do so in writing, and we will place the order for them, that delivery may not be delayed."

To this defendant replied, January 26th:

"The matter of obtaining search-light has been referred by me at length to Mr. Hanscom and Gen. Hyde. Their decision is that it is desirable to obtain all our apparatus as soon as possible, and do everything to forward the work, and I am authorized to say that, if two search-light outfits, guaranteed to pass government inspection,

can be bought for approximately $1,715 each, the Bath Iron Works will pay the excess in cost over $800 each, or about nine hundred and fifteen dollars ($915) each."

Plaintiff purchased the search-lights, and rendered a bill of $3,430. Mr. Fisher obtained a reduction of $430. After obtaining the reduction, plaintiff did not credit defendant with the $430, and was permitted to recover it in this case upon the ground that he had made two trips to New York to purchase the lights, and that this was a proper charge for his services and expenses. Fisher made no charge for this upon plaintiff's books, kept no account of his expenses, and rendered no bill for it at the time. His testimony is very indefinite. He says he made two or three trips to New York, was gone four or five days each trip, and probably allowed himself $20 per day. No such charge was contemplated by the contract, or agreed upon, and the court should have directed its disallowance.

5. On October 20, 1893, plaintiff wrote defendant as follows:

"Inclosed please find bills for 'placing the switchboard on the Machias,' repairing switchboard for 'Castine,' and 'testing circuits.' The switchboard and armatures will be sent forward when you deposit with the agent of the United States Express Co. at Bath the sum of bills rendered to date ($1,943.80)."

Bills covering this amount, it appears, had previously been rendered, and in reply to them, on September 30, 1893, defendant wrote to plaintiff:

"I have answered your telegram as follows: 'Have not sent check. Bills excessive.' You should be ashamed of sending out such prices. They are much more than double what the thing is worth. * * * You may as well understand first as last that we shall pay no such bills. How do you justify charging $1.50 per hour?"

In reply to the letter of October 20th, defendant wrote:

"We have today given the American Express Co. check for $1,944, and they have promised to wire their

people to send the switchboard and armature along. We do not feel satisfied with the bills, but have had no chance to write you about it before. Please explain on what grounds you charge $1.50 per hour for Moag and his helpers. Also would like to have you tell me if the other bills are based in a similar manner, because I have to put in a bill for fixing the armature to the government, and do not want to put in a bill they will refuse to pay. If you will assure me that the charge of the armature is a fair one, I can put in a bill. As far as the $15 a day is concerned, you know as well as we do that no jury will allow it, and we do not suppose for a moment that you intend to insist upon such a ridiculous charge."

It is manifest that plaintiff was endeavoring to force a payment. It was necessary for defendant to have the goods, which were placed in the express office at Detroit, immediately. Its own witness Moag so testified. Under these circumstances, payment by the defendant was not a ratification of the correctness of the bills, and upon final settlement the items of these bills were open for adjustment. The court should have so instructed the jury.

There are other small items to which defendant objects on the ground that there was no evidence to sustain them. We think there was a conflict of evidence upon them, and that they were properly submitted to the jury.

Judgment reversed, and new trial ordered, unless counsel can agree upon the amounts to be deducted from the verdict and judgment under this opinion, and have a judgment entered in this court, and thus end the controversy.

The other Justices concurred.

CRANE LUMBER CO. *v.* BELLOWS.

1. PLEADING—AMENDMENT OF DECLARATION—CONTINUANCE.
   Defendant's motion for a continuance in an action for conversion, made after the plaintiff's proof is all in and without any showing, is properly overruled, although the court has in effect allowed the plaintiff to amend his declaration with reference to the time of the conversion.

2. EVIDENCE—WITNESSES—MEMORANDA TO REFRESH MEMORY.
   Memoranda in the shape of books and papers purporting to contain a daily scale of logs and lumber, made in the course of business by and under the supervision of the witness producing them, may be used by him to refresh his recollection, and, so used, are admissible in evidence.

3. TRIAL—PROTRACTED CROSS-EXAMINATION—REMARKS OF COURT.
   A remark by the court in the course of a cross-examination which he thought was being unduly protracted, with reference to a mistake which the witness claimed to have made in his testimony, that he did not see the materiality of the matter, that the witness had stated that he had made a mistake, and that it was clear upon the record that he did make a mistake,—was not prejudicial to the cross-examining party, where no question or answer was excluded

4. CONVERSION—WHAT CONSTITUTES—DEMAND.
   Appropriating and sawing the logs of another, though without knowledge or fault, and commingling the lumber with one's own, so that it cannot be identified, is a conversion, and no demand is necessary.

Error to Benzie; Aldrich, J. Submitted February 2, 1898. Decided March 15, 1898.

Trover by the Crane Lumber Company against Elwin E. Bellows and another. From a judgment for plaintiff, defendants bring error. Affirmed.

George Whitbeck and *Dodge & Covell*, for appellants.

Pratt & Davis, for appellee.

HOOKER, J. The plaintiff and defendants were saw-mill owners, their respective mills being situate upon opposite shores of Betsie Lake. Both parties obtained logs by floating them down Betsie river to the lake, to a boom, where the logs were separated. The action is trover, it being claimed that the defendants sawed, and thereby converted to their own use, a large number of the plaintiff's saw-logs. A verdict of $992 was rendered in plaintiff's favor. The defendants have taken a writ of error.

It is claimed on the part of the defendants that, if a conversion is shown, it occurred after May 1, 1895, the time fixed by the declaration and bill of particulars, and that proof of such acts of conversion was not admissible. The question was raised at the beginning of the trial. The court thought the testimony admissible, but said that, if not, an amendment would be permitted, and allowed the testimony to come in. No motion to continue was made until the plaintiff's proof was all in, and then no showing was made. The court denied the motion, and, we think, properly so. It does not appear that the defendants were surprised, or in any way injured, and, though a formal amendment was not made, what was done and said was equivalent thereto.

Error is assigned upon the admission of certain papers and books, alleged to contain the list and aggregate of daily scales of logs and lumber. This testimony came in as *memoranda* made by and under the supervision of the witnesses in course of the business, and was in the nature of *memoranda* used to refresh the recollection about matters and details that could not otherwise be recollected. As used, we think they were properly received.

Counsel also assign error upon the remark of the court in relation to a mistake that one of the witnesses stated that he had made in his testimony. Counsel was cross-examining him about the matter, when the court said: "I don't see why this is all material. He stated he made

a mistake, and it is clear upon the record that he did make a mistake." The colloquy that followed shows that the court thought the examination was being unduly protracted, but he did not exclude any question or answer. We see no evidence that the remark complained of was injurious.

The court instructed the jury that, if logs got into the defendants' yard without their knowledge or fault, and they sawed the lumber, and commingled it with their own, so that it could not be identified, and kept no account of it, it was a conversion, and no demand was necessary. We think there was no error in this, as demand and refusal are but one evidence of a conversion, which may be shown by appropriation to the exclusion of the true owner

The judgment is affirmed.

The other Justices concurred.

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KAUMEIER *v.* CITY ELECTRIC RAILWAY CO.

1. TRESPASSERS—STREET RAILWAYS—UNGUARDED CARS.
   One who, in sport, attempts to make use of a street car left unguarded upon the track in the public highway, is a trespasser.

2. NEGLIGENCE—DANGEROUS MACHINERY—UNSECURED CAR—INJURY TO CHILD.
   A small flat or platform car, mounted on four wheels, plainly constructed, with no machinery about it, is not a dangerous machine, within the rule recognized by some of the courts that one who leaves upon his property dangerous machinery, likely to attract children, so unsecured that children may put it in motion, is guilty of negligence.

3. SAME—NOTICE.

A street-railway company, therefore, which leaves a car of such description unblocked upon the track in the highway, is not liable for injuries received by a child by falling under the wheels of the car while it was being pushed along the track by her companions, although the company knew that children were accustomed to make such use of the car when it was left unguarded.

Error to St. Clair; Vance, J. Submitted February 2, 1898. Decided March 15, 1898.

Case by Hazel Kaumeier, an infant, against the City Electric Railway Company, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Phillips & Jenks, for appellant.

Muir & Smith (*Avery Bros. & Walsh*, of counsel), for appellee.

LONG, J. This action was commenced to recover damages for injuries sustained by plaintiff by one of defendant's cars, which, it is claimed, was negligently left by it on a side track without being guarded, or brakes set, or other means employed to prevent children from moving it. On the trial it appeared that the plaintiff was nearly seven years old when the accident upon which this action is founded happened,—September 17, 1895. Defendant operated a street railway in the city of Port Huron. The car which caused the injury was a small flat or platform car, and was about 14 feet long by 6 feet wide, with a box about 12 feet long, having drop sides, and leaving 1 foot of platform at each end projecting beyond the box, the platform being about 26 inches from the ground. The weight of the car was from 1,500 to 1,800 pounds. It had four iron wheels, and had no brake upon it, or other means to prevent its being moved. On the afternoon of the accident, an order was received by the com-

pany to go to Huronia Beach, a point about four miles north of the center of the city. The employés operating the combination of motor car and flat car decided to leave the platform car at the point of the accident, while they proceeded with the motor car alone to Huronia Beach to get some trunks and return, which would occupy from 40 to 45 minutes, and avoid the necessity of drawing the flat car, and making switches that would be necessary in order to reverse the position of the cars on the return trip. There is testimony that this car was in that place in the morning and noon, and that there were then no blocks or anything under or beside the wheels to prevent the car's being rolled; and the car was in the same place when witness came from school at night, about the time of the accident. The place of the accident was the only point on the company's line where the platform car could be left without interference with other cars, and it had been left in the same way and place a number of times before under similar circumstances. The conductor in charge of the cars on this occasion testified that, when the flat car was left at this point on this occasion, he blocked the wheels with a stone and a stick, which could be removed, however, by the kick of a small boy, if he hit it right, and that he always blocked this car every time he left it there.

The plaintiff lived about the length of a block from the place where this car was left, and, coming from school in the afternoon of September 17th, seeing children playing upon the car, came to the place of the accident. At that time there were eight or ten children playing with it, pushing the car a short distance west, and then returning it east. A part were pushing, the others riding. At this point there is a slight descent to the west, but not enough to start the car of itself, and there was much dust upon the track. At the time the plaintiff arrived, the children playing with the car were just starting or about to start it towards the west, and had run it up and down the track a number of times, and there were then no blocks under the wheels. She climbed upon the west end of the plat-

form to ride, and, without having got into the box, either slipped or was pushed in the play from the car, falling in front of the wheels, one of the wheels running over her leg, and causing the injuries complained of. The plaintiff had been told by her mother "not to go near the cars, that she was liable to be hurt;" but the danger was not explained to her, and she testified she did not think or know it was dangerous. She was not told not to go near the car on this day. This car had been left in the same position before, and children had played upon it, and pushed it, and street-car employés had taken the car from that position when the children were playing upon it, and the children had helped the street-car men shove the flat car up to the motor car for the purpose of connecting it. The plaintiff was injured almost immediately after going to the car. The children had been playing upon the car from three-quarters of an hour to an hour.

At the conclusion of the proofs, counsel for defendant requested the court to instruct the jury, among other matters, that, under the undisputed evidence, the defendant was entitled to a verdict. This was refused, and, inasmuch as this is the only question discussed in appellant's brief, we need not state the other requests to charge. The court submitted two questions to the jury:

1. Whether the defendant was guilty of negligence.
2. Whether the plaintiff was guilty of contributory negligence.

Upon the first the court instructed the jury as follows:

"If this car had been left there by the railway company at other times, and the street-railway company knew of that fact, knew that children were in the habit of going there and playing with this car, and moving it up and down the track, and riding upon it, and with that knowledge left the car there, and left it unfastened and unblocked; and, in your opinion, taking all the surrounding facts and circumstances into consideration, you deem the use of that car in that manner by children dangerous to them, and that careful, cautious, and prudent men would not have left it there in that condition,—you would be

justified in finding that the railway company was liable for the injury that this child suffered, provided that she has not been guilty of contributory negligence."

Upon the second question the court charged the jury, substantially, that they might take into consideration the age of the child, the means she had of knowing the danger, the judgment, intelligence, and reason of the child, and say whether, under all the circumstances of the case, she was capable of being guilty of contributory negligence; and, "if you feel that she was, and that any act of hers contributed to the injury, you should deny her claim; otherwise, if she did contribute to it, and you think that in her tender years, and in her judgment and reasoning powers, she was incapable of knowing any better, you would be justified in passing that over."

Plaintiff recovered, and defendant brings error.

Plaintiff contends that, this car track being in a public highway, the child was not a trespasser, either in moving the car or in getting upon it. The plaintiff does not contend that the car was of itself an object dangerous to children, but that, the car being so light that children could move it on the track, it became a dangerous object in being moved along the track, and, being an attractive object, they were likely to move it, and thus be put in danger; that the defendant's employés knew, before leaving the car there on that occasion, that on former occasions children were attracted to it, had moved it along the track, and that such employés had countenanced the children in thus playing with it; that, with this evidence in the case, the court very properly left the question to the jury to determine whether, taking all these matters and the surrounding circumstances into consideration, careful, cautious, and prudent men would have left the car there in that condition. In support of this contention counsel cite the *Turntable Cases* in note to 27 Am. & Eng. Enc. Law, 344. It is said in that text:

"The general rule of liability, as laid down by the Supreme Court of the United States and adopted by the

great majority of the State courts, is that if a railway company leaves a turntable or other like machinery upon its own property, likely to attract children, so unsecured that children may put it in motion, the company is negligent, and, if a child is injured thereby, will be liable in damages."

We are not called upon in the present case to express any opinion upon the questions decided by those cases. In Massachusetts and New Hampshire that ruling is not followed, it being held in those States that a railroad company is not liable for injuries sustained by a child while playing upon a turntable, either upon the ground of an implied invitation to come there, or of a duty on the part of the company to make the place safe. *Daniels* v. *Railroad Co.*, 154 Mass. 349 (13 L. R. A. 248, 26 Am. St. Rep. 253); *Frost* v. *Eastern Railroad*, 64 N. H. 220 (10 Am. St. Rep. 396). All the *Turntable Cases* are rested upon *Railroad Co.* v. *Stout*, 17 Wall. 657. In that case a child of six years was injured by playing upon the defendant's turntable. The turntable was unlocked and unguarded. The court charged the jury, upon the question of the defendant's negligence in the management or condition of the turntable, that—

"To maintain the action, it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine,—one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction, and the manner in which it was left, it was not dangerous in its nature, the defendant was not liable for negligence; that they were further to consider whether, situated as it was, as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it were left unlocked or unguarded; that, if it did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The court, in passing upon and approving this charge, said:

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he [plaintiff] had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, * * * when it was proved to the jury that several boys were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that defendant should have anticipated that such would be the case."

It is difficult to see how that case can be likened to the present. In that case a dangerous piece of machinery was left open, exposed, and unguarded, to the knowledge of the defendant. The turntable itself was dangerous.

In *Peters* v. *Bowman*, 115 Cal. 349, the court said:

"The rule of the *Turntable Cases* is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied."

Even in some of these *Turntable Cases* it is held that railroad cars are not dangerous machines, and attractive to children, within the meaning of those cases. Elliott, R. R. § 1260, says that this is regarded as the true rule. In *Railroad Co.* v. *Stout*, 17 Wall. 657, the court charged the jury that: "If the turntable in question, in its construction and the manner in which it was left, was not dangerous in its nature, the defendant was not liable for negligence." The car in question in the present case was not dangerous in its construction. It was a plain car, with four wheels, with no machinery about it. It had no

brake, but was a small platform car. It is true that it stood upon a track where it might be moved by several children applying their united strength. Several children might, in the same way, move a wagon or carriage left beside the highway. We apprehend that no claim of negligence could be sustained against the owner of such a vehicle if one of the children climbing upon it should fall off and be run over, even if the wheels were left without blocking. In *Robinson* v. *Railway Co.*, 7 Utah, 493 (13 L. R. A. 765), it appeared that a hand-car had been left beside the track. Some boys had lifted it upon the track, and were running it back and forth, when plaintiff, being attracted by it, went there, and was injured by jumping or falling from it while in motion. The boys had used this car eight or ten times before, with the permission of the "boss," while the men were there at work; but he had never given them such permission while the men were not at work. This car weighed six or seven hundred pounds. It was held that the car was not a thing dangerous in itself, and that the company was not negligent in leaving it unlocked beside the track. In the present case, assuming that the defendant left the car without sufficient blocking, it must be held that plaintiff could not maintain this action, for the reason that there is nothing in the case showing or tending to show any negligence on the part of the defendant.

It is not necessary to determine whether the plaintiff was guilty of contributory negligence, or whether that question was properly left to the jury. Neither is it necessary to say that the plaintiff was a trespasser in going upon the track there, which was laid along the highway. It is proper, however, to say that she was a trespasser in any attempt to use this car. The defendant had just as much right to leave this car where it did as a farmer would have to leave his wagon or carriage upon his own side of the highway, and no one would have the right to move it, except upon the claim that it impeded public travel. The

car being rightfully left where it was upon the track, and not being a thing dangerous in itself, the court should have directed the verdict in favor of the defendant.

Judgment below must be reversed. No new trial will be ordered.

The other Justices concurred.

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HENRY *v.* ANN ARBOR RAILROAD CO.

RAILROADS—REMOVAL OF TRACKS—INJUNCTION—SUITS BY PRIVATE INDIVIDUALS.

The fact that private individuals, resident and owning property in a given city, contributed money towards the building and equipping of a line of railroad through such city, upon the representation and understanding that the road would increase the value of their property, does not give them the right to maintain a bill in equity to restrain the company from taking up or discontinuing the use of its track through the city, at least where the injury resulting from such action is not specific to them or their property, but is common to all citizens and property holders of the city; the remedy being by suit in the name of the proper officer of the State.

Appeal from Gratiot; Person, J., presiding. Submitted February 2, 1898. Decided March 15, 1898. Rehearing denied June 28, 1898.

Bill by James Henry, Lemuel Saviers, George H. Scriver, Archibald B. Darragh, and Parker Merrill, residents and property owners in the city of St. Louis, to enjoin the Ann Arbor Railroad Company from discontinuing its line of road through said city. From a decree dismissing the bill, complainants appeal. Affirmed.

E. A. Cooley and *Fatio Colt* (*Benton Hanchett* and *C. W. Giddings*, of counsel), for complainants.

Alexander L. Smith, for defendant.

LONG, J. The bill in this cause is filed by the above-named complainants for the purpose of restraining the defendant, by injunction, from making any change in the operation of its road in and through the city of St. Louis, this State, and from diverting any portion of its traffic, either freight or passenger, from the line now passing through and by said city; from taking up or discontinuing the use of the tracks, or any portion thereof, now operated and used by it to and from that city; and from in any way violating or departing from a certain agreement made by the Toledo, Ann Arbor & North Michigan Railway Company with complainants and other citizens of St. Louis, of which railway company the defendant is the successor. It is also claimed by the bill that no proceedings under the statute have been taken by the defendant to obtain the right to abandon or take up or cease operating the tracks now extending into and through the said city.

The contract which the complainants contend the defendant is violating is substantially that in 1883 the Toledo, Ann Arbor & North Michigan Railway Company proposed building a railroad from South Lyon to Frankfort, and also to Alpena, in this State, constructing a line from South Lyon to St. Louis, via Owosso, and from St. Louis diverging lines, one running to Frankfort and one to Alpena; that said company made a map showing the direction and route of its proposed lines, and thereupon solicited aid and assistance to build and equip said lines of road from the citizens and property owners of said city, and, in furtherance thereof, proposed to build a road which would become a great trunk line, handling and carrying a large amount of business, that would be of great value to the residents and property owners of St. Louis, and would greatly increase the value of property;

that the complainants and other citizens of St. Louis and vicinity, relying upon these representations, contributed upwards of $20,000 to said company, and gave it the right of way through St. Louis. The bill alleges that the road was completed, and freight and passenger depots built within the corporate limits of that city; that property interests have advanced by the operation of said road; that the relative value of property in different parts of the city has been changed by the construction and operation of the road; that certain property advantageously located with reference to the use of facilities afforded by said road has been largely increased in value; that, to a certain extent, the places selected by residents of the city for the construction of business buildings and residences have been affected and determined by the location of said road; and that in other respects the property interests of the complainants and other property owners have been affected by the building of the road; and that to now change the method of operating and using the road would cause great and irreparable injury to the complainants and others of the said citizens and property holders contributing to the aid of said road. The bill sets out that complainant Henry contributed $1,600, Merrill $50, Saviers $500, Darragh $500, and Scriver $600, to aid in building the road. It is quite unnecessary to set out the various changes made in the corporation subsequent to the building of the road. It is claimed by the bill that the bondholders of the Toledo, Ann Arbor & North Michigan Railway Company sold the road under its mortgage bonds, and that the defendant company subsequently became the owner of the rights and franchises of the original road, and now operates it, and that it threatens to take up its tracks, change the location of its main line, and leave the city of St. Louis without the rights and privileges which it had enjoyed, and which it was represented, when the aid was given, that it would have.

The defendant answered the bill, and admitted that it expected and intended to change its main line, and

discontinue its through line to St. Louis; that this is to be done to straighten its line, and avoid a dangerous curve and steep grade, which make it impossible to operate successfully heavy trains over its line as now located. From the view we take of the case, it is unnecessary to set out all the defenses interposed by the answer. It is averred, however, that the complainants are not entitled to the relief asked by the bill, and the benefit of a demurrer is prayed. The cause was heard in open court, and the bill dismissed.

We need consider but one question, as, under defendant's contention, that must dispose of the case upon this record. The action is not brought to recover the bonuses, but to compel the defendant to continue to perform duties claimed to be imposed upon it by the statutes. It is true that the bill alleges that complainants are property owners in the city of St. Louis, and that they, as well as other residents of that city, will suffer great and irreparable injury by the proposed change. The injury, however, is not specific to them or their property, but common to all citizens and property holders of that city. As well claimed by counsel for defendant, such suit must be brought in the name or by authority of the State, through some public officer properly authorized, and cannot be maintained by private individuals. Section 3304, 1 How. Stat., provides for the bringing of such suits by the proper officers of the State; section 3306 saves the rights of private parties to bring suits against railroad companies for private damages; and sections 8148, 8149, 2 How. Stat., give to courts of equity, in suits brought under the direction of the attorney general, power to grant injunctions to restrain any corporation from transacting any business not authorized by the charter of such corporation.

In *Kinealy* v. *Railway Co.*, 69 Mo. 658, the question came before that court whether a private citizen might recover damages from a railroad company, sustained in the depreciation of his property by such company's discontinuing its old route for the passage of its through trains, and its construction of a new route for that pur-

pose. It was held not competent for the citizen to raise the question that such acts of the company were in violation of its charter, as such question could be raised only by the State. It was said by the court:

"Whether the defendant acted in violation of its charter when constructing its new, and withdrawing its trains from its old, route, past Jennings' Station, is a question we do not propose to discuss, as it is a question which can only be raised by the State, except where such collateral inquiry by a private citizen is expressly granted by law. But, disregarding any consideration of this nature, plaintiffs' standing in court is not thereby bettered; for they do not allege that the injury complained of is one special and peculiar to the party complaining,—an injury not shared by the other members of the community. For aught that appears in the petition, every lot owner in Jennings' Station, every owner of real estate in the vicinity, is as much damaged as is the wife of plaintiff by the withdrawal of defendant's trains, and the consequent depreciation in the value of real estate. It is well settled that, where a highway is altered, obstructed, or altogether vacated, no action will lie except by him who 'has greater trust or incommodity than every other man has,'"—citing *Holman* v. *Inhabitants of Townsend*, 13 Metc. (Mass.) 297; *Stetson* v. *Faxon*, 19 Pick. 147 (31 Am. Dec. 123); *Brainard* v. *Railroad Co.*, 48 Vt. 107.

In *People, ex rel. Bristol*, v. *Supervisors of Ingham Co.*, 20 Mich. 95, the board of supervisors, by resolution, purported to discontinue a certain portion of a State road. The case came into this court by *certiorari* at the instance of the plaintiffs to review that action. Plaintiffs did not claim to own any land along that part of the road thus discontinued, but claimed to own property on the line of the road, and that, having occasion to travel it almost daily, the discontinuance of this portion deprived them of a direct road to Lansing; that the discontinuance worked a great hardship and inconvenience, imposing unnecessary travel on all persons using the road; and that it materially depreciated the value of the plaintiffs' property. It was said by this court:

"The parties who seek to reverse the action of the board are not the owners of the land through which the discontinued portion of the road passes. They show no rights affected but such as are common to all other owners of property anywhere along the line of those portions of the road not discontinued, if, in fact, they show anything more than the mere right of travel common to all the people of the State. The whole burden of their complaint is that they are deprived of a direct road to the city of Lansing, and, as far as we can judge from the case, will be compelled to travel from a quarter to half a mile farther in going to and returning from that place. They complain of this, it is true, as depreciating the value of their property. But this, if there be any such damage, being a mere incident arising from the interference with the general public right of travel common to all the people of this State, can hardly be looked upon as a vested right of property which it would not be competent for the legislature to take without compensation; and, if they are entitled to compensation, the fourth section of the original act and the twenty-eighth section of the act of 1851 make full provision for obtaining it."

See *Buhl* v. *Union Depot Co.*, 98 Mich. 596.

The question is not before us in the present case whether the complainants have a right of action against the railroad company for the recovery of the subscriptions to aid in building the road. The only question is whether the complainants, as private parties, may maintain this bill to restrain the defendant company from changing its line of road, and discontinuing that portion through the city. It is evident that, under our statutes, no such bill can be maintained by a private party. The action is one to inquire into the right of the defendant company to carry on its business, and necessarily to inquire by what right the defendant exercises its franchises. Such inquiry can be made only by the proper officers of the State.

But, if a private party could maintain such a bill, no such showing is made in this case as entitles the complainants to maintain the present bill. The injury complained of is common to all the citizens of St. Louis, and the case falls directly within the ruling of the cases cited.

We do not see how an amendment to the bill would aid the complainants.

The order of the court below dismissing the bill must be affirmed, but without prejudice to the complainants' pursuing any other remedy they may have. Defendant will recover costs of both courts.

The other Justices concurred.

ON APPLICATION FOR REHEARING.

PER CURIAM. Motion is made for a rehearing in this case, and counsel now claim that the case should be treated as though the attorney general were a party. We have re-examined the case, and are satisfied that the result reached, as the record now stands, is the correct result. The record does not show that the attorney general was ever consulted about the case, or was ever asked to permit the bill to be filed in his name, or ever authorized the proceedings to be so commenced. Since the hearing, no effort appears to have been made to cause the attorney general to intervene. The motion for a rehearing must therefore be denied.

COMISKIE v. CITY OF YPSILANTI.

1. MUNICIPAL CORPORATIONS—STREET CROSSINGS.
   A city is under legal obligation to maintain in a reasonably safe condition for pedestrians that section of the highway at a street crossing which lies within the lines of the sidewalk if extended, where it appears, from the existence of a beaten foot-path at such point, that the same is used for public travel, even though the city has constructed a cross-walk on the opposite side of the street.

2. SAME—NEGLIGENCE—QUESTION FOR JURY.
   Whether the highway at such a crossing was in a reasonably safe condition for public travel was a question for the jury, where it appeared that a tile drain, which received the water from an open ditch on the opposite side of the street, was allowed to discharge it into a continuation of the ditch at a point within the lines of the sidewalk if extended.

GRANT, C. J., dissenting.

Error to Washtenaw; Kinne, J. Submitted February 3, 1898. Decided March 15, 1898.

Case by Virgie A. Comiskie against the city of Ypsilanti for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Lehman Bros., Smith & Stivers, for appellant.

Darwin C. Griffen (*J. Willard Babbitt*, of counsel), for appellee.

HOOKER, J. Ballard and Emmett streets, in the city of Ypsilanti, cross each other at right angles, the former running north and south, and at the point of intersection and vicinity are well built up with residences. Sidewalks

have existed for some time upon both sides of Ballard street, both north and south of Emmett street, but no cross-walk has ever been laid across Emmett street connecting the sidewalk to the north and south on the east side of Ballard street. Upon the south side of Emmett street was an open ditch, outside of the sidewalk, for the purposes of a highway drain, which was carried across Ballard street by means of tile, which received the water from the open ditch at the west side of Ballard street, and discharged it into a continuation of the open ditch at the east side of Ballard street. While there was no cross-walk at this point, pedestrians crossed Emmett street there, and their travel had made a beaten path. The tile drain did not extend as far east as the east line of the sidewalk on Ballard street, and the path curved sufficiently far to the west to avoid the open ditch at that point, which, at the end of the tile, is shown by some of the testimony to have been about 20 inches deep. In crossing in the darkness, the plaintiff got out of the path, and was injured by stepping or falling into the open ditch.

While there was no cross-walk provided at this point, it was obvious to the city, from the existence of the beaten path, that citizens crossed at that point, and it was under a legal obligation to keep the way in condition reasonably safe for public travel. Whether this highway, at the point mentioned, was so, was a question for the jury. We do not mean to imply that the city should have built a cross-walk, or that covered drains must be constructed at all points, or even across other highways; but whether the construction of this tile drain, and its junction at that particular point with the open drain, was a reasonable one, under all the circumstances and conditions, taking into consideration the grade of the sides of the ditch, the proximity of public light, etc., was a proper question for a jury. It is within the rule of *Baker* v. *City of Grand Rapids*, 111 Mich. 447; *Malloy* v. *Township of Walker*, 77 Mich. 448 (6 L. R. A. 695).

The question of contributory negligence is not discussed, and an examination of the testimony indicates that, if in the case, it was for the jury upon this record.

The judgment is reversed, and a new trial ordered.

MONTGOMERY, MOORE, and LONG, JJ., concurred with HOOKER, J.

GRANT, C. J. (*dissenting*). I think that no case of negligence on the part of the defendant is established by the proofs, and that the court was correct in directing a verdict. Plaintiff stepped into a gutter which was about 18 inches deep, with a slant of 22 inches. The gutter was properly constructed to carry off the water. It was the natural and necessary way to conduct it down the hill. All the streets on this hillside have open gutters. They exist on the east side of Ballard in all the streets from Emmett to Congress, and are from 10 to 20 inches deep. Is the city liable if a traveler leaves the side and cross walks in the night, and falls into a gutter? One Mr. Rouse, a witness for the plaintiff, who lives across the road from the place where plaintiff fell, testified that the place at the end of the gutter "is not as dangerous as out here at the corner of the street opposite the court-house [in the city of Ann Arbor]." These gutters exist in all cities, and, if there is any liability here, it is because the city had failed to construct a cross-walk, or put up barriers as a protection against the gutter. It is under no legal obligation to construct such cross-walk or barriers. There was a sidewalk and a cross-walk on the other side of the street, over which plaintiff might have gone. The fact that people cross there on foot creates no obligation to build a cross-walk or protect the gutter. The gutter, in its then condition, had existed for some time. Plaintiff testified: "There was no cross-walk there, but we thought it was just as safe as the other side." If she and her companions chose to walk there, instead of taking the sidewalk upon the opposite side, where they knew they could walk with safety, she cannot complain, or hold the

city liable for injuries received. *O'Laughlin* v. *City of Dubuque*, 42 Iowa, 541. It is said in that case: "Sidewalks and cross-walks alone are constructed for foot travelers, and he who, without some good and sufficient reason, walks elsewhere and is injured, should not be permitted to complain that he has been injured through the fault and negligence of the city." I do not see how *Baker* v. *City of Grand Rapids*, 111 Mich. 447, has any application here. In that case a sewer was being constructed, and the opening was left unguarded by barriers or light.

I think the judgment should be affirmed.

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ROGERS *v.* VILLAGE OF ORION.

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—NOTICE.
   Notifying a member of the street committee of a village of a loose plank in a sidewalk, without specifying the location, is not sufficient to charge the village with notice of the defect.
2. PERSONAL INJURIES—ACTION BY MARRIED WOMAN—DAMAGES—PHYSICIAN'S SERVICES.
   In an action by a married woman for personal injuries, a recovery cannot be had for the services of a physician, where there is no testimony that she has paid or has promised to pay him therefor.
3. WITNESSES—OPINION. EVIDENCE.
   The opinion of a witness that a sidewalk in front of the premises of a railroad company was rebuilt because it needed rebuilding is inadmissible, where witnesses in the employ of the company have testified that the walk was in sound condition, and was rebuilt because of a change in grade.
4. EVIDENCE—PROBABILITIES.
   In an action against a village for injuries caused by a defective sidewalk, it is competent for defendant to show that it was the duty of one of its witnesses to look after the walk in question, as bearing upon the probability of his having made the examination testified to by him.

Error to Oakland; Smith, J. Submitted February 4, 1898. Decided March 15, 1898.

Case by Jennie Rogers against the village of Orion for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

A. & S. H. Perry, for appellant.

Joseph H. Holman (*Fred A. Baker*, of counsel), for appellee.

GRANT, C. J. Plaintiff recovered verdict and judgment for damages claimed to have been received on account of a defective sidewalk.

1. In order to show notice on the part of the defendant, plaintiff introduced one Russell, who testified that, before the accident to plaintiff, he also had fallen over a loose plank, and was afterwards shown the plank where plaintiff fell, and that it was at the same place. He testified that, the next morning after he fell, he went to one Kessel, who was a member of the street committee. His testimony on direct examination is as follows:

"I notified him the morning of the 27th. It was in the evening that I fell, but I didn't see him until the next morning. I knew he kept the books there. He was always there when the council board met. I went there for the purpose of notifying him. I told him,—I explained to him that I had fallen, and come near breaking my neck; and, of course, I didn't use the bad words I used when I fell, but I told him that if my wife ever passed over that sidewalk, and she would get hurt over it, that I would make somebody pay dear for it. He didn't say anything at all to me in reply."

On cross-examination he testified:

"I told him that, if my wife should fall, I would make somebody pay dear for it. That's what I told him right there, sir. That's the question asked between him and me. That was all the conversation there was. The substance of what I said was: 'Mr. Kessel, there is a loose plank up here, and, if my wife should fall over that, why, I would make the city pay dear for it.'"

He also testified that he did not know the name of a single street in the village. This testimony was left to the jury as evidence of notice. Mr. Kessel positively denied any such conversation. The judge instructed the jury that, if the testimony of Russell were true, this was notice to the village. There is nothing in the testimony of the witness Russell to show that he notified Kessel where the loose plank was. If Russell had testified that he told Kessel what the defect was, and the spot where it was, and it was the same one that caused plaintiff's injury, there would have been no error in the charge.

2. The court erred in directing the jury that plaintiff could recover for the services of the physician. There was no testimony to indicate that she had paid or had promised to pay him. She was therefore under no legal duty to pay him. *State* v. *City of Detroit*, 113 Mich. 643.

3. The railroad company, in front of whose premises was this walk, rebuilt the walk some months after the accident. On cross-examination of one Blanchard, a witness for defendant, he was permitted to answer the following question: "Well, it was rebuilt because it needed rebuilding, wasn't it?" Witnesses in the employ of the railroad company had testified that the walk was in sound condition, and that it was rebuilt because of a change in grade. The opinion of the witness as to the reason for rebuilding was incompetent.

4. One Farrell, the station agent at the railroad depot, testified as to the condition of the walk, and his examination of it. Defendant offered testimony to show that it was one of the duties of Farrell to look after this walk, and this was excluded. The avowed purpose was to show the reason for his making the examination. If it was his duty to make it, that fact bears upon the probability of his having done so. The jury would have a right to infer that it was probable he did make it if that duty was imposed upon him. It is always proper to show reasons and opportunities for such examinations.

We are not prepared to say that the last two errors alone were so prejudicial as to justify a reversal of the case. We decide them, inasmuch as the questions may arise upon a new trial. We find no other errors.

Judgment reversed, and new trial ordered.

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

SEAMAN v. CITY OF MARSHALL.

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1. MUNICIPAL CORPORATIONS — SEWERS — NEGLIGENCE — FLOODING PRIVATE PREMISES.

A city is bound to use due caution in establishing a system of drainage; and if, through its negligence in not providing reasonably efficient means to carry off the water that it should reasonably expect to accumulate by reason of its gutters, water is collected and cast upon premises which otherwise would not have been invaded, the city is liable for the resulting damages.

2. SAME—SUFFICIENCY OF DECLARATION.

A declaration, in an action against a city, which alleges the ownership by the city of gutters and sewers, its duty to keep them open and clear, and not to permit them to become dammed, or the flow of the water through them to be impeded in any way, and charges that the city negligently permitted and allowed to remain in the gutters and sewers of a certain street divers impediments, by reason of which, and of the improper construction of said gutters and sewers, the water became dammed up until it overflowed the gutter, and ran down upon and injured plaintiff's property,—is sufficient to sustain a verdict for negligence in not removing obstructions, or in constructing a sewer inadequate for the exigencies of ordinary floods.

Error to Calhoun; Smith, J. Submitted February 3, 1898. Decided March 15, 1898.

Case by Frank G. Seaman against the city of Marshall for the negligent flooding of his store building. From a judgment for plaintiff, defendant brings error. Affirmed.

Richard S. Lockton, for appellant.

Herbert E. Winsor, for appellee.

HOOKER, J. State and Mansion streets, in the city of Marshall, are parallel streets, running east and west. Plaintiff's store fronts the former. Division street intersects, but does not cross, Mansion, from the north. Near the intersection of the east side of Division and the north side of Mansion there is a catch-basin, into which 12-inch tile drains enter from the north, upon both sides of Division street, and from the east upon the north side of Mansion street. There is also a 10-inch tile drain which enters from the west upon the north side of Mansion street. Whether these are more than surface drains does not appear, and it is not material to this opinion. A brick sewer 2 feet in diameter extends south across Mansion street, where there is another catch-basin, and thence eastward along the south side of Mansion street. An 8-inch tile drain enters this last-mentioned catch-basin, coming from the west a distance of about 10 rods, where it receives the water from an open street gutter. The plaintiff's store is in the vicinity of the junction of the tile and open gutter, and is on low ground, which is drained by a catch-basin connecting with the main sewer. In July a heavy storm occurred, during which the 8-inch tile failed to carry off the water, which accumulated in and overflowed the open gutter, street, and sidewalk, and ran down the alley towards the plaintiff's store. In the morning he found 3 feet of water in his basement, and sued for and recovered a judgment against the city for injuries to his property contained in the basement. The defendant has brought the case to this court by writ of error.

The declaration alleges the ownership by the city of gutters and sewers, its duty to keep them open and clear, and

not to permit the gutters and sewers to become dammed, or the water to be impeded in any way from flowing freely down and through said gutters and sewers, and that it negligently permitted and allowed to remain in said gutters and sewers of said Mansion street divers impediments, and by reason of such impediments, and the improper construction of said gutters and sewers, the water became dammed up and held back until it overflowed the sides and top of the gutter, and ran down upon and injured plaintiff's property.

There was evidence in the case that this was originally an open gutter to the catch-basin, but that some years ago the 10 rods of 8-inch tile was laid by direction of the common council, and that the gutter had satisfactorily disposed of the water theretofore. Several witnesses stated that their opinions were that the tile was inadequate, and that it was frequently stopped up by rubbish at its upper end. There was evidence tending to show that the open gutter served as the outlet of water which fell upon several blocks. The principal contention of counsel for the defendant is that the injury resulted from the inadequacy of the 8-inch tile or main sewer, and not from any defect in the construction; that the direction of the construction of this tile drain was a legislative act; and that the city is not liable for the failure of the council to plan such a sewer as should protect the plaintiff from all injury. It is insisted that the uncontradicted testimony establishes the fact that the accumulation of water was due merely to the inadequacy of the sewer—possibly the 8-inch tile, but probably the 2-foot sewer—to take care of the flood which was occasioned by the violent storm, and that there was no evidence to support the allegation of impediments in the drain, or to justify a recovery for injuries resulting from the inadequacy of the sewer, if it should be held that a recovery can be had in such a case.

We are of the opinion that there may be a right of action where an injury results from a sewer, although built with all due care, and in strict conformity to the plan

adopted by the council. Such liability is recognized where it is permitted to collect water and discharge it upon the lands of a private person, as said in *Defer* v. *City of Detroit*, 67 Mich. 346, where this subject is considered, or, as held in *Rice* v. *City of Flint*, Id. 401, where it backs up a drain and floods a cellar. See, also, *Ashley* v. *City of Port Huron*, 35 Mich. 301 (24 Am. Rep. 552). This subject is elaborately discussed in 2 Dill. Mun. Corp. § 1042 *et seq.*

Upon the uncontradicted testimony, we are able to say that the city of Marshall caused an accumulation of water that would not have occurred but for its street gutters, and that by reason of the inadequacy of the outlet, or its stoppage, this water overflowed the gutter upon plaintiff's premises, to his injury. There is no doubt of the authority of the city to establish a system of drainage for the benefit of the highway and the citizens, and it cannot be said that it must be sufficient for every possible emergency. But the city is required to use due caution, and if, through its negligence in not providing reasonably efficacious means to take care of the water that it should reasonably expect to accumulate by reason of its gutters, a person is injured by the overflow upon his premises of water collected by the sewers, and brought to such premises, and which would not otherwise have invaded them, the city is liable for the damages. While we are able to say that the court might have properly charged the jury that the plaintiff was injured by water the bringing of which to that point was chargeable to the defendant's act, and that he was injured to the amount found by the jury, it was for the jury to determine whether the defendant was guilty of negligence in the premises, thereby causing the injury. Whether such negligence was declared upon is a question for the court.

There was evidence tending to show that the accumulation was due to one or more of several causes, viz., the inadequacy of the main outlet, the insufficient size of the 8-inch tile, stoppage of the same by rubbish, and, lastly,

the extraordinary character of the storm and quantity of water by which the city was deluged. The declaration was sufficient to sustain a verdict for negligence in not removing obstructions, or for constructing a gutter which it should have known, or have reasonably expected, would bring water to the point in controversy faster than the means provided could reasonably be expected to take care of it, under conditions reasonably to be anticipated, whether by reason of the inadequacy of the 8-inch tile or that of the 2-foot brick sewer. The declaration was not demurred to, and its allegations that the drain was negligently constructed, and negligently allowed to become clogged, which it says in substance, should be held sufficient. It was also for the jury to determine whether the flood was of such an unusual character that it was not negligence in the city to fail to anticipate and provide against such, and, if they found it due to obstructions, whether reasonable diligence had not been used in the matter of their removal, although, under the circumstances, inadequate, which questions could not be tested by the result alone. The jury were instructed that:

"If you find as a fact that that portion of Mansion street from the Jefferson-street manhole to the west side of the 'Cook Property,' so called, was so defective in construction as not to take care of the water under ordinary conditions, and by reason thereof the water which fell upon said highway and the adjoining highways of the city and near to this locality was dammed up and held back by reason of such defective construction, so that it was forced over and upon the property of the plaintiff, then the city is liable for the damage done, provided the plaintiff was free from negligence, and the city had knowledge or notice of such defective construction of the highway, and, after such knowledge or notice, had a reasonable time to repair it; and notice or knowledge by the officers of the city would be knowledge or notice to the city. The city of Marshall is a municipality, hence exercises control and ownership of its streets and highways, and is bound to keep them and all parts thereof in reasonable repair, and must use them so that no one, in person or property, may be injured by reason of the negligence of the city to

keep them in repair; and I instruct you, if you find as a fact that any injury was caused to the property of the plaintiff by reason of the negligent acts or negligent want of action of the city authorities after they became aware of the defects, or had notice thereof, and water was forced over and into the cellar of the plaintiff on account of such defects in the highway of the defendant, then the city is liable for such damages as have been proven in the case. The defendant—that is, the city—has the right to determine what part of Mansion street should be devoted to the various purposes of travel or passage, and what part for sidewalks, trees, and gutters, and other suitable uses, and upon such subject the municipal discretion must prevail, and is beyond judicial review, unless some distinct legal duty has been imposed and violated; but if the city, in constructing its streets, so arranges or elevates the same that the water accumulates in large quantities on any part thereof, then it is the duty of the city to so construct such streets that the water accumulating there under ordinary circumstances will be taken care of, and not held back so that the water will overflow the street, and injure the property of any one by reason of such overflow.

"You see, gentlemen, there may be two questions for you to consider: *First*, has the defendant been negligent in the care of its street where the injury complained of is alleged to have been occasioned? and you determine that from the evidence in the case, and under the law as I have given it to you. If, from the evidence in the case, you shall find that the sewerage system of the city pertaining to Mansion street and its immediate connections took care of the water or rainfall under ordinary conditions, then the city would not be liable. In other words, the city cannot be held liable for extraordinary conditions; that is, conditions which cannot be anticipated by ordinary care and foresight, and guarded against. Nor would the city be liable for the damage, if any such occurred, from surface water coming into the cellar, if any such did come in, from other ways or sources other than from Mansion street on account of the alleged negligent act of the city in the construction of the sewer complained of. In other words, if the city is liable at all, it must be for its negligent act occurring from the negligence alleged against it; that is, the defective construction of Mansion street from the Jefferson-street manhole to the west side of the 'Cook property,' so called. If upon this first question you shall find the city not guilty of the negligence

urged against it,—or, in other words, not liable for the damage done,—then that would end the case, and your verdict will be, 'No cause of action.' On the other hand, if you shall find the city liable on account of its negligent acts, then you will take up the question of damages."

In substance, the jury were told that, if the defendant caused water to accumulate there, and flow upon the plaintiff's land, it would be liable for the consequences of its failure to provide for the exigencies of ordinary floods, and that otherwise it would not. This comprehended the entire question of negligence, and, as the other essentials were conclusively established, it was sufficient. The requests to charge were sufficiently covered, and the instruction was as favorable as the defendant had a right to expect.

The judgment is affirmed.

The other Justices concurred.

PENINSULAR TRUST CO. *v.* BARKER. 116 333
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1. WILLS—TESTAMENTARY CAPACITY.
   One has sufficient capacity to make a will where he understands the business in which he is engaged, and the extent and value of his property, and knows who are his relatives, and who would be his heirs at law if no will were made

2. SAME—DELUSIONS.
   That a testator was subject to certain delusions does not invalidate his will if they did not dictate its provisions.

3. SAME—UNDUE INFLUENCE—EVIDENCE.
   Upon a review of the evidence on the contest of a will, *held*, that there was nothing to go to the jury upon the question either of mental incompetency or of undue influence.

Error to Kent; Adsit, J. Submitted February 3, 1898. Decided March 15, 1898.

The Peninsular Trust Company presented for probate the will of George M. Barker, deceased, which was duly allowed by the probate court. Silas Barker and Imogene Chappell appealed to the circuit. From a judgment for contestants, proponent brings error. Reversed.

Taggart, Knappen & Denison, for appellant.

Maher & Salsbury, for appellees.

LONG, J. October 13, 1890, George M. Barker made and executed his last will and testament, by which $9,000 was divided among certain church benevolences, $500 given to each of two of his own relatives, including his brother, and $500 each to two of his wife's relatives, and small bequests to others, the residue of his estate being given to the Michigan Association of the Church of the New Jerusalem. This will was duly probated, and, on appeal to the circuit court, the jury found in favor of the contestants, who are the nephew and niece of deceased.

It appears that the testator was married in 1839. He and his wife lived together until 1889, when Mrs. Barker died. No children were born to them. During these years the parties had accumulated considerable property, though poor at the time of their marriage. In 1845 Mr. Barker purchased 40 acres of land, which is now within the corporate limits of the city of Grand Rapids. It was the rapid increase in the value of this land which brought the property of which Mr. Barker died seised. He and his wife were members of the "New" or "Swedenborgian" Church, to which they were in the habit of making regular contributions. Some time prior to 1870 they made a special contribution of $1,000 for the support of the church educational institutions. Mrs. Barker's health had not been good for many years, she being practically helpless, requiring the constant attendance of her husband, which he gave her. In 1876 she was regarded as seriously ill. At this time she was desirous that a portion of the property possessed by them should be given for the

benefit of the church educational institutions. Her husband was apparently equally interested in this benevolence. In order that the gift might be made in his wife's name, he, on July 1, 1876, conveyed to her practically one-half of his property (himself drafting the deed), for the sole purpose of carrying out their mutual plan of devoting the property to church purposes. They were especially at this time interested in Urbana (Ohio) University. On the same day that the conveyance was made by Mr. Barker to his wife, he wrote the president of the university as follows:

"The health of my wife is gradually failing, and she will probably leave this world at no very distant day. She has property, real estate, in her own right, which, in my judgment, is worth, at a moderate calculation, ten or twelve thousand dollars, which she intends to bequeath to the New Church, to apply towards some of their many uses. She would like very much to help the university, but wants first to see that young women have the same privilege there that men have. Now, will you be so kind as to inform us whether, in your opinion, we have any reason to expect anything of the kind," etc.

The president of the university, Mr. Sewall, replied to this letter on July 5th; and, on receiving this reply, Mr. Barker drew his wife's will, giving to the trustees of Urbana University all the lands so conveyed to her by him, and appointing the president of that university executor of the will. On July 21st following, Mr. Barker wrote the president of the university again, saying:

"Yours of the 5th inst. was duly received, and the statements concerning the desires and intentions of the trustees of Urbana University with regard to granting to females equal privileges with males are quite satisfactory," etc.

On January 29, 1878, Mrs. Barker added a codicil to her will, giving the life use of this property to her husband. Before her death, she and her husband made direct conveyance of two lots to the university. At the time of Mrs. Barker's death, her husband had practically

used up the whole of his own property in the care of his wife and their joint support. Mrs. Barker's will was presented for probate by the university. The heirs of Mrs. Barker contested the probate of the will, and prevailed by reason of the failure to prove by the witnesses thereto that the will was signed by Mrs. Barker in their presence and in the presence of each other. The setting aside of this will left the title of one-half of the real estate in Mr. Barker, the remaining one-half being vested in seven heirs at law of Mrs. Barker. Four of these heirs released their interest to Mr. Barker, but the three others refused to do so. In October, 1890, Mr. Barker filed his bill in the Kent county circuit, in chancery, against these three heirs, asking to have the deed from him to his wife set aside on the ground of total failure of consideration through the noneffectiveness of the will. The court entered a decree adjudging that, by reason of the failure to probate Mrs. Barker's will, the consideration for the deed had wholly failed, and decreeing that the deed be canceled and held for naught. The case was removed to this court, and that decree affirmed. *Barker* v. *Smith*, 92 Mich. 336. After the decision denying the probate of his wife's will, and just prior to the time of filing the bill to set aside the deed given to his wife, Mr. Barker drafted with his own hand a form of will. From this the present will was drawn by his attorney.

On the trial below, the claim of the contestants was that the will was executed under undue influence, and that the testator had no sufficient mental capacity to execute a will. A large amount of testimony was given upon the trial, which we have carefully examined. The proponent of the will asked the court to charge the jury that there was no evidence of undue influence. This the court refused, and submitted the question to the jury. We are satisfied from an examination of the record that the court erred in this refusal to so charge. It appears from the record that it was the intention of Mr. and Mrs. Barker for many years to give the bulk of their property

to these benevolent purposes; that Mr. Barker had in mind, when he deeded this property to his wife, that the gift should be made in her name, as is seen from the letters written to the president of the university at Urbana. After her death, he was willing that her will should be carried into effect; but her heirs contested the probate, and, after the will was defeated, he immediately took steps to have the deed set aside which he had given his wife, bringing the estate back into his own hands; and even before that was accomplished, and evidently in anticipation of such action, he made the will in controversy. It is true that in 1893 he made a codicil to the will, by which he revoked the $500 bequests to the four persons named; but he gave his reasons therefor by saying that he intended in his lifetime to give these persons such property or money as he should deem right, and that in some cases he had already done so.

Upon the question of mental incompetency, the court was asked to instruct the jury:

"6. There is no evidence in the case of any mental unsoundness or of any undue influence operating upon the mind of Mr. Barker at the time of the execution of the original will of October 13, 1890; and such will must therefore be admitted to probate, and must stand as so drawn, except as the same may be changed by one or more of such codicils thereto, in case the jury so find one or more of such codicils duly established."

It appears that Mr. Barker had charge of his property up to July 12, 1894, when he made a power of attorney to the Peninsular Trust Company, to take charge of and manage it. In 1886 he made several conveyances of the real estate. He also made six conveyances in 1888, one in 1890, four in 1891, five in 1892, ten in 1893, six in 1894, and one in 1895, the year of his death. The will was made in 1890. The testimony is overwhelming that he managed the property with good judgment and discretion. Yet it is contended that he had insane delusions; that he on many occasions claimed to have been guided

by his departed wife; that these delusions and other acts of his are evidences of senile dementia.

"17. If the jury find that Mr. Barker had sufficient mental capacity at the time of making his will, or at the time of making either or both of the codicils, to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep those facts in his mind long enough to dictate his will without prompting from others, he had sufficient capacity to make a will. If he had sufficient mind to clearly discern the nature and extent of his property, and the objects of his bounty, and the scope and provisions of the will, he was mentally competent to make it."

"23. It is established by the undisputed evidence that, at the time of making this will, Mr. Barker did understand the business in which he was engaged, and did know and understand the extent and value of his property, and did know who were his relatives, and who would be his heirs at law if no will were made."

These requests should have been given, for the evidence in the case clearly shows, and without contradiction, that Mr. Barker clearly comprehended the nature and extent of his property and his own business, and who were his relatives and his heirs at law. He had at that time the sole management of his property, had commenced litigation to recover the title, and apparently for the very purpose of making a will for the benefit of the New Church, to carry out the understanding which he and his wife had that the property should be so devoted after his own death. If it were established that the testator was subject to certain delusions, the existence of such delusions would not vitiate the will so long as they did not dictate its provisions. As was said in *Fraser* v. *Jennison*, 42 Mich. 231:

"It is not an uncommon impression that a will must be set aside whenever the existence of any mental disorder at the time of its execution is established. That this is not the law is apparent from the fact that the testamentary dispositions of monomaniacs are often sustained in spite of the mental disorder. When the monomania is con-

ceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test."

See cases cited in support of this rule.

Counsel also asked the court to charge the jury:

"There is no evidence in the case that Mr. Barker was affected by religious monomania at the time of making the will in question."

This request should have been given. From an examination of the record we are unable to find any evidence that Mr. Barker was influenced in making this will by any monomania, but, rather, that it was made under a long-settled purpose to dispose of his property for the benefit of the New Church.

The court should have directed the verdict in favor of the proponent, and was in error in refusing a new trial.

The judgment below must be reversed, and a new trial ordered.

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

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BREITENWISCHER *v.* CLOUGH.

1. APPEAL—RETRIAL—CONCLUSIVENESS OF PRIOR DECISION.
   Where the court, upon reversing a judgment, rules adversely to the appellant on some of his assignments of error, the questions raised by such assignments are not open for consideration on a second appeal.[1]

2. REPLEVIN—DEFENSES—CHANGE OF THEORY.
   A defense pleaded upon the retrial of a suit in replevin, that defendant's father deeded to plaintiff a farm leased to defendant, in consideration of an agreement that defendant should be allowed to raise thereon a crop of wheat, a portion of which was replevied by plaintiff, is substantially the same as a defense decided on a former appeal to be permissible, that the deed was in consideration of an agreement that the grantor should be allowed to raise the wheat, which agreement inured to defendant's benefit,—and the same rule of law is applicable to both.

3. SAME—EVIDENCE.
   The fact that plaintiff bases his right to the wheat replevied upon a cropping agreement between defendant and himself, the making of which is denied by defendant, does not render inadmissible evidence of the arrangement between plaintiff and defendant's father, since such evidence tends to throw light upon the transaction, and to corroborate defendant's denial.

4. SAME—BREACH OF CONTRACT—REMEDY.
   Even if it were admitted that both bargains were made, it would be competent to show that defendant did not perform one, and did put in the wheat by consent of his father under the other; in which case plaintiff's remedy would be an action for damages for not raising wheat under his contract, not replevin for the wheat raised under a valid contract with another.

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[1] The numerous and not altogether harmonious authorities on the conclusiveness of prior decisions upon subsequent appeals are analyzed and discussed in a note to *Hastings* v. *Foxworthy*, (Neb.) 34 L. R. A. 321.

5. WITNESSES—IMPEACHMENT—TESTIMONY ON FORMER TRIAL.
A witness cannot be impeached by introducing a bill of exceptions containing a statement of his testimony on a former trial, unless the correctness of the transcript is established; the usual method being to call the stenographer, and prove the statements made upon his oath.

Error to Washtenaw; Kinne, J. Submitted February 3, 1898. Decided March 15, 1898.

Replevin by Henry Breitenwischer against Elmer Clough. From a judgment for defendant, plaintiff brings error. Affirmed.

A. F. & F. M. Freeman, for appellant.

Thomas D. Kearney and *Thomas A. Bogle*, for appellee.

HOOKER, J. This cause has been before us on a former occasion upon a writ of error issued at the instance of the plaintiff. 111 Mich. 6. On that occasion we held that it was competent for the defendant to offer to show a certain defense, viz., that, when defendant's father deeded the place to the plaintiff, the consideration was an agreement that the grantor should be allowed to grow 20 or 25 acres of wheat upon the premises, and that this inured to the defendant's benefit. Upon the last trial the plaintiff was careful, in stating his case to the jury, to base his right to the wheat which he had replevied upon a bargain made between himself and the defendant, by which the latter was to raise a crop on shares, one-third to go to the plaintiff; and he says that he relied on no other claim. Thereupon the defendant's counsel stated the defense, in the course of which he said that the defendant's father, owning the farm, leased it to the defendant for a year in May, 1893, and that he afterwards deeded to the plaintiff, in consideration of an agreement that the defendant should be allowed to raise 20 or 25 acres of wheat, and that in reliance upon this arrangement, and by consent of his

father, the defendant sowed and harvested the wheat in question, of which plaintiff replevied one-third in this action. An objection to the introduction of any testimony tending to prove this statement was overruled, and this is one of the errors assigned. Counsel assert that this is not a statement of the same defense that was passed upon in our former opinion. They also claim that the question decided was not raised by the former record. If they are right in the former, it is unnecessary to discuss the latter, question; but we think the defense stated is substantially the same, though technically it was not, because upon one record the statement was that the contract was that Clough should have the right to raise wheat, which accrued to the son, while in the other it was that the son should be allowed to raise the wheat. The same rule of law is applicable to both statements. In replevin a defendant may show any state of facts which controverts the plaintiff's right of possession, and he is not precluded from showing circumstances consistent with his own or another's title by a claim of title on the part of plaintiff, disproval of which would be a complete defense, thus reducing the trial to a single issue of his own selection, although the pleadings do not thus restrict it.

We are of the opinion that counsel have misconceived the other case. They alleged two errors,—one that, although the trial court excluded the proposed testimony, it was error to permit the defendant to state to the jury what he proposed to prove upon that subject. The court, as is its custom where a question is sure to arise upon a second trial, discussed and determined it. The question was raised by the assignments of error, and would have reversed the case had we taken plaintiff's view of it. As it was, the case turned on the question of demand. Our former opinion has settled the principle applicable to this case.

If it be conceded that, notwithstanding the agreement between plaintiff and the father, a valid contract for cropping might be made between the plaintiff and the defend-

ant, thereby admitting that the former is not necessarily a defense to the plaintiff's claim, this testimony throws light upon the transaction, and tends to corroborate the defendant's denial. Even if it be admitted that both bargains were made, it would be competent to show that the son did not perform one, and did put in the wheat by consent of his father under the other. In such case the plaintiff's remedy would be an action for damages for not raising wheat under his contract, not a replevin of the wheat actually raised under a different and valid contract with another. The right to show that this wheat was thus raised is not lessened by the fact that the defendant does not admit the making of the two contracts, and denies the bargain stated by the plaintiff.

The fourth request was given in substance, which we have frequently said dispenses with the necessity of giving specific requests.

Counsel urge that the only agreement proved was, not that plaintiff would allow the father of defendant to raise wheat, but the son. We think this would not alter the rights of the son, if, by consent of his father, he raised this wheat. It was none the less his wheat, and none the more the wheat of the plaintiff.

We must decline to again discuss the question of the alleged variation of the deed by parol, as it was covered and settled upon the former hearing.

Counsel sought to impeach a witness by introducing the former bill of exceptions containing a statement of his testimony. This was clearly inadmissible, as it had not the sanction of an oath. It is usual to call the stenographer, and prove the statements made upon his oath.

The judgment is affirmed.

The other Justices concurred.

NEELY *v.* FLUMERFELT.

PARTNERSHIP—PAYMENT OF INDIVIDUAL DEBT WITH FIRM ASSETS —APPEAL.

In an action to recover for goods alleged to have been furnished to defendant by plaintiffs as copartners, in which defendant denied the existence of the partnership, and claimed that the goods were received from one of the plaintiffs in payment of a debt due from him, but further contended that, if such partnership did exist, defendant was ignorant of the fact, and that the other plaintiff knew of and assented to the arrangement under which the goods were furnished, a judgment for defendant, based upon a verdict rendered under full and fair instructions as to the law applicable to the case, was affirmed.

Error to Oakland; Smith, J. Submitted February 3, 1898. Decided March 15, 1898.

Assumpsit by John Neely and Thomas Neely against George Flumerfelt for goods sold and delivered. From a judgment for defendant, plaintiffs bring error. Affirmed.

Davis & Bromley, for appellants.

A. & S. H. Perry, for appellee.

MOORE, J. Plaintiffs sued defendant to recover pay for flour and feed, valued at $23.61, furnished to him between May 2, 1896, and January 5, 1897. Judgment was rendered in favor of defendant in justice's court, and upon appeal to the circuit court was also rendered in his favor. Plaintiffs bring the case here by writ of error.

It is plaintiffs' claim that April 7, 1896, they formed a partnership to do a milling business at Rochester, Mich., and that during the existence of the partnership the flour and feed were furnished to defendant. It was the claim of defendant that there was in fact no partnership during

the time these items were furnished, but that the business was that of John Neely, who had prior to that date, and for several years, conducted the business, with the exception of a short time in 1895, when Mr. Curry and John Neely were partners.

The defendant, in 1894, left at the mill, while John Neely was doing business alone, about 300 bushels of wheat, with the agreement that, at any time Mr. Flumerfelt wanted to sell it, he should be paid within four cents of the Detroit price. One hundred bushels of the wheat were sold and paid for. The balance was never sold, and it is the claim of the defendant that it was also agreed he could draw flour and feed for himself and man, on the wheat, and that all the flour and feed were furnished him under the agreement, and that he had no knowledge that Thomas Neely claimed to be a partner in the business until after all the flour and feed were furnished him. It is also claimed that if, between themselves, Thomas and John were partners, Thomas was a secret partner, and the partnership was wrongfully concealed from the defendant. It is also claimed that Thomas Neely knew of the agreement existing between John Neely and the defendant about the furnishing of the flour and feed, and assented thereto.

A good many errors are assigned,—as to the admission of testimony, to the refusal of the trial court to give certain of plaintiffs' requests to charge, and to the charge as given. There was no error in relation to the admission of testimony. The questions of law applicable to the case were fairly, and at length, given to the jury. *Dob* v. *Halsey*, 8 Am. Dec. 293 (16 Johns. 34), and note; *Locke* v. *Lewis*, 124 Mass. 1 (26 Am. Rep. 631); *Rogers* v. *Batchelor*, 12 Pet. 231. A careful examination of the record and briefs, and the cases cited therein, satisfies us that none of the errors are well taken. We do not deem it necessary to discuss them in detail.

Judgment is affirmed.

The other Justices concurred.

DOWLING *v.* DOWLING.

1. HUSBAND AND WIFE—COMPETENCY AS WITNESSES.
   In a suit by a wife against her husband, the wife is competent, to testify, under 3 How. Stat. § 7546, without his consent, in relation to a business transaction between them which is the subject-matter of the suit.

2. SAME—EARNINGS OF WIFE.
   It is competent for a husband and wife to agree that the wife's earnings shall be her individual property.

Error to Wayne; McMahon, J., presiding. Submitted February 3, 1898. Decided March 15, 1898.

Assumpsit by Caroline C. Dowling against Charles F. Dowling for money had and received. From a judgment for plaintiff, defendant brings error. Affirmed.

James H. Pound, for appellant.

Grove Campbell, for appellee.

MONTGOMERY, J. Plaintiff and defendant are husband and wife. The plaintiff brought this action to recover the sum of $350 and interest, and gave testimony tending to show that she loaned the amount to defendant shortly after her marriage to him. Defendant admits that he received of her $263, but denies having received more, and also denies that the money was a loan, but testifies that the money was placed in a common fund with money of defendant, which was used by him in the meat business. The defendant also claims a set-off. It appears that, after engaging for a time in the meat business, that undertaking proved a failure, and the plaintiff and defendant engaged to work at farm work, and later worked in the Illinois Insane Asylum for wages; that out of these wages a sum ($300 as defendant claims; $200 as plaintiff

concedes) was loaned to plaintiff's brother-in-law, one Gustave Schufte, and that it is now held by him (Schufte) payable to plaintiff. Plaintiff testifies that, when the two engaged at service, it was understood between them that she should receive her earnings, and that the money loaned to Schufte was her money.

The record contains a large number of assignments of error, but we find it wholly unnecessary to discuss any considerable number of them. It is settled that the wife may testify in relation to business transactions with her husband. Indeed, the statute (3 How. Stat. § 7546) scarcely needs interpretation. But, if it does, it has been construed in *Hunt* v. *Eaton*, 55 Mich. 362. It is also settled that the husband may agree that the earnings of the wife may be her individual property. *Mason* v. *Dunbar*, 43 Mich. 407 (38 Am. Rep. 201).

The learned circuit judge, in his charge, covered fairly every aspect of the case. He charged, in substance, that, if there was a contract between the parties to consider the advance made by plaintiff to defendant a loan, it should be so treated, and that this might be gathered from the situation and circumstances and what the parties said; but if, on the other hand, the plaintiff simply contributed the money to assist defendant, without any understanding that it should be repaid, or with the understanding that she went into the business taking the risks and consequences which might ensue, and the money was lost in the business, she could not recover. As to plaintiff's earnings, the court charged that ordinarily the husband is entitled to the wife's earnings, but that it is competent for the parties to agree that the wife should have her earnings, and that, "if the husband so consented, the earnings would belong to her, but, if he did not consent to it, he has a right to her earnings,—her earnings are his property." The court left it for the jury to say whether the money loaned to Schufte belonged to plaintiff or defendant, and charged that, if the money belonged to defendant, and was loaned to Schufte in such a way that defendant can-

not get it, and that it is payable to plaintiff, it constitutes a set-off, and that the jury would have a right to reduce plaintiff's claim by the amount. These directions fairly present the issue.

We discover no error in the record, and the judgment will be affirmed.

The other Justices concurred.

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GOODMAN *v.* FELCHER.

STATUTE OF FRAUDS—PROMISE TO PAY ANOTHER'S DEBT—HUSBAND AND WIFE.

A wife is not liable upon a parol promise to pay for supplies previously furnished to a boat owned by her husband, upon which she held a mortgage, although she knew, at the time of making such promise, that the claim for such supplies was a lien upon the boat, and although the creditor thereafter took no steps to enforce a lien, where there was no express agreement that the lien should be released, and the creditor did not know of the wife's interest in the boat.

Error to Saginaw; Snow, J. Submitted February 3, 1898. Decided March 15, 1898.

Assumpsit by William E. Goodman and John F. Winkler against Rebecca L. Felcher for goods sold and delivered. From a judgment for plaintiffs, defendant brings error. Reversed.

Trask & Smith, for appellant.

Chauncey H. Gage, for appellees.

MOORE, J. The plaintiffs sued defendant in justice's court, declaring on all the common counts in *assumpsit*, and specially for goods sold and delivered. Plaintiffs

recovered a judgment for $31.26. The case was appealed to the circuit court, where, after a jury trial, judgment was rendered in favor of plaintiffs for the same amount, with costs. Defendant brings the case here by writ of error.

In August, 1895, the plaintiffs sold to the steamer Periwinkle a bill of coal amounting to $28.77. It seems to be conceded that the owner of the steamer at this time was Mr. Felcher, the husband of the defendant. The plaintiffs' claim that defendant is liable is based upon the testimony of their collector, Mr. Hay, and the testimony of Mr. Goodman. Mr. Hay testified:

"After the coal was delivered, I went to the house of Mrs. Felcher for the pay, and saw Mrs. Felcher there.

"*Q.* What statement did she make to you regarding it?

"*A.* The first time I went there she said Mr. Felcher was not there; he had been away. I think that was the day, to the best of my knowledge and belief. Then the next time that I called she said not to be bothering all the time, she was good for it, and she would see the bill satisfied; and I went down and told Mr. Goodman what she said.

"*Q.* What did you then do in reference to making out a bill to her?

"*A.* Why, simply called upon her for the money. She had promised to pay it.

"*Q.* What did she say in regard to it?

"*A.* She said she had not got the money; she was expecting to get some, but did not get it. And that was her excuse from time to time. I cannot say how many times I called to get it; a great many times, I guess. She acknowledged she would pay it all the time until the last time, after the house was burned there, and I went there, and told her, I says, 'Mrs. Felcher, you had better take and settle this thing up;' and I says: 'You had better be wise about it. You promised to pay it.' And she says, 'I didn't promise anything of the kind.'

"*Q.* She stated to you what in regard to the claim being against the Periwinkle or Felcher?

"*A.* She said not to bother Mr. Felcher at all; she would see it paid.

"*Q.* As I understand you, she promised to pay it several different times?

"*A.* Yes, sir.

"(Cross-examination.) *Q.* The first time you went to see her, what did she say to you, and what did you say to her?

"*A.* I asked Mrs. Felcher if Mr. Felcher was in, and she said 'No,' that he wasn't there, and asked me what my business was, and I gave her the bill, and she said Mr. Felcher was away. So I didn't want to say too much that time. That is all that occurred the first time, as near as I can recollect. I did not show her the same bill we have here, but took her a dozen bills. They stated the amount, but can't say any of them gave the items. They were all made out to the steamer Periwinkle. They stated the amount, and she knew about the coal.

"*Q.* The second time you went there, tell us what she said.

"*A.* She said not to come over there bothering all the time; she would see the bill paid herself.

"*Q.* Is that about all she said?

"*A.* That is about all that was necessary.

"*Q.* Can you recollect any other conversation you had with her?

"*A.* No, not that I recollect. I might have passed the time of day, or talked a little the way collectors generally do. I can't say.

"*Q.* You have told us substantially all that was said?

"*A.* Well, all that I can recollect.

"*Q.* That is, not to keep bothering all the time, and she would see it was paid?

"*A.* Yes, that's the idea exactly."

William E. Goodman testified as follows:

"I am one of the plaintiffs, and am acquainted with the defendant. I remember some coal that was delivered to the steamer Periwinkle. I remember when Mr. Hay returned from defendant's and told me with regard to his conversation with her, and her agreement to pay the bill. I afterwards saw Mrs. Felcher.

"*Q.* What did she say to you in regard to coal bill?

"*A.* She came into our office, and wanted me to take some hay. She said she did not want me to take the pay for the coal out of the hay, because she wanted to use that money. She said she would pay the bill.

"*Q.* Upon being informed that Mrs. Felcher would pay the bill, what did you do in reference to putting in a claim against the steamer Periwinkle, so far as you were concerned?

"*A.* We made no claim after that against the boat. We paid no further attention to the boat at all, expecting that Mrs. Felcher would pay the bill. We took no further action to collect the claim against the steamer Periwinkle after she promised to pay it.

"*Q.* State whether the firm of Goodman & Winkler, after the time Mr. Hay returned, and informed you of the interview he had there with Mrs. Felcher, looked to the steamer Periwinkle for your pay for the coal?

"*A.* No, sir. We never, after this, looked to the steamer Periwinkle for our pay.

"*Q.* Why not? State why you didn't. (Counsel for defendant objected to giving his reason unless such reason was communicated to defendant, but the court overruled the objection, and counsel for defendant duly excepted.)

"*A.* From that time on we looked to Mrs. Felcher. We did not look to the boat any more. We relied on Mrs. Felcher's promise. I cannot recall that Mrs. Felcher ever spoke to me but once about the bill, and that was when she wanted me to buy the hay, in 1896. Mr. Hay is our collector, and is authorized to make arrangements in regard to our bills.

"(Cross-examination.) *Q.* After your collector, Mr. Hay, returned, and said Mrs. Felcher had said not to bother her any more, that she would see that the bill was paid, you mean after that you looked to her?

"*A.* Yes, sir.

"*Q.* And the only other time that you have any personal knowledge of was, you say, at the time she tried to sell you some hay, and said she would pay the bill, but she didn't want it taken out of the hay?

"*A.* Yes, sir. I think George P. Felcher, or Stewart, ordered the coal."

Mrs. Felcher denied that she made any promise to pay the bill, but admitted that she knew that a claim for coal could be enforced as a lien against the boat. It was shown on the trial that, at the time the bill was made, the firm of A. W. Wright & Co. had a first mortgage on the boat, and the defendant had a second mortgage.

The trial judge, among other things, charged the jury as follows:

"If you find from the evidence in this case that the defendant had a mortgage on this boat in question at the time she had the conversation with the plaintiffs or their agent, and that she knew that the claim that the plaintiffs presented at her house for payment, inquiring for her husband, was in the nature of a lien upon the boat upon which she had a mortgage, and that she promised to pay the debt, believing at the time, from her knowledge of the manner in which boats are conducted, and the manner in which liens are obtained for supplies furnished boats, —knowing at the time, I say, and believing what she did there, that the lien that was upon that boat for the supplies was released, and would be released from that time on, and that she alone would be held for the payment of that debt, then the plaintiffs would be entitled to recover. But, on the other hand, if what she said to the plaintiffs or their agent, at the time she said it, had no reference, in her own mind, to the lien that was created upon this boat, nor no thought of its being discharged upon her promise to pay the debt, then she would not be liable, because it would not be an original promise, as there would be no benefit accruing to her, or that might accrue to her, for the promise to pay the debt. The defendant disputes this. The defense claim that they never at any time promised to pay this debt, neither to the agent nor the plaintiffs; absolutely and emphatically deny it. Now, before you can, in any circumstances in the case, render a verdict against the defendant, you must believe from the preponderance of evidence in the case that the defendant did make that promise under the circumstances which I have explained to you, understanding at the time and believing that the lien was released, and that she alone would be held thereafter for the debt. You must also find that the plaintiffs did release the lien, and that it was released immediately upon her promise to pay the debt; not at some subsequent time, but at the time she made the promise."

This portion of the charge, it is said, is error, for the reason that there is no testimony to base it upon. A careful perusal of the record does not disclose that, at the time of the conversation with Mr. Hay, either he or the plaintiffs knew of the existence of defendant's mortgage. While the record does show that, after Mr. Hay disclosed to the plaintiffs his conversation with defendant, they

looked to her, and not to the boat, for their pay, it does not disclose that, because of her agreement to pay the debt, it was agreed that the lien upon the boat should be relinquished. So far as the record discloses, the plaintiffs were in a position to assert their claim against the owner of the boat or their lien against the boat, and, if they had done so, Mrs. Felcher could not have claimed that they had agreed not to assert it. When the most favorable construction possible for the plaintiffs is put upon the evidence, it amounts, at most, to an agreement upon the part of Mrs. Felcher to pay the debt of another. To make such an agreement valid it must be in writing. 2 How. Stat. § 6185; *Waldo* v. *Simonson*, 18 Mich. 345; *Stewart* v. *Jerome*, 71 Mich. 201 (15 Am. St. Rep. 252), and the cases therein cited. The court should have directed a verdict in favor of defendant.

Judgment is reversed, with costs of both courts.

The other Justices concurred.

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S. K. MARTIN LUMBER CO. *v.* MENOMINEE CIRCUIT JUDGE.

1. ATTACHMENT—MOTION TO QUASH.
   A trial of the issue in attachment proceedings cannot be avoided by a motion to quash based upon the merits, even if it be accompanied by a stipulation of the facts.

2. SAME—DISSOLUTION—REVIEW—REMEDY.
   Certiorari, and not *mandamus*, is the proper remedy to review a ruling of the circuit judge upon an application to dissolve a writ of attachment under 2 How. Stat. § 8026.

Mandamus by the S. K. Martin Lumber Company to compel John W. Stone, circuit judge of Menominee county, to quash a writ of attachment. Submitted February 15, 1898. Writ denied March 15, 1898.

Sawyer & Waite, for relator.

L. D. Eastman (*Eastman & Martineau*, of counsel), for respondent.

HOOKER, J. An action was brought by the city of Menominee against the relator by writ of attachment issued upon filing the usual affidavit. The defendant, who is the relator, appeared specially, and moved to dismiss the proceedings, filing a stipulation of fact in the case. The grounds relied upon are:

"1. That no debt is owing by the defendant to the plaintiff in the attachment suit.

"2. That, if any debt exists against any one, it is not subject to recovery through attachment.

"3. That the statute does not authorize a suit to be brought for the collection of a tax against any one but the person actually assessed as appears by the roll, the *roll* being the *evidence of the debt*, and being *conclusive*.

"4. That a distinction is made between the rights of a treasurer, proceeding under his tax warrant for the collection of a tax, and the rights of the municipality, proceeding

under the special remedy by suit, wherein strict construction of the statute is required."

The relator appears to have two objects in view: *First*, to obtain an adjudication that the city has no legal claim against him, without a trial of the question; *second*, to quash the proceedings, and compel the institution of new ones to recover such claim, if it be not held invalid. These things he proposes to do on an application to quash the proceedings, supplemented by a *mandamus*. His most far-reaching proposition is that he will show upon this motion that the city had no right to bring this action, and therefore that the court has no jurisdiction, by making proof, before declaration filed, of the cause of action sued upon; and, *second*, matters in defense, viz., that the assessment does not appear upon the roll to have been made against the defendant. In other words, he will try the merits upon a motion to ascertain whether the court has jurisdiction, and, if defeated, will review the question upon *mandamus*. If it appear that this tax sued for was not assessed against the defendant's name upon the roll, all proceedings are said to be void, because suit was authorized by law only against the person whose name actually appeared. Thus the jurisdiction depends on a matter outside of the record, and the proceedings might be shown to be void in a direct proceeding or upon collateral attack at any time by the production of the assessment roll, showing the absence of the defendant's name. The statute (Act No. 206, Pub. Acts 1893, § 47) should not be thus construed. If the alleged defense is a good one, it would be effective upon a trial of the merits, which is the only place it can be made. We think that trials cannot be avoided by a motion to quash based upon the merits, even if it be accompanied by uncontradicted proof, or even a stipulation of fact. If such a procedure were permitted, it would permit the practice of taking the opinion of this court upon questions of law in advance of the trial at *nisi prius*, thus practically making this the court of original jurisdiction, instead of a court for the correction of errors.

Upon the face of the papers—*i. e.*, affidavit and writ and return—the court has jurisdiction. If, upon filing a declaration, enough should appear therefrom to show the facts set up in the stipulation, a demurrer would test the question; if not, a plea in abatement would do so; but it cannot be tried on a motion to quash involving the merits.

The other question in the case should be tested upon a motion to dissolve the attachment under the statute, whereby the court has the power to require the entry of appearance by the defendant, though the attachment be dissolved. 2 How. Stat. § 8026. In such case *certiorari*, and not *mandamus*, is the proper remedy.

The writ of *mandamus* prayed for should be denied.

The other Justices concurred.

BAXTER *v.* LATIMER.

1. OFFICES—VACANCY—WHAT CONSTITUTES.

   An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally-qualified incumbent who has a lawful right to continue therein until the happening of some future event.

2. MILITIA—FIELD OFFICERS—EXPIRATION OF TERM—HOLDING OVER.

   Act No. 63, Pub. Acts 1895, relative to the Michigan National Guard, provides that the field and line officers, except when elected to fill a vacancy, shall be commissioned for a term of three years from the date of their election, and until their successors are commissioned. *Held*, that no vacancy exists upon the expiration of a regular term, but the incumbent holds over pending the issuance of a commission to his successor.

3. SAME—ELECTION.

1 How. Stat. § 901, relative to the organization of the Michigan National Guard, provides that the regimental field officers may be elected by the company officers. Act No. 198, Pub Acts 1893, empowers the "field and company officers," by a majority vote, to fill vacancies in the field offices. Authority is nowhere conferred upon the field officers to participate in a general election. *Held*, that an election for a regimental field officer for a full term, participated in by certain field officers whose votes were required to make a majority for the person declared elected, was void, and that a new election was properly ordered by the commander-in-chief.

Mandamus by Charles S. Baxter to compel William G. Latimer, colonel of the 4th infantry of the Michigan National Guard, to vacate an order calling for an election of field officers. Edwin M. Irish, adjutant general, Henry B. Lothrop, and others intervened. Submitted February 15, 1898. Writ denied March 15, 1898.

John Atkinson, for relator.

Edwin M. Irish, in pro. per.

Edwin F. Conely and *Orla B. Taylor*, for other interveners.

LONG, J. The relator asks a *mandamus* to compel the respondent to vacate an order calling an election to be held by the officers of the 4th regiment to elect field officers, and to recognize the relator as major of said regiment. The petition sets out, substantially, that at a regular meeting of the officers of said regiment held October 5, 1897, for the purpose of electing field officers, there were present 27 officers, being all the officers of said regiment duly commissioned; that George L. Winckler was present, and claimed to be a second lieutenant, under a commission dated September 21, 1897, and signed by the governor of this State; that the colonel commanding said regiment and presiding at the meeting referred the matter of allowing said Winckler to vote to a committee, which reported that, at the time said commission was issued, the

governor was absent from the State. The petition further states that in fact the governor was absent from the State from September 13 to October 15, 1897, and was all that time *en route* from Detroit, this State, to Venezuela and back, or in Venezuela, and that on the 21st day of September he was not executing, or claiming to execute, the office of governor, but that the same had devolved upon, and was being executed by, the lieutenant governor; that at said meeting it was regularly moved and supported and carried that the commission of said Winckler be not recognized, and in accordance with said motion the chairman refused to allow him to vote; that a ballot was ordered, and 14 votes were cast for relator as major; that 13 of the officers present answered to their names, but refused to vote; and that relator, having received all the votes cast, and the votes of a majority of all the officers present, was duly declared elected. The petition then recites that the relator thereupon filed his acceptance as required by law, and that a return was made of said election to the adjutant general of the State, but that the adjutant general, having received a protest from the 13 officers refusing to vote, and from Winckler, against the action thus taken, and alleging that Winckler was entitled to vote at said election, ordered the election to be set aside and a new election held; that the colonel commanding said regiment appealed from the decision of the adjutant general to the governor, who has since that time decided that on the date of the commission to Winckler he was absent from the State, and that said commission was invalid; that, notwithstanding that fact, the election has been called by the adjutant general. Upon the filing of this petition an order to show cause was entered in this court, and all proceedings stayed.

The answer of Col. Latimer admits the facts stated in the petition. The adjutant general and all the parties interested were thereupon permitted to appear in the cause, and be represented by counsel.

The adjutant general makes a return to the order, in

which is set out all the official records in his office, together with certain affidavits, from which it appears that Harry F. Chipman, prior to September 8, 1897, was acting as second lieutenant of Company D, 4th regiment, under a regular election and commission, and that on September 8, 1897, he resigned his said office, forwarding his resignation direct to the adjutant general, and also through military headquarters, the same being indorsed "Approved" by the regimental and brigade commanders. It appeared also that Lieut. Chipman had been elected sheriff of Wayne county. This resignation was duly accepted by the adjutant general, as was and long had been the custom of that office, without reference to the governor. Thereupon the adjutant general ordered an election to fill the vacancy in the office of second lieutenant of Company D aforesaid. An election was held by that company, and Lieut. Winckler was duly elected, and on September 17th an official return of that election was made to the adjutant general. A showing is also made by affidavit that a report of this election was also made through the proper military channels, and a certificate was filed by the inspector general, showing that Lieut. Winckler had a full and fair examination, and that he was qualified for the office, with a recommendation that a commission issue. Upon the filing of the oath of office by Lieut. Winckler, a commission was issued to him by the adjutant general. This commission was issued September 21, 1897, and bears the genuine signature of Gov. Pingree, was countersigned by the secretary of state and by the adjutant general, and bore the great seal of the State. It appears, however, that the commission so issued was upon a blank which had theretofore, and before he left the State, been signed by Gov. Pingree, and deposited in the office of the adjutant general. It is claimed by the adjutant general that there has long been an established custom for each governor to leave with the adjutant general blank commissions, ready to issue, and duly signed by the then governor, and that in accordance with this custom he

issued the commission to Lieut. Winckler during the absence of the governor from the State.

It is further shown by the return of the adjutant general that, before the election of Lieut. Winckler as second lieutenant, he had been for many years an enlisted soldier in the company, and at the time of his election was first sergeant of said company; that on September 22d, when the commission was delivered to him, he was by his captain relieved from duty as first sergeant, and placed on duty as second lieutenant, and since that time has performed the duties of second lieutenant in that company, and has ever since been recognized as second lieutenant of that company by the officers and members of the company. It is claimed he was therefore entitled to vote at the election. The adjutant general further returns that after he received the protest from the 13 officers of the regiment, and from Lieut. Winckler, he was asked by Col. Latimer to refer the matter to the governor, and that upon such reference the governor, on December 13, 1897, ordered that a new commission issue to Lieut. Winckler, and that a new election be had; that, upon the receipt of this order, a new election was ordered and duly held, but that the officers failed to elect. It appears now that under the call for a new election there is a deadlock in the election; 14 voting for one set of officers, and 14 for another. In further answer to the petition, the adjutant general returns that he had no official notice of the governor's absence from the State, and no notice whatever except newspaper rumor; that the lieutenant governor never assumed command of the National Guard, and never in any way communicated with or gave instructions to the adjutant general of that fact, or in any way modified his standing authority to act.

Upon this state of facts, it is claimed by counsel for relator that relator was elected, whether Lieut. Winckler was entitled to vote or not; that upon the assumption that he was entitled to vote, and that his vote ought to have

been received, there were 15 of the 28 taking part in the election, as the other 13 refused to take part in it; that 15 would be a quorum, and the majority of the 15 would be sufficient to elect; that, as the record stands, it is clear that Lieut. Winckler's vote, if received, could in no way have affected the result; that its rejection was not prejudicial, and does not therefore affect the result; that, assuming that Lieut. Winckler was not entitled to vote, then there were only 27 officers in the regiment, and the 14 who voted for the relator constituted a quorum, and a clear majority.

We are met at the outset with the proposition from respondent's counsel that no legal election was held, as, under the statutes of this State, the regimental field officers had no right to vote at that election. Section 901, 1 How. Stat., provides:

"Companies may elect their own officers in the manner to be prescribed in general regulations; regimental field officers may be elected by the company officers according to general regulations."

Section 927 provides:

"On the occurrence of any vacancy in office after the first organization of any company, the members thereof may proceed to elect some person to fill such vacancy."

Section 928 provides:

"The manner, time, and place of holding and conducting all company elections shall be regulated by the by-laws of such company. All vacancies in the field officers of a regiment shall be filled by a majority vote of the commissioned officers of said regiment, at a time not exceeding sixty days from the date such vacancy occurs, to be fixed by the officer commanding such regiment. Ten days' notice of the time and place of holding such election shall be given in writing to each company officer in said regiment."

By Act No. 198, Pub. Acts 1893, section 928, 1 How. Stat., was amended so as to read, "All vacancies in the field officers of a regiment shall be filled by a majority

vote of the field and company officers of said regiment present at a time to be fixed by the officer commanding such regiment;" the 10-days notice in such case to be given, etc.

By Act No. 63, Pub. Acts 1895, it is provided:

"The field and line officers, except when elected to fill a vacancy, shall be commissioned for a term of three years from the date of their election, and until their successors are commissioned."

It will be noticed that section 901 has not, in terms, been amended by these acts. It is apparent that, at the first organization of companies into a regiment, there would be none but company officers to elect the field officers of the regiment. It is also apparent that section 901 is the only section providing for the election of the field officers of a regiment, except in cases of vacancies. Section 928 provides for the election of regimental field officers in cases of vacancies. The modes of election, and the officers who may participate in the election, are different, under the two sections. Under section 901, the regimental field officers are to be elected by the company officers. Under section 928, in cases of vacancies the regimental field officers are to be elected, under Act No. 198, Pub. Acts 1893, by the "field and company officers of said regiment." By the act of 1895, regimental field officers, except when elected to fill a vacancy, are commissioned for three years from date of election, and until their successors are commissioned. Can it be said that there were vacancies in the field officers of this regiment, within the meaning of these statutes, at the time the election was called and held? It was evidently the intent of the legislature, by the act of 1895, that no vacancies should occur by lapse of time of service, but that the officers commissioned for three years should hold over until their successors were commissioned. In *State* v. *Howe*, 25 Ohio St. 588 (18 Am. Rep. 321), it was held that where an officer appointed by the governor, by and with the advice and consent of the senate, is authorized to hold his office for a

term of three years, and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant, but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified. McIlvaine, C. J., said in that case:

"That the framers of the constitution, in providing for filling vacancies in office, did not regard an office as vacant when an incumbent might lawfully hold over his definite term until a successor was elected or appointed and qualified, is manifest from other provisions in the instrument. By section 4, art. 10, the duration of the term of township officers is fixed at one year from the Monday next succeeding their election, and until their successors are qualified. It would hardly be contended that, under this provision, a township office becomes vacant at the end of the year, from the mere fact that no successor to the incumbent has qualified. Again, the following provisions are found in the schedule: Section 7 provided that all county and township officers and justices of the peace in office on the 1st of September, 1851 (when the constitution took effect), should continue in office until their terms expired, respectively; section 8 provided for the filling of vacancies which might occur after that date, and until officers were elected or appointed and qualified under the constitution; and section 10 provided that all officers should continue in office until their successors should be chosen and qualified. Under these provisions in the schedule, it cannot be doubted that all officers in office on the day named continued in office *de jure* until their successors were chosen under the new constitution, unless removed by death or otherwise, although their fixed and definite terms expired before their successors were chosen; or, in other words, by virtue of section 10, the expiration of terms did not create vacancies to be filled under the provisions of section 8."

In *State* v. *Johns*, 3 Or. 537, it was said:

"Vacancy in an office means the want of an incumbent at the time. * * * Vacancy in an office is one thing, and term is another. An office may be vacant and filled many times during a term of four years."

An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally-qualified incumbent who has a lawful right to continue therein until the happening of some future event. *People, ex rel. Baird*, v. *Tilton*, 37 Cal. 614; *State, ex rel. Tredway*, v. *Lusk*, 18 Mo. 333; *Com., ex rel. Broom*, v. *Hanley*, 9 Pa. St. 513. The foregoing is the rule in this State, as is well illustrated in *People, ex rel. Andrews*, v. *Lord*, 9 Mich. 227; *Lawrence* v. *Hanley*, 84 Mich. 399; *Conely* v. *Detroit Common Council*, 93 Mich. 446. We must presume that the legislature used the word "vacancy" in the statute in the sense in which the courts had theretofore interpreted it.

In the present case there were no vacancies in the field officers of the regiment. It appears that the colonel, lieutenant colonel, senior major, and junior major were in office, either for the original term of three years, or under the legal extension thereof by reason of their holding over until their successors were elected. Therefore the election must be held under the provisions of section 901, and in which election only the company officers can participate. Section 928 has no reference to a general election, but to an election only to fill a vacancy, and it is at such an election only that the regimental field officers have the right to vote. It may have been an oversight in the legislature in not providing that regimental field officers, after the first election, may participate in all elections, whether general or to fill vacancies, but the legislature has not so provided by these statutes. However, we do not question the policy of the legislature in providing that regimental field officers shall be elected by company officers, except in cases of vacancies. It is a matter resting entirely with that body. It appears to be conceded by the parties hereto that the regimental field officers did take

part in the election under which relator claims to have been elected. It also appears from the return that the colonel and lieutenant colonel were among those voting for relator and the other field officers claiming to have been elected, and without their votes those claiming to have been elected would not have received a majority vote of those present at the election. We think for these reasons the election was void, and the governor could and did very properly call another election. We see no objection to the governor's making the call through the regimental officer, but, when the company officers assemble, they, and they alone, constitute the electoral body. Lieut. Winckler now having received a new commission, no question can be raised as to his right to vote.

In this view of the case, it is unnecessary to discuss the other questions raised. The writ will be denied. No costs will be allowed.

The other Justices concurred.

WALLERSTEIN *v.* BOARD OF CONTROL OF STATE HOUSE OF CORRECTION AND REFORMATORY.[1]

PRISONS—POWERS OF WARDEN—CONVICT LABOR.

Section 34 of Act No. 118, Pub. Acts 1893, makes it the duty of the boards of control of the various prisons in the State to meet once in six months in joint session to determine what lines of labor shall be pursued in each prison. Other sections of the act require the wardens to keep prisoners constantly employed at hard labor "beneficial to the State," and provide that "all the fiscal transactions and dealings on account of each prison shall be conducted by and in the name of the warden." *Held*, that, where the joint prison board has taken no action in the way of determining the lines of

[1] Rehearing denied May 24, 1898.

employment to be pursued in a prison, the warden thereof may, with the approval of the board of control, make a valid contract for the employment of convicts, for a term of years, along any line consistent with the provisions of the act.

Mandamus by Alfred Wallerstein to compel the board of control of the state house of correction and reformatory at Ionia to approve a bond. Submitted March 1, 1898. Writ granted March 15, 1898.

John Atkinson (*Cahill & Ostrander*, of counsel), for relator.

Fred A. Maynard, Attorney General (*Alfred Lucking*, of counsel), for respondent.

MONTGOMERY, J. On the 17th of December, 1897, the petitioner entered into a contract with the warden of the state house of correction, which was approved by the board. This contract provided for the employment of 300 inmates of the house of correction, "or so many thereof as are not assigned to any contract now in force, or are not assigned to do the general work of the prison," in the business of the manufacture of shirts, collars, and cuffs. This contract was for the term of 10 years, and the relator was required to furnish a bond for the faithful performance of the same in the sum of $10,000. The relator presented a bond to the board, which was pronounced satisfactory as to terms and sureties, but the board refused to approve the same because it had been directed by a joint meeting of the prison boards to take no further action in regard to the contract, and for no other reason.

Prior to 1891, the several prisons of the State had been each controlled by its own board. In 1891 this was changed, and provision made for the control of all the penal and reformatory institutions by a single board. In 1893, by Act No. 118, a separate board was provided for each of the several prisons. The first section of this act provides that persons sentenced to these several prisons shall be confined and employed at hard labor. By para-

graph 4 of section 9 of the act it is made the duty of the warden to use all proper means to furnish employment to the prisoners most beneficial to the State and best suited to their several capacities. Section 38 provides:

"All convicts other than such as are confined in solitude for misconduct in the prison shall, as far as practicable, be kept constantly employed at hard labor at an average of not less than ten hours a day, Sundays excepted, unless incapable of laboring by reason of sickness or other infirmity."

By section 2 of the act the government and control of the house of correction is vested in a board of control consisting of three members. In section 12 it is provided

"All the fiscal transactions and dealings on account of each prison shall be conducted by and in the name of the warden thereof."

It is clear that, under these provisions, the warden, with the approval of the board, would have the authority to make a contract for the employment of prisoners, unless that authority is restricted by other provisions of the act. It is contended by the attorney general, who appears on behalf of the joint boards, that such restriction is found in section 34, which reads:

"It shall be the duty of the prison boards to meet once in six months in joint session to determine what lines of productive labor shall be pursued in each prison, and in so determining said boards shall select diversified lines of industry, with reference to interfering as little as possible with the same lines of industry carried on by citizens of this State."

It does not appear that the boards have met in joint session and determined as to what lines of industry are to be adopted in each of the several prisons. Meetings have been held from time to time, contracts made by the several boards have been approved or disapproved, but no action restrictive of the powers of the several boards, other than this, has been taken. It is not contended that section 34 confers upon the joint boards the power to

contract, but it is contended that action of the joint boards is a condition precedent to the execution of any contract for the employment of the convicts. The question is not free from difficulty. We would have little hesitancy in saying that, if the determination contemplated by section 34 had been made, future contracts by the several boards must have been made with reference to and within the lines of this determination. The question is, Was it the intention that, before any such determination, the power to make a contract should exist in no one? We think not. Such a construction is inconsistent with the policy marked out by the other provisions of the act, and with the authority of the respondent to control the affairs of the prison.

The writ must issue as prayed.

The other Justices concurred.

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116 368
141 [2]579

116 368
147 [2]538

116 368
149 [2] 28
150 [4]782

HENDERSON *v.* DETROIT CITIZENS' STREET-RAILWAY CO.

1. TRIAL—INSTRUCTIONS—EVIDENCE.

An instruction in an action for personal injuries that "if the jury believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides, plaintiff has made out a case," is prejudicial to defendant, where many of the facts testified to by plaintiff's witnesses might be true, and yet no liability exist.

2. INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE.

A boy who has sufficient intelligence to appreciate the danger of running in front of a street car, and has in mind the necessity of taking precautions, is guilty of contributory negligence in running in front of a car, even though he did not fully possess the intelligence of an adult.

3. SAME.

Where, in an action by a father for damages resulting to him from the negligent running down of his eight-year-old son by a street car, the father testified that the boy was perfectly competent to take care of himself upon the street, and the boy himself showed by his testimony that he possessed sufficient intelligence to appreciate the danger in crossing the tracks, it was error to submit the question of his capacity in this respect to the jury.

4. NEGLIGENCE—INSTRUCTIONS.

It is error for the court to submit to the jury an action for personal injuries under instructions which permit them to find the defendant negligent upon grounds which are negatived by the undisputed evidence.

Error to Wayne; Donovan, J. Submitted October 12, 1897. Decided March 22, 1898.

Case by Henry Henderson against the Detroit Citizens' Street-Railway Company to recover for expenses incurred in caring for his son, alleged to have been injured through defendant's negligence. From a judgment for plaintiff, defendant brings error. Reversed.

Brennan, Donnelly & Van De Mark and *Bernard B. Selling*, for appellant.

John Galloway (*Edwin Henderson*, of counsel), for appellee.

MONTGOMERY, J. Plaintiff's son, Malcolm Henderson, was injured by contact with one of the cars of defendant. The plaintiff brings this action to recover for expenses incurred in nursing and caring for his son, and for medical attendance, medicines, etc. A verdict was recovered of $203.50, upon which judgment was entered, and defendant brings error.

The accident occurred on Michigan avenue, near its intersection with Humboldt avenue. At this place the defendant has double tracks. The car which struck plain-

tiff's son was going west. The testimony is conflicting as to whether it met an east-bound car at this point. Some of the testimony tended to show that the boy ran or walked past the rear of the east-bound car, and was immediately struck by the west-bound car; and other of the testimony tended to show that he went behind a coal wagon standing on the track, and came in collision with the west-bound car. The boy testified that he looked for the cars to see if they were coming, for the reason that he knew, if they did strike him, he would get hurt; that he went behind one car, and was struck by the other; that there was a coal wagon right on the track; that he just saw it, and looked that way to see if the car was coming; that he turned right behind the wagon, and did not run behind a car at all, and ran into the fender of the car that was going west; that, just as soon as he went behind the wagon, he was struck by the car; that he did not get across the track, and ran right into the fender; that he did not see the fender out from behind the wagon, because he did not look for that; that he looked to see if the car was coming. Again, on redirect examination he testified that he did see the car which did not strike him; that he ran right behind the coal wagon, and saw only the one car which did not strike him.

Frank Almas, a witness for the plaintiff, testified that he stood near the scene of the accident; that the boy was from 30 to 50 feet from him when he started to cross the street; that, when the boy started to cross the street, he was running, and ran up to the time he was struck; that he saw the car the first time when it was about 25 feet from Humboldt avenue, and thought, when he saw the boy running across the street, he was bound to be struck by the car when he saw the car coming so fast; that there was nothing to prevent the boy seeing the car if he had looked; that he could see it as soon as witness could; that the boy ran right into the car, or the car ran into him, witness could not say which, but, after the accident, he was lying between the double tracks; that he might have

run against the car. Maud Wilson, a witness for the plaintiff, testified that she saw the car strike the boy, and throw him to the west; that she did not hear any gong ringing; that the boy was walking across the street. On cross-examination she testified that the boy passed behind a car going down town, maybe three or four feet, maybe not so far, and he was struck by the other car as he got past the car going down town; that the car which struck him was not any distance away when he appeared upon the track; that she thinks the side of the sign struck him. Edward Siebert testified that the boy was struck by the end of the car, but that he could not say whether the fender struck him or not; that he struck the front part of the car, and bounced off, and fell on the ground. On cross-examination he testified that the boy did not completely get on the track of the west-bound car when he was struck by it; that he could not say whether he walked into the car or not; that, in his judgment, the car ran into him; that he was not over two feet on the track when he was struck, but that he was struck in pretty near the corner of the car. Joseph Gomersall, a witness for the plaintiff, testified that he was driving a coal wagon west on Michigan avenue; that he was in front of the blacksmith shop on the east side of Humboldt avenue when the accident happened; that he saw no other coal wagon around there; that he came onto Michigan avenue from Fifteenth street, and was traveling at a pretty good rate of speed; that he had just reached the east crossing of Michigan avenue and Humboldt, and the west-bound car went down, and up came the east-bound; that he saw the boy leave the sidewalk, and the west-bound car came by, and he could not see the car strike the boy, because he was on the wrong side for that. On cross-examination this witness testified that the east-bound car was already half a block away when the boy stepped upon the track on which it was traveling; that it was a good half block away; that the witness could

not say when the east and west bound cars passed each other, as they were both behind him when they passed.

The above, with other testimony showing that the car in question was traveling at an unusual rate of speed, and tending to show that the gong was not sounded, comprised the testimony offered by the plaintiff bearing on the *res gestæ*. The plaintiff also testified that he had frequently cautioned his son always to be careful, and look both ways, before he attempted to cross the street, and that the boy must have comprehended what he said, and that, in his judgment, he was perfectly competent to take care of himself on the street. Defendant offered testimony showing a somewhat different state of facts, but we deem it unnecessary to quote the testimony at any length, as the questions raised depend upon the case as made by plaintiff's testimony.

The defendant preferred the following requests:

"1. Under the pleadings and proofs, the plaintiff cannot recover.

"2. It is entirely immaterial in this case at what rate of speed the car was going, for the undisputed testimony of all the witnesses is that, after the boy approached the car, it was impossible to have stopped it before the collision occurred."

"5. If you find that Malcolm Henderson, the boy who was hurt, had been warned repeatedly by his father of the danger of crossing the car tracks on Michigan avenue without looking to see whether a street car was coming, and that the boy himself appreciated the danger of going upon the tracks of the defendant, then your verdict must be for the defendant, and be no cause of action."

"8. If you find that Malcolm Henderson ran from behind a coal wagon or behind a car directly into the fender or side of defendant's car, your verdict must be for the defendant."

The court refused to give the first, second, and last of these requests, and modified the fifth by adding:

"That is, if he was a grown person under the circumstances, or if he had the intelligence of a grown person fully."

Assignments of error are based upon the refusal of the defendant's several requests, the modification of the fifth request, and the instructions of the court given on its own motion.

Error is assigned on that portion of the general charge which reads: "If you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case." This method of submitting a case, always dangerous, was obviously damaging to the defendant in this case, for, in my view of the case, many of the facts testified to by plaintiff's witnesses might be true, and yet no liability exist.

We also think the modification of the fifth request was error. The circuit judge evidently had in his mind the case of *Baker* v. *Railroad Co.*, 68 Mich. 90, which case certainly goes to the extreme limit in permitting recovery by a child somewhat younger than the son of the plaintiff in the present case; but the court in that case held that the question of contributory negligence was for the jury for the reason that, under the facts of that case, it was for the jury to determine whether the lad had such judgment and such comprehension as to enable him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and senses in an effort to avoid it. But the instruction of the learned circuit judge in this case relieved the jury of the duty of passing on the question of whether plaintiff's son had such appreciation of the danger as to render him subject to the consequences for a failure to use his reason and senses in an effort to avoid it. The modification of the request in question was by adding: "That is, if he was a grown person under the circumstances, or if he had the intelligence of a grown person fully." It is hardly necessary to say that this test is too liberal. If the boy had sufficient intelligence to appreciate the danger, and had in mind the necessity of taking precautions, it is not necessary that he should have had the intelligence of an adult fully.

Another instruction is objected to, which was as follows:

"This negligence must consist of either failing to give the proper warning of the approach of the car, or of failure to stop the car after the perilous position of the son of the plaintiff was discovered by the motorman, if he could with reasonable care discover it. That is qualified a little, and this I leave to the jury: Whether it was possible, by diligent endeavors of the motorman, to stop the car after the boy came from behind the coal wagon, or whatever he did after he came upon the track, or we will say within reach."

We think, upon the case made by the plaintiff, this instruction was misleading. There was no evidence which would have justified the jury in finding, or which tended in the slightest degree to show, that the position of this boy on the track was discovered in time to avoid the injury. On the contrary, it appears that the boy never was upon the track; that he came in contact with the car on reaching the track; and his own theory was that he passed as far forward as he went, before being struck, from behind an obstacle which obstructed his vision, and would equally have obstructed the vision of the motorman, and the evidence shows that he was at the time on a run.

It is evident that this verdict cannot stand, but the more doubtful question is presented as to whether the first request of defendant should have been given. In my opinion, upon this record, it should have been. See *Ecliff* v. *Railway Co.*, 64 Mich. 196. The plaintiff himself testified that this boy had intelligence enough to appreciate the danger. He placed the boy on the stand, and he so testified. The evidence clearly shows that there was nothing except this wagon and the east-bound car to obstruct the vision. Witnesses for the plaintiff state that, if the boy had looked in the direction of the car, he could have seen it. It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury

would have occurred from collision with an ordinary wagon just as surely as from running into this car, and, from the testimony of the lad himself, he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?

Error is assigned upon certain language employed by plaintiff's counsel upon the argument, but, as the case is reversed upon other grounds, it is not necessary to consider the objection at length. We find in the record language which ought not to have been employed, but, as it is not likely to be repeated, it is not necessary to quote it.

Judgment will be reversed, and a new trial ordered.

The other Justices concurred.

MUELLER v. MARSH.[1]

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138 261

116 375
142 510

ESTATES OF DECEDENTS—JUDGMENT FOR CLAIMANT—AFTER-DISCOVERED RECEIPT—REVIEW IN EQUITY.

A court of equity is not justified in setting aside a judgment against an estate merely because of the subsequent discovery of claimant's receipt running to the deceased, where the payment of certain moneys was admitted by the claimant, who took judgment for the balance only, and it is not clear but that the receipt refers to such admitted payments.

Cross-appeals from Wayne; Carpenter, J. Submitted January 6, 1898. Decided March 22, 1898.

Bill by Jennet F. Mueller, administratrix of the estate of John C. Mueller, deceased, against Robert J. Marsh, to set aside a judgment against the estate. From the decree rendered, both parties appeal. Reversed and bill dismissed.

[1] Rehearing denied June 7, 1898.

Henry M. Duffield (*Divie B. Duffield*, of counsel), for complainant.

Elliott G. Stevenson, for defendant.

MOORE, J. Complainant filed a bill as administratrix of her deceased husband, in which she stated that her husband, in his lifetime, entered into an agreement with defendant, as follows:

"The undersigned acknowledges herewith that in the mortgage given him this day by E. F. Riopelle, amounting to thirty-two hundred dollars, Robert J. Marsh has an interest in the same to the amount of six hundred dollars, bearing interest at the rate of six and one-half per cent. per annum, which will be paid to him at the expiration of the mortgage three years hence, if not sooner realized, provided that the mortgage brings par value, or to such proportions as it may realize. The execution of this acknowledgment is depending on the filing and executing his (Marsh's) bond, given to me this day, in regard to his interest of the firm of Marsh & Riopelle, and for which is this present acknowledgment an equivalent. This acknowledgment not transferable.

"Detroit, December 3, 1885.

"J. C. MUELLER."

"An agreement entered into this day between John C. Mueller, at Detroit, and Robert J. Marsh, of same place, to witness: John C. Mueller acknowledges that the mortgage given him today by E. F. Riopelle on lots A and B, Riopelle farm, amounting to three thousand and two hundred dollars, belongs one-half of it to Robert J. Marsh, and that half to be paid to him as soon as realized on it, with the consent of both Mueller and Marsh. Robert J. Marsh acknowledges that John C. Mueller has an equal share with him in the interest he (R. J. Marsh) holds in the firm of Marsh & Riopelle, and also one-half in the soda apparatus stored at present in the house of said Marsh, 101 Catherine street, Detroit. Said Robert J. Marsh promises herewith to account to said J. C. Mueller for all his interest as above stated, and give him his equal share as soon as he realizes on it.

"In testimony, witness our hand and seal this 3d day of December, 1885.

"JOHN C. MUELLER. [L. S.]
"ROBERT J. MARSH. [L. S.]"

"The undersigned acknowledges herewith that I owe one-half of my interest in the firm of Marsh & Riopelle, at Detroit, to John C. Mueller, of the same place; that, in consideration for this interest, John C. Mueller has deeded to me a share in the mortgage given to him by E. F. Riopelle of thirty-two hundred dollars, on which I have received one thousand dollars in cash, and a further interest of six hundred dollars when realized upon, or mortgage expires. And I herewith promise faithfully to account to said Mueller all the profits, valuables, and stock I have and may receive as my share in the said firm of Marsh & Riopelle, and turn over one-half of the same to said Mueller. I further acknowledge that J. C. Mueller has an equal interest with me in the soda apparatus and counter stored at present on my premises, and that I will turn over to him one-half of the proceeds when sold with his consent. This presents not transferable.

"Detroit, December 3, 1885.

"ROBERT J. MARSH."

Complainant further stated that her husband died in April, 1889; that defendant presented a claim before the commissioners, which was disallowed, but that, upon appeal to the circuit court, a judgment was recovered for $838.33, which judgment was affirmed in the Supreme Court (96 Mich. 488), with costs; that this judgment was made up of $600 and interest; that since the trial complainant has found written evidence showing that at least half of that amount had been paid. She alleged that on the 1st of December, 1885, her husband and said Marsh entered into partnership; that said firm was dissolved, and settled its affairs, but at what date she was not informed; that Marsh never accounted to her husband, and that upon a proper accounting there would be due her, as administratrix, not less than $500. She further alleged that defendant was insolvent, and prayed that he be required to answer under oath as to what sums of money he had received on the claim which had been put into judgment, and to state fully an account of the partnership, and that he be enjoined from attempting to collect his judgment.

The defendant answered under oath, denying that he

had received any payment whatever from Mr. Mueller which ought to have been applied upon the $600, and denying that there was any profit in the partnership business, and giving his version of its condition.

The case was tried before the circuit judge, who set aside the judgment which had been entered in the law case, and decreed that the claim of Mr. Marsh should be allowed at $504.96. From this decree both parties appeal. No proof was offered in relation to the condition of the partnership for which an accounting was asked, and no reference was made to it in the decree.

The question is raised whether a court in chancery has the power to vacate a judgment at law under the state of facts set up in the bill of complaint. We do not deem it necessary to discuss that phase of the case. It is well understood that before a chancery court will interfere with a judgment at law it must be made very clearly to appear that an injustice has been done. A reference to the case of *Marsh* v. *Mueller*, 96 Mich. 488, will aid in understanding what is involved in this proceeding. It was the claim of Mr. Marsh in that proceeding, as well as in this, that he had a one-half interest — that is, $1,600 — in the $3,200 mortgage which had been given by Riopelle. He admitted then, and admits now, that Mr. Mueller paid him $1,000 during his lifetime, but claimed then, and claims now, that Mr. Mueller did not pay him the $600 to which he was entitled when the final $1,200 of the mortgage was collected. It is the contention of complainant that her husband paid this $600 to Mr. Marsh before the death of Mr. Mueller. Mrs. Mueller was sworn, and testified to the search she had made for any papers or receipts passing between Mr. Marsh and her husband, and to the first knowledge she had of the receipt which was offered in evidence, and to having been in the store of her husband a short time before his death, when he was writing in his check-book, and the witness asked him what he was doing; that he made no reply, but Mr. Marsh did; that

Mr. Marsh said, "The doctor is very good in helping me out of a difficulty with a loan." The son was sworn to his fruitless search among his father's papers, and to a talk with Mr. Marsh on the street, when "he said something to me about some papers being in the safe at the store, I believe, and he wanted to get them. He said they were his papers. I did not look for the papers at that time, but afterwards saw all the papers in the safe, and I did not notice any belonging to him." Col. Duffield testified to the finding of the receipt after the trial and judgment in the circuit court, when looking up another claim. Mr. Williams, a bookkeeper at the American Exchange National Bank, testified that Dr. Mueller had an account at their bank, and that in the account there was an item on December 10, 1885, for $300; on September 16th, for $300; on September 9, 1886, for $1,010; on September 8th, $1,228.46. On the cross-examination he said it was an active account, and these were selected from a large number of debits. They would average a check a day of various amounts. He did not know to whom the checks were payable; they were returned when the books were written up. Mr. Bowman, the cashier of the Detroit Savings Bank, testified:

"With reference to this $3,200 mortgage, I remember something about this transaction between Dr. Mueller and the bank. According to this memorandum, it was some seven or eight years ago, and I have not seen it since. On the 12th of December, 1885, the bank made a loan to Mr. Mueller of $2,000 on security of a mortgage of $3,200, which, if I remember right, was made by Edward F. Riopelle. That loan ran along until September 8, 1886, when the bank took over the mortgage, deducting the amount due on Mr. Mueller's note, and paid him the difference. That was the 8th of September, 1886, and the difference which he got at that time was $1,228.46. The mortgage was subsequently paid."

The receipt was offered in evidence, and reads as follows:

"Received, December 10, 1885, of John C. Mueller, three hundred dollars, advance to me on the produce of the loan of two thousand dollars, made this day on the Riopelle mortgage. R. J. MARSH."

Mr. Marsh was called as a witness by the complainant, and it is claimed that his testimony, when confronted by the receipt, was equivocal, and that a fair inference from it is that he had been paid by Mr. Mueller in his lifetime. This case was tried in May, 1897. While there was a reference made to a writing in the bill of complaint, no copy of the receipt was set up, and it is not shown that Mr. Marsh ever saw it until it was shown him when he was a witness. It is not strange that he could not remember all the details surrounding the transaction. His testimony is of the most positive character that the money mentioned in the receipt was part of the $1,000 paid to him by Mr. Mueller, and that he had never been paid any part of the $600 to which he was entitled when the last $1,200 of the mortgage should be collected. We have recited the substance of all the testimony, and there is nothing in any of it which contradicts the testimony of Mr. Marsh, unless it is to be found in the statement contained in the paper signed by him, dated December 3d, in which he says, "In consideration for this interest, John C. Mueller has deeded to me a share in the mortgage given to him by E. F. Riopelle of thirty-two hundred dollars, on which I have received one thousand dollars in cash, and a further interest of six hundred dollars when realized upon, or mortgage expires," taken in connection with the receipt for $300. We think, when these two papers are read in connection with the testimony of the cashier of the bank, instead of contradicting Mr. Marsh, they strongly corroborate his testimony. It is shown by the testimony of the cashier that on December 12, 1885, the bank made a loan to Mr. Mueller of $2,000 on the security of this mortgage, and that this loan ran along until September 8, 1886, when it was paid by the bank's taking over the mortgage,

and paying the difference, which amounted to $1,228.46. The $300 receipt recites that it was "advanced to me on the produce of the loan of two thousand dollars, made this day on the Riopelle mortgage." There was but one loan of $2,000. It had undoubtedly been negotiated, but it was not completed by the bank's paying the money over until two days later. For some reason, before the money was obtained from the bank, $300 was paid to Mr. Marsh as an advance to him on the $2,000 loan, which was consummated two days later between the bank and Mr. Mueller. We cannot see why this is not a much more reasonable explanation of the transaction than to say that the receipt does not refer to the money received from the $2,000 loan, but does refer to the money realized on a sale of the mortgage made nearly a year later, especially in view of the fact that Mr. Marsh was not entitled, under his contract with Mr. Mueller, to this $600, until the mortgage was realized upon, or the mortgage expired.

The complainant has not made so clear a case as to justify setting aside any part of the judgment. The decree is reversed, and complainant's bill is dismissed, with costs of both courts.

The other Justices concurred.

BLACK *v.* SIMON.

1. EVIDENCE—FILING OF BILL OF SALE.
   The fact that the vendee in a bill of sale placed the same on file in the office of the township clerk may be considered on the question whether it was given as security or as an absolute sale. *Wessels* v. *Beeman*, 87 Mich. 481, followed.

2. SAME—INVENTORY—HEARSAY.
   An inventory based in part on information received by the one making it from other persons is inadmissible in evidence.

Error to Cheboygan; Adams, J. Submitted January 26, 1898. Decided March 22, 1898.

Trespass *de bonis* by Robert Black and others against Samuel Simon and another. From a judgment for plaintiffs, defendants bring error. Reversed.

Frost & Sprague, for appellants.

J. L. Stoddard, for appellees.

MONTGOMERY, J. Plaintiffs compose a copartnership known as the "Maltby Lumber Company." In November, 1895, Rorabeck & Moore gave a bill of sale of seven horses, which were used by them in lumbering operations, to the Guelph Patent Cask Company. Subsequently they gave another bill of sale covering the balance of their camp equipage. After the date of these bills of sale, the last company executed bills of sale to its superintendent, Fred Start. About the 1st of February, 1896, an agreement was made between Start and the Maltby Lumber Company, by which Start sold to the Maltby Lumber Company the property covered by the bills of sale, on the agreement that the Maltby Lumber Company would pay the men engaged in the lumbering operations, and would turn over to Start or the cask company, for which he was

acting, certain logs, amounting in value to $812. This purchase by the Maltby Lumber Company was made in the first instance with the full assent of Rorabeck & Moore. There is a conflict in the testimony as to whether the Maltby Lumber Company understood, at the time, that the bills of sale were absolute or were given as security for advances, but, as to the assent of Rorabeck & Moore to the transaction, there is no dispute whatever, although there is testimony that after Maltby took charge of the camp, and accepted and paid orders of the foreman to the amount of $973.40, Rorabeck protested to Start about carrying out the agreement by executing a bill of sale. The theory of the plaintiffs was that they were given an absolute title to the property through these conveyances. The defendants, who claimed through a subsequent bill of sale from Rorabeck & Moore, claimed that the bills of sale to the cask company were given as security, and that only about $50 remained due on them, and that this was tendered to plaintiffs by defendants. The plaintiffs' testimony tended to show a much larger lien, even if the instruments were to be treated as security.

A large number of assignments of error appear in the record, but we do not deem it necessary to consider them at length. One, however, merits attention. It appears in evidence that the cask company, under whom plaintiffs claim, caused the bills of sale to be filed in the office of the township clerk. The circuit judge charged the jury as follows:

"Something has been said about the fact of the bills of sale to the Guelph Patent Cask Company and to Mr. Start being placed on file in the town clerk's office, and, as I understand it, it is claimed the placing of those bills on file is evidence that they were intended as security. It is true that it is not necessary to file a bill of sale that is not intended as security, but I charge you that the fact of filing such bills of sale would be no evidence, one way or the other, as to whether or not the bill of sale was intended as an absolute sale, or was intended as security, as claimed by the defendants."

This instruction conflicts with the holding of the court in *Wessels* v. *Beeman*, 87 Mich. 481, and must be held erroneous. It is contended that this error was harmless, for the reason that the plaintiffs were entitled, in any view of the case, to recover more than the amount found by the jury. We are not, however, able to say this with such certainty as to cure the error, particularly as the entire testimony is not included, the certificate being that the record contains the substance of all the testimony deemed by the circuit judge material as bearing on the assignments of error.

We think the inventory made by witness Maltby, based in part on information received from others, should not have been received as evidence.

The other points relied upon are not likely to arise on a new trial.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

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FEATHER *v.* FEATHER'S ESTATE.

1. MARRIED WOMEN—POWER TO CONTRACT—PROMISSORY NOTES. A married woman may bind herself by contracts relating to her separate property, and may borrow money upon her own account; but she cannot bind herself by a note given as surety for her husband, or to secure the payment of money nominally received by her, yet in fact received for the use of her husband.

2. SAME—CLAIM AGAINST ESTATE OF DECEDENT—EVIDENCE. Claimant presented for allowance a claim against the estate of his deceased wife for moneys paid in discharge of a note executed by himself and wife, which he claimed to have signed as surety merely. Upon appeal from an order disallowing the claim, claimant's daughter testified that she

went, under her mother's directions, to the person who was to loan the money in consideration of which the note was given, obtained it, and took it to her mother; that her mother prepared a note, which both of her parents signed, and that she delivered the same to the lender. It appeared that the wife owned the farm upon which she and her husband lived, and there was testimony tending to show that she conducted the same in her own interest. The testimony of the daughter was disputed by the lender, who testified that she loaned the money to claimant; but other testimony tended to impeach that of the lender. *Held*, that there was evidence to go to the jury in support of the claim.

3. SAME.

The testimony of laborers who had worked upon a farm owned by a married woman, and occupied by herself and husband, that their wages were paid by the wife, is competent in support of the contention that the farm was conducted in the interest of the wife.

Error to Washtenaw; Kinne, J. Submitted January 28, 1898. Decided March 22, 1898.

Joseph Feather presented a claim against the estate of Caroline Feather, deceased. The claim was disallowed in the probate court, and claimant appealed to the circuit. From a judgment for claimant, defendant brings error. Affirmed.

Frank E. Jones (*Seth C. Randall*, of counsel), for appellant.

M. J. Lehman and *Arthur Brown*, for appellee.

MONTGOMERY, J. Claimant presented for allowance a claim against the estate of his deceased wife. The claim was for money paid in discharge of a note executed by deceased and claimant. Claimant asserts that he was a mere surety, and that the obligation was the obligation of deceased. It appears by the testimony that Mrs. Feather was the owner of a farm consisting of 72 acres of land, upon which the parties lived; that, some time before her death, a note was given to a sister of the deceased, Mrs.

Brainard, for $1,200, borrowed money. The question for determination by the jury was whether this money was borrowed by deceased for her own use.

The main questions of law discussed in the briefs of counsel are not novel, but, on the contrary, have been well settled. This court has uniformly held that a married woman may bind herself by contracts relating to her separate property, and it is, of course, equally clear that she may borrow money if she borrows it on her own account. On the other hand, a wife cannot bind herself by a note given as surety for her husband, nor to secure the payment of money nominally received by her, yet in fact received to the use of the husband. *Fechheimer* v. *Peirce*, 70 Mich. 440; *Schmidt* v. *Spencer*, 87 Mich. 121; *Fisk* v. *Mills*, 104 Mich. 433. The difficulty in the present case is in the application of these rules to the facts of the case. The claimant gives testimony tending to show that deceased, during all the time that the parties lived together on the farm, kept the account of the financial matters on the farm, kept the money which came from carrying on the business, paid the help, and paid some other bills. The testimony, however, shows that claimant during this time had charge of the work on the farm, and directed the work of the men employed. The only direct testimony tending to charge deceased for the money in question is that given by Lizzie Feather, a daughter of claimant, who lived in the family during this time, and who testified that, when the $1,200 was procured, deceased directed the witness to go to Mrs. Brainard, and get the money; that she did so, and took it home, and gave it to her mother (deceased); that her mother prepared a note for the amount; that both she and claimant signed it, and that it was taken by witness, and delivered to Mrs. Brainard; that she did not know what Mrs. Feather wanted to do with this $1,200. This witness also testified that her father had charge of the work on the farm, through the direction of deceased, and that, whenever anything was sold on the farm, the money was given

to deceased. This testimony on the part of the claimant was disputed by Mrs. Brainard, who testified that the loan of $1,200 was made to Mr. Feather; but there is testimony tending to impeach her statements, the probate judge having been called to testify that she testified in the probate court that she had loaned the money to Mrs. Feather, and that the note was given by both Mr. and Mrs. Feather.

Defendant's counsel objected to the testimony of numerous witnesses who were called to testify that they had performed work upon the farm in question, and that their wages were paid by Mrs. Feather. We think this testimony was admissible, as bearing upon the question of whether the farm was being conducted in the interests of Mrs. Feather or of claimant. The circuit judge charged upon this question that the mere fact that Mrs. Feather herself paid the men employed upon the farm did not in itself establish the claim made, but that it was one of the circumstances to be considered by the jury.

It is also claimed that there is no evidence whatever tending to show that deceased borrowed this money on her own account. We are not prepared to say that there was a total lack of evidence on this subject. The testimony of Lizzie Feather referred to tends to show that deceased was the principal in the transaction. It is true, this testimony was disputed; and, had the testimony of Mrs. Brainard stood unimpeached and uncontradicted, we should hesitate before holding that there was evidence for the jury. But such is not the case, and the case is to be treated as though the testimony of Mrs. Brainard were out of it; and we are not prepared, in view of this, to hold that the testimony of Lizzie Feather had no tendency to establish the facts claimed.

No other questions arise in the case of interest to the profession. An examination of the record convinces us that no prejudicial error was committed, and the judgment will be affirmed.

The other Justices concurred.

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142 623
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PEOPLE *v.* CRAIG.

CRIMINAL LAW — CARNAL KNOWLEDGE OF CHILD — WITNESSES — VERACITY—EVIDENCE.

In a prosecution for carnally knowing a female under the age of 16 years, the prosecution attempted to show, as a corroborative circumstance, that pregnancy had resulted from the alleged intercourse with respondent. Upon cross-examination, the prosecutrix admitted having written certain confessions of respondent's innocence and of her own misconduct, but claimed that they were written by direction of respondent, and under threats. *Held*, that it was competent for respondent to show, as bearing on the truthfulness of the prosecutrix, that the girl had had intercourse with others.

Error to Houghton; Hubbell, J. Submitted January 28, 1898. Decided March 22, 1898.

George Craig was convicted of carnally knowing a female under the age of 16 years, and sentenced to imprisonment for 20 years in the state prison at Marquette. Reversed.

J. F. Hambitzer, for appellant.

Fred A. Maynard, Attorney General, and *A. T. Streeter*, Prosecuting Attorney, for the people.

MONTGOMERY, J. Respondent was convicted of having carnal knowledge of a female child, one Annie Dapio, while a member of respondent's family. On the trial she gave evidence supporting the charge, and also gave testimony tending to show that respondent furnished her medicines, which she took by his direction, and which produced a miscarriage. On her cross-examination, written confessions, signed by her, were introduced, and also a written statement to the effect that respondent had always treated her kindly, and that he had never tried to take

any liberty with her. The witness admitted having written these letters, but testified that they were written by direction of respondent, and under threats. Respondent was a witness in his own behalf, and, after having denied the charge brought against him, testified that "Annie was a wild girl, and that he had just about caught her in different places,—that is, with different ones." He was asked, "When did you first commence noticing these acts of hers,—the first that you saw anything of the kind?" That was objected to, and ruled out.

We think this testimony should have been received for its bearing on the truthfulness of the complaining witness. It is true, as contended by the prosecution, that the character of the female for chastity is not ordinarily involved in a prosecution for this offense; but by the receipt of these confessions, and the statement of the witness that they were forced from her, the line of inquiry was opened up, particularly as the prosecution had attempted to show that pregnancy had resulted from the alleged intercourse with respondent. This could only have been offered to corroborate the statement of the complaining witness. If competent for this purpose, it was proper for respondent to meet it by showing a state of facts justifying an inference that another than he was responsible for the condition of the girl. *People* v. *Kaminsky*, 73 Mich. 638. This question was preliminary, it is true, but the objection was that "the fact that she [the witness] had a crime committed on her by some one else can have no bearing on the question involved." Respondent's counsel stated that it was offered for its bearing on the truth and veracity of the witness. For this purpose it was admissible. However strong the case for the people may be, we think the defense was entitled to the benefit of this testimony.

Conviction set aside, and new trial ordered.

The other Justices concurred.

116 390
144 14

PEOPLE *v.* TURNER.

CRIMINAL LAW—BIGAMY—DEFECTIVE COMPLAINT—WAIVER.

An objection that the complaint in a prosecution for bigamy was made by the husband of the respondent is waived by pleading to the information.

Error to Ingham; Person, J. Submitted January 28, 1898. Decided March 22, 1898.

Alice Turner was convicted of bigamy, and sentenced to imprisonment for two years in the Detroit house of correction. Affirmed.

James Harris, for appellant.

A. M. Cummins, Prosecuting Attorney, for the people.

MOORE, J. The respondent was convicted of the offense of bigamy, and appeals from that conviction. The complaint was made by the husband of the respondent, though he was not so described in the complaint. The respondent waived examination before the magistrate, and was bound over to the circuit court for trial. An information was filed against her by the prosecuting attorney, which was verified by the prosecuting attorney, to which the respondent pleaded not guilty. A week later the trial of the case was commenced. The jury was sworn, and a witness produced upon the part of the people, when objection was made to any further trial of the case on the ground that the husband could not make a complaint, and that the complaint and all subsequent proceedings were void. The objection was overruled, the trial proceeded, and respondent was convicted.

It is urged on the part of the respondent that the proceedings are void *ab initio*, and respondent should be dis-

charged; citing *Hubbell* v. *Grant*, 39 Mich. 643; *Calder* v. *Bull*, 3 Dall. 390; *People* v. *Williams*, 1 Idaho, 85; *Merwin* v. *People*, 26 Mich. 298 (12 Am. Rep. 314); *Turner* v. *People*, 33 Mich. 363; *People* v. *Quanstrom*, 93 Mich. 254 (17 L. R. A. 723). The first of these cases is a civil case. In the Idaho case the alleged offense is held not to have been an offense when the act complained of was done. In the *Merwin Case* the information upon which the trial proceeded did not state an offense. The case of *Turner* v. *People* does not sustain the position taken by the respondent. The case of *People* v. *Quanstrom* decides that a lawful wife cannot make a complaint against her husband for bigamy; and, if the question had been raised at any time before the respondent pleaded to the information, it would have been the duty of the court to discharge her. An examination of the original record in *People* v. *Quanstrom* shows, what does not appear in the opinion, that the respondent, when arraigned by the prosecuting attorney, stood mute. Doing this, he of course waived nothing by his plea. In the case now before us an information complete in form and substance, which was verified by the prosecuting attorney, who was competent to verify it, was filed. To that information the respondent did not object, but pleaded thereto not guilty. We think this was a waiver of the want of regularity in justice's court, and gave the circuit court jurisdiction to try the case. *Washburn* v. *People*, 10 Mich. 372; *People* v. *Jones*, 24 Mich. 215.

Judgment is affirmed.

The other Justices concurred.

WILLIAMS *v.* FLINT & PERE MARQUETTE RAILROAD CO.

1. RAILROADS—ABANDONMENT OF TRACK—CLAIMS OF CONTRIBUTORS—STATUTES.

   Prior to the passage of Act No. 125, Pub. Acts 1891, those who contributed to the construction of a railroad had no right of action against the company for abandoning and taking up its track. That act makes the taking up of the track unlawful, unless by virtue of proceedings in court, where decree is to be granted only upon condition that the company pay back all moneys received as a bonus. It is further provided that no decree or order for a proposed abandonment shall take effect, or be of any force, until all awards of contributors be first legally and fully settled and paid. The act designates no method for ascertaining who are claimants, or for bringing them before the court if they do not voluntarily appear. *Held*, that the act does not give to contributors a right to have their claims heard and allowed at any time, but contemplates an expeditious adjudication of their rights in the proceeding instituted by the company for leave to take up its track.

2. SAME—WAIVER.

   Where, therefore, after application made by the company for leave to abandon, a contributor files a petition, upon behalf of himself and such others as may choose to avail themselves of the proceeding, for the appointment of a time and place at which all parties who have contributed to the road may be notified to appear and prove the amount of their several contributions, and an order is entered thereon that all contributors shall prove their claims before a commissioner upon a certain day, which order is published, as directed by the court, in a county paper, contributors who fail to appear and make proof of their claims will be deemed to have waived their right to reimbursement.

3. SAME—NOTICE—SUBSTITUTED SERVICE.

   Substituted service of a notice to contributors to the construction of a railroad to appear and submit their claims on abandonment of the road under Act No. 125, Pub. Acts 1891, is permissible.

4. SAME.

The fact that an order for the presentation of claims for contributions against a railroad company which has filed its petition under Act No. 125, Pub. Acts 1891, for permission to abandon its tracks, is issued at the instance of a contributor instead of at the instance of the company, does not render it the less binding upon contributors who fail to comply with its provisions.

Appeal from St. Clair; Eldredge, J., presiding. Submitted February 5, 1898. Decided March 22, 1898.

In the matter of the application of the Flint & Pere Marquette Railroad Company to abandon and take up its track between Yale and Zion stations, and to abandon the intermediate stations of Fargo and Hartsuff: Petition of William Williams and others for a refunding of contributions. From a decree dismissing the petition, petitioners appeal. Affirmed.

N. E. Thomas (*H. W. Stevens* and *J. A. Rapley*, of counsel), for petitioners.

Benton Hanchett, for defendant:

Personal service is not required where the object of the suit or proceedings is to furnish opportunity to parties to assert and prove claims which they may have against other parties, or against the property of other parties. *United States Trust Co.* v. *United States Fire Ins. Co.*, 18 N. Y. 199, 214; *Happy* v. *Mosher*, 48 N. Y. 313; *Mason* v. *Messenger*, 17 Iowa, 261, 266; *Hahn* v. *Kelly*, 34 Cal. 391, 417; *Bickerdike* v. *Allen*, 157 Ill. 95; *Board of Directors* v. *Collins*, 46 Neb. 411; *Bardwell* v. *Collins*, 44 Minn. 97, 101; *Town of Hinckley* v. *Railroad Co.*, 70 Minn. 105; *Nations* v. *Johnson*, 24 How. 195, 205; *Pennoyer* v. *Neff*, 95 U. S. 714, 727; *Arndt* v. *Griggs*, 134 U. S. 316, 320; *Lent* v. *Tillson*, 140 U. S. 316, 327; *Hamilton* v. *Brown*, 161 U. S. 256, 268, 275.

HOOKER, J. In the year 1890, the Flint & Pere Marquette Railroad Company filed its petition, under Act No.

275 of the Public Acts of 1887, for an order permitting it to abandon and take up that portion of its track between the stations of Yale and Zion. Notice of the proceedings was published, and a contest made, and upon the hearing the circuit court dismissed the petition. Upon review in this court, by an opinion filed in 1892, the decree of the circuit court was reversed, and the cause remanded for further proceedings. See *Flint, etc., R. Co.* v. *Rich*, 91 Mich. 293. Meantime the statute was amended by Act No. 125 of the Public Acts of 1891. This act made the repayment of bonuses to those from whom they had been received, etc., a condition of such decree. After the cause was remanded to the circuit court, one Charles Eves filed a petition upon behalf of himself and such others as might choose to avail themselves of the proceedings, asking that the circuit court "*appoint a time and place at which all parties who have so contributed to said road may be notified to appear and prove the amount of their several contributions, and that this court may direct in what manner such notice to such contributors shall be given.*" This was contested by the railroad company, but the court made an order as prayed, said order containing, among others, the provision:

"*That all parties having claims against said railroad for contributions given in aid of the construction of said road, as aforesaid, shall file said claims in writing in the office of the clerk of the circuit court for the county of St. Clair on or before the 1st day of September, 1892;* that the railroad company shall, on or before the 10th day of September, 1892, file in writing in said clerk's office a notice of contest and of objections to all such claims as the railroad company intends to contest; that the claims be referred to Dennis P. Sullivan, a commissioner of said court, to take proofs thereon, and report said proofs, with his opinion, to the court.

"It is further ordered that all parties presenting or representing said claims be notified, by publication as hereinafter provided, to appear at the office of said commissioner in the city of Port Huron, in said county, on Monday, the 26th day of September, 1892, at 10 o'clock in the fore-

noon of said day, for the purpose of proving the amount of their said claims, and that said proofs be heard, taken, and continued from day to day by said commissioner in behalf of each party until all of said proofs are taken on behalf of said claims, and in opposition thereto.

"It is further ordered that a copy of this order be printed once in each week for three weeks in succession, before the time appointed for filing said claims, in the Sunday Herald, a newspaper printed, published, and circulating in said county, the first publication to be on or before the 6th day of August, 1892; and that a copy of this order be served upon William L. Webber and upon Messrs. Atkinson & Wolcott, solicitors for said railroad company, within 10 days from the date hereof."

The publication of the order mentioned was followed by the presentation of several claims, some of which were ultimately allowed and others disallowed, by a decree dated May 7, 1894, on which day a decree was also entered granting the prayer of the railroad company as to the abandonment of the road in controversy. In this decree it was adjudged that "all persons who did not so file their claims, and all who failed to appear and make proof of their claims pending the proceedings before said commissioner, pursuant to the order of this court of the 25th day of July, 1892, must be deemed to have waived their right to be reimbursed their contributions." This proceeding was reviewed by this court upon appeals taken by the railroad company and persons whose claims were not allowed, and the decree was affirmed (*In re Flint, etc., R. Co.*, 105 Mich. 289), except as to the appealing claimants, who had contributed to the portion of the road abandoned, whose claims were allowed by this court. Thereupon the claims allowed were paid by the company. Subsequently this petition was filed in the cause, and by it other persons who claim to have contributed to the building of some portion of the defendant's road ask to be reimbursed under this statute of 1891, claiming that they were not before the court, and that their rights under the statute have not been divested.

Previous to the act of 1891, those who contributed

to the construction of a railroad had no right of action against the railroad company for abandoning and taking up its track. See *Ayres* v. *Dutton*, 87 Mich. 528 (13 L. R. A. 698). That act made the taking up of the track by a railroad company unlawful, unless by virtue of proceedings in a court of justice, which was given authority to grant a decree permitting it. It was provided, however, by section 1 of the act, that no such decree should be made "except upon condition that such company first pay back to each individual, private or public corporation, or to the heirs, executors, administrators, successors, or assigns of such, all moneys received by such railroad company from such individual or corporation as a bonus," etc. The second section provides that "no decree or order for a proposed abandonment shall take effect, or be of any force, until all awards of such contributors be first legally and fully settled and paid." Under these provisions, according to the letter of the statute, the company has no right to abandon its road without first paying the claims allowed. It designates no method for ascertaining who are claimants, or bringing them before the court if they do not appear voluntarily, unless it is to be inferred that the proceeding is to follow the general rule of chancery practice. It is contended by the petitioners that this act gives them rights of action against the company of which they cannot be deprived except by due process of law, and that the court acquired no jurisdiction over them through the publication of the order mentioned, and that they were entitled to have their claims heard and allowed whenever they should see fit to move the court therefor.

It seems to us that all the rights to redress by reimbursement which the petitioners have in this proceeding are derived from the statute, and must be obtained in the proceeding instituted by the railroad company for the purpose of obtaining a decree to take up a portion of its track. We have seen that its decree cannot become operative until all awards are paid, and a law-abiding railroad com-

pany may be expected to make such payment before abandoning its road. Again, there is no express provision in the act compelling such payment if, after ascertaining the amount awarded, the company shall elect not to abandon its track; and it is possible that it has a right to elect not to do so. Unless there is some way by which the company can compel the expeditious adjudication of outstanding claims of this nature, and if, as counsel's contention implies, every contributor to any portion of the road may take his own time to appear and submit his claim unless brought in by personal service of process, it might be a long time before a decree would become operative if taken, or the railroad company could safely determine whether or not it could afford to take up its track to any portion, though it be insignificant.

We are of the opinion that a fair construction of this act is that the legislature intended to provide a procedure through which the railroad might safely abandon and take up portions of its tracks when its interests require it, and those of the State permit, and at the same time, and in the same proceeding, permit the contributors — to such portion of the road, at least — to obtain reimbursement. It is not to be supposed that such persons can be cut off without an opportunity to be heard as to their claims, and we must, therefore, consider the question of the sufficiency of the notice given. As a general rule, personal notice is requisite to a personal judgment. There are many cases, however, where this is impracticable, and substituted service is a common thing, even where judgment is sought to bind the property of another, provided such property is within the jurisdiction of the court. In a large class of cases it is also common practice to resort to a substituted service to compel the assertion and prosecution of claims. This course is especially adapted to and adopted in cases where the proceeding is instituted to ascertain the rights of those upon whose behalf the proceeding is instituted in specific property by proceedings *in rem*, or in the nature of proceedings *in rem*. Such, as counsel suggest, are

attachments, the administration of estates, claims against ships and against the levy and collection of taxes, the impounding of animals, and proceedings in bankruptcy. Especially is this true where it is impossible or difficult to ascertain with certainty the ownership of claims or interests in the property. Numerous authorities supporting this rule will be found in the briefs of counsel. *Happy* v. *Mosher*, 48 N. Y. 313; *Mason* v. *Messenger*, 17 Iowa, 261. This is a case of that kind. It has for its object the ascertainment of the rights of parties in the piece of railroad in question. There can be no presumption that the railroad company would know, or could readily ascertain, the ownership of the claims, or whether the owners were within the jurisdiction of the court. It seems to us closely analogous to the settlement of an estate, where those having claims must present the same seasonably for adjudication, or be forever barred, and publication is the only notice to which they are by law entitled.

It is contended that this notice was not given or order made at the instance of the railroad company, being made upon the petition of Eves, a claimant; but we think that is immaterial. The court, by its decree, provided for notice, and that notice was given. Some availed themselves of it. These claimants did not, though counsel asserts—and we do not discover a denial—that it is not shown that they had not knowledge of the notice and pendency of the proceedings in time to have seasonably filed their claims; a fact that is perhaps unimportant, except as it goes to the question of an intentional waiver.

We consider a discussion of other questions unnecessary. The decree dismissing the petition is affirmed, with costs.

The other Justices concurred.

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LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. *v.* BRANCH CIRCUIT JUDGE.

MANDAMUS—BILL OF EXCEPTIONS—SETTLEMENT.

Mandamus will not issue to compel the circuit judge to settle a bill of exceptions after the expiration of the time provided for by Circuit Court Rule No. 47, in the absence of a stipulation extending the time.

Mandamus by the Lake Shore & Michigan Southern Railway Company to compel George L. Yaple, circuit judge of Branch county, to settle a bill of exceptions. Submitted March 1, 1898. Writ denied March 22, 1898.

On March 19, 1897, verdict and judgment were entered against the relator. On March 20th an *ex parte* order was made granting relator until July 1st to settle a bill of exceptions. On June 26th relator entered a motion for a new trial, which was denied September 7th. On July 1st, September 9th, and October 4th *ex parte* orders were made extending the time to settle the bill, the last order extending it to November 1st. On September 9th a copy of the proposed bill was served upon the plaintiff's attorneys. On October 6th proposed amendments were served. During October and November several letters passed between the respective parties in regard to the matter. On October 25th the attorneys for plaintiff wrote the attorney for the relator, stating that they had heard nothing from the proposed amendments, and they were anxious to get the case settled and heard at the next term of court, and said, "We shall feel like opposing any extension of time whereby the settlement is to be delayed." On November 23d one of the attorneys for plaintiff wrote relator's attorney, refusing to take any further steps towards settling the bill of exceptions. On December 2d notice was given

to settle the bill before the respondent on December 6th. December 13th relator made a special motion to extend the time to settle the bill. This was heard December 20th and denied January 31st. The relator now asks for the writ of *mandamus* to compel respondent to settle the bill.

C. E. Weaver, for relator.

Lockerby & Lockerby and *Campbell & Johnson*, for respondent.

GRANT, C. J. (*after stating the facts*). Cir. Ct. Rule 47 gives a party absolutely 20 days in which to settle a bill of exceptions, and the right to further time, not exceeding 60 days; but no further time shall be granted except for good cause shown by affidavit on special motion after notice, or on the written stipulation of the parties. There was no written stipulation, and the circuit judge, who had all the facts before him, refused to settle the bill. The correspondence did not amount to a stipulation extending the time, and there was no order made by the court extending the time after November 1st. We cannot set aside the ruling of the circuit judge without virtually abrogating Rule 47.

The writ is denied.

The other Justices concurred.

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GRISWOLD v. CITY OF LUDINGTON.

1. MUNICIPAL CORPORATIONS — CLAIM FOR PERSONAL INJURIES — VERIFICATION.

   Although a statement of claim for personal injuries against a city of the fourth class is duly filed within 60 days after the injury occurs, as required by section 1 of chapter 22 of the general charter (Act No. 215, Pub. Acts 1895), the city cannot be held liable therefor where claimant fails to verify the same, or to have it certified by an officer of the city, as required by section 20 of chapter 8, which provides for the certification or verification of claims, and makes it a sufficient defense to any action for the collection of any demand or claim against a city, "for personal injuries or otherwise," that it has never been certified or verified as therein provided.

2. SAME.

   The certificate or affidavit, by the terms of section 20 of chapter 8, must "accompany" the statement of the claim or account; and therefore the filing of a separate verification after the expiration of the 60 days does not meet the requirements of the statute.

3. SAME—WAIVER—EVIDENCE.

   But the failure to verify is a defect which may be waived by the common council; and evidence that it received an unverified claim without objection, and kept the same under advisement, carrying on negotiations with claimant, until after the time for filing a verified claim had elapsed, tends to show such a waiver.

4. SAME—DEFECTIVE SIDEWALKS—ABSENCE OF LIGHT.

   A declaration averring that the defendant city permitted a dangerous hole to exist in a sidewalk, and that, the walk being unlighted, plaintiff was injured, states a cause of action.

Error to Mason; McMahon, J. Submitted January 5, 1898. Decided March 29, 1898.

Case by A. Linley Griswold against the city of Ludington for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Cutcheon & Swarthout (*A. A. Keiser*, of counsel), for appellant.

H. G. Reek (*E. N. Fitch*, of counsel), for appellee.

LONG, J. This suit is brought to recover for personal injuries claimed to have been received by plaintiff from falling through a hole in a sidewalk in the city of Ludington, October 19, 1896. Defendant is a city of the fourth class.

The declaration contains four counts. The first alleges the injuries to plaintiff from falling through an open hole in the sidewalk, about eight inches by four feet in dimensions, at a point where the sidewalk was raised four feet above the level of the ground, and supported upon posts and blocks, in the manner of a bridge or trestle. The second count, while embracing all the substance of the first, relies especially upon the defective construction of the walk, it being raised about four feet above the ground, in the manner of a bridge or trestle, and having no supports between the stringers, which were four feet apart, and being constructed of improper, unsound, and weak material. The third count is upon a weak, defective, and broken plank in the sidewalk, and does not differ materially from the first count. The fourth count embraces all the features of the first and second as to the existence of the hole, and the construction and defective condition of the walk, and then alleges that:

"Also, in view of the peculiar construction of the said sidewalk, so raised above the ground in the manner of a bridge or trestle, and of the manner in which it was supported upon posts and blocks, and of the fact that the said sidewalk was constructed in a negligent and careless manner, and of unsound, inferior, and improper materials, and in view of the danger to persons passing over the same,

and that the said sidewalk had become old, decayed, and weakened, and that some of the planks in said sidewalk had become loosened, weak, and dangerous, especially at night, when it was impossible to see or to avoid holes and defective places or weak or loosened planks in said sidewalk, it became and was the duty of the said defendant to cause the said street and the said sidewalk to be suitably lighted by night, especially in the early hours of the evening, when said street and sidewalk was frequented by many persons going to the railroad station to take the outgoing trains; and plaintiff avers that the said sidewalk was not in a condition reasonably safe and fit for public travel without being lighted; but that defendant, well knowing the dangerous and unfit condition of the said sidewalk, negligently and wrongfully turned off the lights upon said street and sidewalk, so as to leave the same in darkness, and render it impossible for passers to perceive and avoid the dangerous places therein."

To this declaration defendant demurred. Upon the hearing, the court sustained the declaration as to the first three counts, and sustained the demurrer to the fourth, holding that it stated no cause of action. The defendant demanded a bill of particulars of the plaintiff's claim, which plaintiff furnished. Defendant thereupon pleaded the general issue, and gave notice of special matter of defense, under the charter, that plaintiff's claim had not been presented to the common council of said city, verified or certified as required by the charter.

The cause came on to be heard before a jury on June 29, 1897. Plaintiff introduced testimony tending to show the defective condition of the sidewalk, the existence of a hole at the place averred, and of the dimensions claimed; that the hole had existed there in the same condition for about four months, and had been observed by various witnesses in July, August, September, and October, 1896. Plaintiff testified that upon the 19th day of October, 1896, in the evening, it being very dark and stormy, and slush covering the sidewalk, while going to the railroad station, he suddenly and unavoidably fell into said hole; that he went down the entire length of his leg, causing severe injuries, etc.; that on December 17th he served upon the city clerk a notice in writing as follows:

"THE COMMON COUNCIL OF THE CITY OF LUDINGTON, MICH.

"*Gentlemen:* You are hereby notified that on the 19th day of October, 1896, at about the hour of 7 o'clock in the evening, I was seriously and permanently injured and disabled by falling into and through a hole or opening in the sidewalk on the south side of Foster street, near the intersection of Charles street, in the said city of Ludington, at a point in front of the building owned by August Tiedemann and William C. Ungers, and about 43 feet west of the point where the south line of Foster street intersects with the west line of Charles street; that said injury and disability were caused by a defect in the sidewalk on said street, at the point designated, produced by a broken plank; that the manner of said injury was as follows: I was passing along said street, upon said sidewalk, with all due care and caution, and without any negligence on my part, the night being very dark and stormy, and I being almost a stranger in the city, and, without any fault on my part, I unavoidably stepped with my right foot into said opening or hole in the sidewalk, and fell heavily upon and along the said sidewalk; and, the sidewalk at the point aforesaid being raised considerably above the natural surface of the ground, my foot went down the entire length of my right leg, and, the sidewalk being wet and slippery, my left foot slipped and slid upon the sidewalk, so that I fell with my whole weight upon the parts of my body between the legs, very greatly bruising and injuring the testicles, scrotum, spermatic cord, and the parts adjacent to the rectum, and also greatly bruising, straining, and contusing the hips and the lower parts of the spine. The injury to the genital and urinary organs was such that I have been subject to great pain and distress ever since, and have been unable to stand upon my feet without supporting the said parts by means of a suspensory bandage; and the muscles, nerves, and ligaments of the rectum were so bruised, strained, and injured that it has been difficult, and at times impossible, to control the action of the bowels; and the hips and spine have been so strained, shocked, bruised, and contused that, in consequence of the said various injuries, I was confined to my bed, and under the charge and care of physicians, for a period of three weeks, and am still able to walk only with difficulty and much pain, and by the aid of crutches.

"There were no other witnesses present at the time of said injuries.

"By reason of said injuries so received through the said defective sidewalk, I have been put to great cost and expense for doctor's bills, for nurses and attendance, for medicine and suspensory bandages, crutches, and other appliances, and for other large outlays; and have been disabled from performing my professional work as a minister of the gospel at the village of Custer, where I reside; and have been caused to suffer very great pain and distress of body, and also great pain, anxiety, and distress of mind, and have been permanently and seriously injured and disabled thereby; on account of all which injuries, bruises, wounds, and disabilities, costs, expenses, charges, loss of time and services, pains, sufferings, and permanent injuries, I claim damage from the said city of Ludington to the amount of $5,000.

"You are further notified that I have appointed Messrs. Cutcheon & Swarthout, 831 Michigan Trust Company Building, Grand Rapids, Mich., to represent me and to act for me as my attorneys in all matters pertaining to this claim.

"Very respectfully,

"A. LINLEY GRISWOLD.

"Dated December 17, 1896."

Plaintiff was then asked by his counsel to state what further was done between himself and the council of the city after this notice was served, and answered, "There was a conference had between a council committee and myself." He was then asked, "Who were present?" and stated that he could not name all the members of the committee. The inquiry was objected to and sustained, the court stating that there was no showing that any committee was authorized by the common council to treat with the plaintiff; that the showing was that some people met whose names could not be specified, and assumed to act as such committee. No further proof was then offered upon that point, and no showing made that this committee was authorized by the common council to act, or who composed the committee. Plaintiff then introduced a letter from the city clerk to his attorneys, dated January 20, 1897, as follows:

"*Gentlemen:* At a meeting of the common council held Monday evening last I was instructed to notify you, as attorneys for Rev. Griswold, that no damages would be offered him for the alleged injuries received last October. Yours very truly,

"U. S. GRANT, City Clerk."

Plaintiff then offered in evidence the record of the common council, which read:

"On motion of Alderman Smith, the city clerk was instructed to notify the attorneys of Rev. Griswold that no damages would be offered him for alleged injuries incurred on October last."

Plaintiff then gave evidence of the extent of his injuries, the employment of a physician, etc. Plaintiff was then asked "whether, at your interview on that day with the mayor of the city, or with the clerk of the city, or with the supposed committee that you had the conference with, or with anybody else connected with the defendant city, any objection was made upon the ground that your claim had not been sworn to." This was objected to, and the objection sustained. Plaintiff was then asked "whether or not at any time since, by the city attorney or by any official connected with the city, any objection has, until the plea was filed, ever come to you in any way in regard to your claim not being sworn to or otherwise," and answered, "Never."

Mr. O. J. Wangen, a member of the city council, was called, and testified that he knew of the claim being filed by the plaintiff, and was asked:

"Were you present at the council meeting on the night of December 7th last?

"*Counsel for defendant:* Do you propose to prove what occurred at the council meeting by oral testimony, independent of the record?

"*Counsel for plaintiff:* I propose to prove something that took place in connection with the council meeting.

"*The Court:* Do you propose to prove an action by the council?

"*Counsel for plaintiff:* Not a formal action. We want to show that there was a meeting of the common council; that this claim was then presented to the council; and that, in order to avoid the taking of a formal action, after the council had formally adjourned they were requested by the mayor to remain, and did all remain, and that this matter was brought up, and a committee was appointed, and that Mr. Wangen was on that committee, and chairman of it, to consider the claim of Mr. Griswold, and that they did consider it, and that that committee met with the counsel and Mr. Griswold, and that this matter was gone into, and that, in consequence of this conference on the night of the 8th of December, that letter which has been once offered in evidence was written by Mr. Smith.

"*Counsel for defendant:* The record of that meeting is here. If it was an informal meeting, we have nothing to do with it.

"*Counsel for plaintiff:* It was the council; and that this proceeding was taken in this matter for the express purpose of keeping it off the records. Our impression is that this whole matter is a deliberate plan to defeat the putting of this claim upon the record.

"*The Court:* Can you prove that?

"*Counsel for plaintiff:* That is what we want to prove.

"*Counsel for plaintiff:* I will ask you whether you were present at that meeting of December 8th last?

"*A.* I was, if the record shows that. I don't remember the date.

"*Q.* December 7th, it appears to be here.

"*A.* Yes, sir; I was present at that meeting if my name is on there.

"*Q.* What was done at the close of the council meeting in regard to the council remaining?

"*Counsel for defendant:* I object to that for the reason that, after the council closed a session, whatever was done afterwards was done as citizens, and not as representatives of the city, and could not bind them.

"*The Court:* As preliminary, I will receive it, and note an exception.

"*A.* Well I don't remember what was done in particular, who called the meeting, or anything of that kind. I don't remember anybody in particular calling the meeting.

"*Q.* I refer to the time when Mr. Griswold's claim

was brought up and talked over. Do you remember that occasion when a committee was appointed, of which you were a member, to confer with Mr. Griswold's attorney?

"*A.* There was no committee appointed during the session of the council, to my memory.

"*Q.* But was there an informal committee appointed?

"*Counsel for defendant:* We object to that.

"*The Court:* I sustain the objection. I think, without any showing of fraud or anything else, you must take the action of the council at its public meeting, held according to the charter, as a body.

"*Counsel for plaintiff:* Note an exception."

Witness further testified that this informal committee never reported to the council, to his knowledge.

Dr. McConnell testified in behalf of plaintiff that he went voluntarily before the council, and made a statement of plaintiff's claim. The following letter was also put in evidence:

"GRAND RAPIDS, MICH., March 10, 1897

"U. S. GRANT, Esq., City Clerk,

"Ludington, Mich.

"*Dear Sir:* We hand you herewith verification on oath of the claim of A. Linley Griswold against the city of Ludington for injuries received by him through defective sidewalk in said city, and for which his claim was duly filed with you on the 17th day of December last; also sworn statement of the items of his claim, and the particulars of his injuries, so far as it is possible for him to itemize the same. You will please file these papers with his claim formerly filed, as hereinbefore stated, and return to us the inclosed receipt for the same. We are,

"Yours truly,

"CUTCHEON & SWARTHOUT,

"Attorneys for said Griswold."

Plaintiff also put in evidence an affidavit made by him on March 4, 1897, setting forth that on December 17, 1896, he served on the mayor of the city of Ludington, and upon the clerk, his claim in writing for damages, and that attached thereto was a true copy of his claim in writing. The affidavit then recites:

"All the allegations set forth in said claim as to his said

injuries through said defective sidewalk, and as to the time, place, and manner of his injuries, and as to the extent of his said injuries, are true in manner and form as therein set forth."

It appears that this affidavit, with a copy of his former claim in writing, was served on the city some time in March, 1897.

The defendant thereupon moved the court that the verdict be directed for the defendant, and it was so directed. The court was of the opinion that no such certified or verified statement had been served upon the defendant as entitled the plaintiff to maintain his action.

The claims made by the plaintiff are:

1. That the claim presented to the common council substantially complied with the statute, (*a*) in that claims for personal injuries are not required by the charter to be verified; (*b*) in that the time when it must be verified is not fixed by the charter, and the verification in March, 1897, was sufficient.

2. That there was some evidence to go to the jury tending to show a waiver by the council of the fact that the claim was not sufficiently verified or certified.

3. That the court erred in holding that the fourth count of the declaration did not state a cause of action.

The defendant city is operating under the general charter of fourth-class cities, being Act No. 215, Pub. Acts 1895. There are two sections in said charter which are claimed to be applicable to this case. The first is section 1, chap. 22, which is as follows:

"The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the city, and shall cause the same to be kept in repair and free from nuisance. No city subject to the provisions of this act shall be liable in damages sustained by any person in such city, either to his person or property, by reason of any defective street, sidewalk, cross-walk, or public highway, or by reason of any obstruction, ice, snow, or other incumbrance upon such street, sidewalk, cross-walk, or public highway, situated in such city, unless such person shall serve or cause to be served, within sixty days after such injury shall

have occurred, a notice in writing upon the clerk or the deputy clerk of such city, which notice shall set forth substantially the time when and place where such injury took place, the manner in which it occurred, and the extent of such injury, as far as the same has become known, and that the person receiving such injury intends to hold such city liable for such damages as may have been sustained by him."

Section 20, chap. 8, 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 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 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."

The remaining clauses of section 20 are as follows:

"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, 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 affidavit or certificate as 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."

It will be noticed that the claim was not sworn to or verified in any manner until March 10, 1897, nor is the bill of particulars in any manner verified. Counsel for plaintiff, however, claim that the statute does not require such verification where claim is made for personal injuries. Section 1, chap. 22, provides for the service of notice in writing, setting forth the time when and place where

such injury took place, the manner in which it occurred, and the extent of such injury, so far as the same has become known, etc. This section does not in terms require the statement to be verified. The first part of section 20, chap. 8, above quoted, provides that no account or claim or contract shall be received for audit or allowance unless it shall be accompanied by a certificate of an officer of the corporation, or an affidavit of the person rendering it, etc. So far as this part of this section is concerned, it may well be said, as held by the court below, that "the words 'account or claim' are not enough to cover unliquidated claims for personal injuries in an action *ex delicto*." *Lay* v. *City of Adrian*, 75 Mich. 443. But the remaining portion of that section refers especially to claims "for personal injuries or otherwise," and makes it "a sufficient defense in any court to any action or proceeding" that such claims are not "certified to or verified as aforesaid."

I take it that this latter part of section 20 means that claims for personal injuries or otherwise (that is, all claims) must be certified to or verified as provided in the former portion of section 20, which has reference to claims arising out of contracts, either express or implied. It is the evident intent of the legislature by these sections of the charter to compel all parties having claims against a city to make a statement of the claim under oath, or to obtain the certificate of an officer of the corporation certifying to the correctness of the claim, and until this is done no action can be commenced or maintained. It is made a sufficient defense to the action if this is not done. This question is settled in *Springer* v. *City of Detroit*, 102 Mich. 300; *Snyder* v. *City of Albion*, 113 Mich. 275; *Selden* v. *Village of St. Johns*, 114 Mich. 698.

The claim that the affidavit, as a verification of the claim, served in March, 1897, was a compliance with the statute, can have no force. Under section 1, chap. 22, the claim must be made within 60 days after such injury, and the verification must accompany the claim. It must,

in other words, be verified or certified and served within 60 days after the injury.

But we are satisfied that the court was in error in holding that there was no evidence of waiver by the common council of the right to insist upon a verified claim being presented. The plaintiff gave testimony tending to show that the claim was served upon the city clerk and mayor on December 17, 1896. The council held this claim until January 20, 1897. In the meantime it is apparent that several meetings of the council were held at which this claim was up for discussion; and plaintiff offered proof on the trial tending to show (which testimony was ruled out by the court) that after the claim was referred to the council, and in order to avoid the taking of formal action, the members were asked to remain after the council closed, and did remain, and a committee was then informally appointed to consider the claim, and did consider it; that this committee met with plaintiff and his counsel, and the matter was fully discussed; that no objection was made by this committee, or ever made by the common council, to the claim on the ground that it was not verified. It appears that one of the aldermen notified plaintiff that the council had informally appointed a committee "to look into the liability of the city, and report the same at the next meeting." Plaintiff sought to show what that committee reported back to the council. This was not permitted. The council appointed this committee, and had the claim of plaintiff under advisement until after the time for filing a new and verified claim had elapsed, and then notified plaintiff that no damages would be offered for the injuries.

A waiver is a mixed question of law and fact, and each case must necessarily depend much upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but, when there is any evidence, the jury must determine what the intent of the party was, as the question of waiver is usually one of intent, as indi-

cated by the acts and declarations of the party. *Fox* v. *Harding*, 7 Cush. 520; 28 Am. & Eng. Enc. Law, 535. We are unable to say, as matter of law, that there was no evidence in the case showing an intent on the part of the council to waive the fact that the claim was not verified. In *Germaine* v. *City of Muskegon*, 105 Mich. 213, the claim was verified, though the verification was before one of the attorneys in the case. The statute makes such affidavits void. It did not appear in that case that the claim was rejected for the reason that it was sworn to before one of the attorneys for the party, and this court held that such objection was waived. It is true the charter of the city of Muskegon is different from the charter under consideration, and provides substantially that the reason for such rejection must be stated. But in the present case we think the question of waiver was one of fact for the jury, under all the circumstances stated. That the common council might waive such defects, under certain circumstances, is held in *Canfield* v. *City of Jackson*, 112 Mich. 120.

One more question needs to be mentioned, that relating to the fourth count. We think the court was in error in sustaining the demurrer to that. That count, added to the other causes set out in the former counts, avers that the city failed to light the street, so that by the walk's being out of repair, and being unlighted, the plaintiff was injured. In *Miller* v. *City of St. Paul*, 38 Minn. 136, it was said:

> "Of course, the fact as to whether a street was lighted or not may, in many cases, have a material bearing upon the question of negligence, for the manifest reason that a street left in a certain condition may be reasonably safe if lighted, but dangerous if unlighted."

In *Hayes* v. *City of West Bay City*, 91 Mich. 422, the negligence claimed was leaving a building in the street with timbers projecting and without lights.

In the present case, the negligence claimed is not that the city did not properly light its streets, but that it

left a dangerous hole in the walk, and, the walk being unlighted, the plaintiff fell into it and was injured.

The case, for the reasons above given, must be reversed, and a new trial awarded.

The other Justices concurred.

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116 414
123 592

116 414
152 2366

UNION NATIONAL BANK *v.* RICH.

1. APPEAL—REVIEW—RES JUDICATA.
   A question directly raised on appeal, and passed upon by the court after a full discussion and citation of authorities by counsel, is not open for consideration on a second appeal.

2. SAME—FINDINGS ON DISPUTED EVIDENCE.
   A finding of the circuit judge as to the value of a stock of goods involved in a chancery suit heard before him, concerning which the opinions of witnesses are not in harmony, will not be disturbed on appeal, unless it clearly appears to be erroneous.

3. SALE UNDER TRUST MORTGAGE—LIABILITY OF PURCHASER—CONTRIBUTION—EQUITY—DECREE.
   One who, knowing of the right of another to be subrogated to the claim of a beneficiary under a trust mortgage, purchases the property covered thereby, paying the full purchase price to the other beneficiaries, cannot complain that a decree by which he is held liable to the excluded claimant for the latter's proportion of the purchase price, and which is made without prejudice to his right to bring an action at law against the other beneficiaries to recover the amounts paid to them in excess of their *pro rata* shares, does not go further, and enforce contribution in the same suit.

Appeal from Wayne; Peck, J., presiding. Submitted January 6, 1898. Decided March 29, 1898.

Bill by the Union National Bank of Detroit against Charles A. Rich, trustee, and others, to compel the appli-

cation of certain of the proceeds of a trust mortgage to the payment of a note held by complainant, and for other relief in connection therewith. From the decree rendered, complainant and certain of the defendants appeal. Affirmed.

Sloman & Groesbeck, for complainant.

A. G. Pitts, for appellants Oscar E. Rasch and Augusta Rich.

T. T. Leete, Jr., for appellants Walter Buhl & Co.

Charles K. Latham, for appellee Charles A. Rich.

Brennan, Donnelly & Van De Mark, for appellee Peninsular Savings Bank.

Wells, Angell, Boynton & McMillan, for appellee American Exchange National Bank.

Bowen, Douglas & Whiting, for appellee Mechanics' Bank.

MOORE, J. This case has been here before, and is reported as *Union National Bank* v. *Rich*, 106 Mich. 319. A reference to the case, as reported, will aid in the understanding of its present situation. After the case was remanded for further proceedings, a trial was had, and a large amount of testimony was taken, the witnesses being examined in open court. A decree was rendered, in which the circuit judge found that, when the chattel mortgage was made, the defendant August Rasch was insolvent, and that the complainant and the defendant the Peninsular Savings Bank were entitled to be subrogated to his rights in the mortgage before any of the property was sold to Walter Buhl & Co., or before the trustee in the mortgage assented to said sale, and that their rights in said mortgage could not be impaired through any act of the defendant Rasch; that defendants Buhl & Co. knew of the existence of the mortgage and its terms when they purchased the property, and had notice of the rights of the banks in the mortgage. The circuit judge further found

that the property sold to Buhl & Co., including the stock, fixtures, leasehold interest, and horse and wagon, would, upon foreclosure, realize no more than Buhl & Co. paid for it, and that the value of such property at the time of the sale was $10,000. The circuit judge decreed the proportionate share to which each of such banks should be entitled of such fund. He also made a decree disposing of the book accounts, and fixing the interest of the two banks therein, and a decree in relation to the other property mentioned in said bill of complaint. From that decree the complainant and the defendants Oscar E. Rasch, Augusta Rich, and Buhl & Co. appealed.

Counsel for defendants Rich and Rasch makes a very elaborate argument, in which he seeks to show that complainant is not entitled to be subrogated to the rights of August Rasch, and that if it is, inasmuch as Mr. Rasch discharged the mortgage at the time Buhl & Co. purchased the stock, there is nothing to which the complainant can be subrogated. It is urged by the complainant's counsel that the question of subrogation was fully discussed by counsel when the case was here before, and that as to that portion of the case it is not now open to argument. In that respect counsel are right. The brief of the solicitor for the defendants Rich and Oscar Rasch raised the question direct, and stated that this was really the point upon which the case turned, and cited a large number of authorities which he claimed supported his contention. The argument made then was substantially the same as the argument now made. The position taken by the solicitor for the defendants was disputed by the solicitors for the complainant, who cited a large number of authorities in support of their view, and the court adopted the view entertained by the solicitors for the complainant. That feature of the case must, then, be considered as *res adjudicata*.

It is the contention of the complainant that the court erred in deciding the value of the property to be but $10,000. It is urged that the inventory showed it to be worth more than twice that amount, and that, under the

peculiar circumstances of this case, the amount found by the court is too small. The property described in the mortgage consisted chiefly of a stock of fur goods. The sale to Buhl & Co. was made in June, 1894. The season for that kind of goods, at retail, had passed, and would not open again until December. It is a matter of common knowledge that when fur garments are out of style their value is very greatly depreciated. The judgment of the witnesses varied as to the value of this property. They were sworn and testified in the presence of the court, whose opportunity of seeing their degree of intelligence and candor was much better than ours. We do not think it clearly appears from the record that the trial judge was wrong in his conclusion as to the value of the property purchased by Buhl & Co.

It is claimed on the part of Buhl & Co. that the American Exchange National Bank and Mechanics' Bank, inasmuch as they had been paid their claims in full, should be required to contribute to Buhl & Co. for a portion of what they had received. It is the claim on the part of the banks that they were beneficiaries named in the mortgage, and discharged their interest therein upon the agreement that there should be delivered to them, respectively, the note of Walter Buhl & Co. for the amount of indebtedness which was due them from Rasch & Co., and that these notes were afterwards paid voluntarily, and that Buhl & Co. are not entitled to any contribution. Under the facts disclosed by the record, we think the decree of the circuit judge, made without prejudice to the right of said Buhl & Co. to sue at law to recover from these banks, is quite as favorable as Buhl & Co. have any right to ask.

The decree of the lower court is affirmed. Appellees will recover costs of this court against the appealing defendants.

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

PETZ *v.* VOIGT BREWERY CO.

1. LANDLORD AND TENANT—DUTY TO REPAIR.
   A landlord, in the absence of covenants on his part, is not required to repair, even when the premises become defective by reason of deterioration or decay.

2. SAME—LIABILITY FOR RENT.
   Rent is payable even when demised premises have become untenantable by inherent defect, provided they were habitable at the time of the demise, and there was no fraud on the part of the landlord.

3. SAME—EVICTION.
   Where premises demised without any covenant by the landlord to repair become unfit for occupancy while the tenant is in possession, and the landlord, with the tenant's consent, enters upon them for the purpose of making repairs, and completes the same with reasonable promptness, the tenant, in the absence of an agreement to the contrary, is liable for rent during the time such repairs were being made, although he was excluded from the premises for such period.

Error to Wayne; Donovan, J. Submitted January 6, 1898. Decided March 29, 1898.

Assumpsit by Sophia Petz against the Voigt Brewery Company, Limited, for rent. From a judgment in her favor for less than the amount claimed, plaintiff brings error. Reversed.

Keena & Lightner, for appellant.

Wilkinson & Post, for appellee.

LONG, J. Plaintiff is the owner of the premises in question. Edward W. Voigt had been in the brewing business in Detroit for many years, when, in 1889, he organized the defendant corporation. In September, 1882, plaintiff leased the premises in question to Mr. Voigt personally, for the term of five years, "to be occupied for a

restaurant and dwelling." The lessee covenanted that, during that term, he would "keep the said premises, and every part thereof, in as good repair, and, at the expiration of the term, yield and deliver up the same in like condition, as when taken, reasonable use and wear thereof, and damage by the elements, excepted." There was the usual covenant for quiet possession on the part of the lessor, but there was no agreement by her to repair. On April 16, 1887, the parties to this lease executed a renewal lease for five years after the expiration of the first one; *i. e.*, until October 1, 1892. The covenants in this second lease were the same as those above quoted from the first one. February 12, 1891, this second lease having been surrendered for its unexpired term, a new lease was given to the defendant for a term of 10 years from May, 1891; and this lease (being the one upon which this action is based) contained the same clauses as the two prior leases, as quoted above. The rental during the time covered by these leases varied from $2,500 per annum during the first years to $4,000 during the final years. From the time the lessee took possession of the premises, in 1882, until the trial of the cause, in 1897, Mr. Voigt (either for himself personally, or on behalf of the defendant) had the sole and exclusive possession of the whole of said premises, except during three months in 1896, when plaintiff was engaged in making repairs. Mr. Voigt furnished them for the tenants, as he desired, from time to time; and they were taken by the defendant from Mr. Voigt, under the new lease, in precisely the same condition as he had occupied and left them. Mr. Voigt made many changes in the building during his occupancy under the three leases.

In August, 1896, plaintiff received notice, through her brother, Joseph Pulte, who managed her business affairs, from the building inspectors, that the side wall of the building was in an unsafe condition, due to its bulging out at the first and second floors, and that it must be repaired. None of the parties interested in the building had noticed this defect before this time. Mr. Pulte saw

Mr. Voigt, and some conferences followed between them, resulting finally in an interview between Mr. Voigt and Mr. Lightner, on behalf of plaintiff, which was followed by certain correspondence. Plaintiff offered to make the needed repairs to the wall, but refused to allow anything off the rental during the time the repairs were being made. The keys were handed by defendant to plaintiff's attorneys on August 27, 1896, to make the repairs. On September 2d, Mr. Voigt spoke of not intending to pay rent while plaintiff was engaged in making repairs. At once plaintiff's attorneys returned the keys to Mr. Voigt, with the positive declaration that the repairing would be undertaken by plaintiff only on the understanding that all the rent would be paid by defendant under the lease. Defendant thereupon, acknowledging receipt of this letter, returned the keys to plaintiff's attorneys, and told them to go ahead with the repairs, and inclosed check for the month's rent, which was then past due. The repairs were undertaken at once by plaintiff, and were done in a thorough manner, at an expense to plaintiff of about $2,500. The building was inspected by defendant's architect, and was accepted by him about December 1st, he receiving the keys on behalf of defendant. The building inspectors examined the building in December, and gave a certificate that it was in good condition. Defendant, by Mr. Voigt, took possession of the building, and entered upon extensive improvements, to fit it for a German restaurant. While at this work, his men found it necessary to support certain joists with a truss, and to put in supports. This was not in the part of the building which plaintiff had repaired. Defendant did not notify plaintiff of these defects, nor call upon her to repair them, but Mr. Voigt had them attended to himself, and he paid for these latter repairs. This action was brought by plaintiff to recover five months' rental, under the lease, from September, 1896, to January, 1897, which defendant has refused to pay, and interest thereon. The jury returned a verdict for plaintiff for two months' rent; and

the plaintiff, claiming that she is entitled to the five months' rental, asks this court to review the questions decided against her on the trial.

At the close of the testimony, the court submitted to the jury the following special questions:

"1. Did the plaintiff take such control of the premises, to rebuild the wall and repair the building, as to exclude the defendant thereby from possession during the repairs?

"2. Were the premises unfit to occupy during such rebuilding and repairs?

"3. Were the defects that required curing by rebuilding the walls and under-piers made necessary by the uses or changes of the building during the time that these tenants had control?

"4. Did the defendant, during its possession under this lease, remove any columns or partitions, and weaken the building, so as to cause the defects complained of that required repairs?"

Questions 1, 2, and 3 were answered by the jury in the affirmative, and question 4 in the negative, and verdict was rendered in favor of plaintiff for $685, which was for two months' rent.

Plaintiff contends:

(1) That she was not legally required to make the repairs, and that doing the work she did at defendant's request does not constitute an implied covenant that she would make the repairs, and is no excuse for refusal to pay the rent stipulated.

(2) That, admitting that plaintiff was bound to make the repairs, defendant must pay the rent stipulated in the lease, provided the repairs were made with reasonable speed and care, and that it is shown this was done.

(3) That the repairs were made necessary by the improper use of the building by Mr. Voigt under the former leases; and that the defendant knew, through its agent, Mr. Voigt, the condition of the building, and the defendant cannot hold plaintiff liable for the conduct of Mr. Voigt, of which it had full knowledge.

(4) That the repairs were made necessary by the improper use made of the premises by defendant under its lease, — that is, in using them for other than for restau-

rant and dwelling; and defendant must therefore pay rent.

(5) It being admitted that five months' rental under the lease was not paid, and there being no evidence to sustain any of the items of counterclaim given in defendant's bill of particulars, the verdict should have been directed for plaintiff for her entire claim.

(6) That defendant's measure of damages, if it were entitled to any set-off under the facts, was not the rental reserved in the lease, but the actual amount defendant was damaged by reason of the repairs being made.

(7) That the burden was upon the defendant to prove its counterclaim, and to show the amount of its damage.

(8) That, plaintiff having consented to make the repairs on condition that defendant would pay all the rent, by accepting this offer defendant estopped itself to refuse to pay the rent.

(9) Since defendant did not notify plaintiff of the defects claimed to have been discovered elsewhere in the building in January, 1897, evidence of these alleged defects and repairs made by defendant was irrelevant.

We think the most of these contentions are answered by the jury under the general charge of the court. The court charged the jury substantially, after submitting the four special questions:

"There is one other question, while I am upon the subject, I will speak of. It seems to be contended by counsel for the plaintiff, and as sharply denied by counsel for the defendant, that there was an agreement, just about the time they entered upon these repairs and the $300 was sent in for the August rent, whereby the brewing company should pay the rent, notwithstanding that they were to be out of the occupancy; and whether there was an agreement of that kind or not is a question for the jury. * * * Whether or not they came together, whether or not their minds met, or whether they agreed upon anything, you must gather from their dealings there together, and from their correspondence. * * * If you find that the building was unfit for occupancy at the time the plaintiff was notified to rebuild the northeast wall, and the defendant, without any fault on its part, was deprived of the peaceable use of said building, plaintiff cannot recover rent for the use of the building during the period it was in an untenantable condition."

In the verdict, none of the defendant's set-offs were allowed as such. The jury undoubtedly took the defendant's theory, that it was not liable for the rent of September, October, and November, the months during which the plaintiff was making the repairs, and during which time the defendant had no use of the building.

It appears from the testimony that in July, 1896, the board of building inspectors of Detroit inspected the building, and found it in a dangerous condition, and notified plaintiff's agent to "make safe the northeast corner, as this wall is bulged up to the second-story window, and is in bad shape;" that, in accordance with this notice, plaintiff, September 1, 1896, took possession of the building, to make the repairs, and found the wall in such bad condition that, instead of merely bracing it up, the entire easterly wall, for the height of two stories and 60 feet back, was taken out and rebuilt; that the westerly wall of the building had also sagged inwardly; that these repairs were going on until December 1st, when the defendant accepted it, and again commenced its occupancy. Testimony was also introduced by defendant tending to show that during these three months the building was untenantable. Defendant also claimed that it should not be liable for rent for December and January; but, as the jury found for plaintiff for those months, that question need not be discussed.

The only questions, then, remaining are:

1. Whether the court was in error in submitting to the jury the question whether the building was unfit for occupancy during September, October, and November, 1896, and instructing them that if they found it was, and the defendant was thereby deprived of its peaceable use, the plaintiff could not recover the rent during the time it was in an untenantable condition.

2. Whether the court was in error in submitting the question whether there was an agreement between the parties that, if the plaintiff undertook the repairs, the defendant would pay rent during the time the building was being repaired, and instructing them that, if they found such an agreement, the defendant would be liable for the rent for those months.

We think there was evidence in the case which warranted this last charge, if such charge was at all important. But, in view of the fact that defendant did not introduce testimony tending to show an agreement upon the part of plaintiff that it should not pay rent during these months, we think the court in error in submitting the first proposition. The jury found, specially, that the plaintiff took such control of the building to make these repairs as to exclude the defendant from possession. But it is well settled that the landlord, in the absence of covenants on his part, is not required to repair, even when the premises become defective by reason of deterioration or decay. *Fisher* v. *Thirkell*, 21 Mich. 22 (4 Am. Rep. 422); *Gott* v. *Gandy*, 2 El. & Bl. 845. Rent is payable even when demised premises have become untenantable by inherent defect, provided they were habitable at the time of the demise, and there being no fraud on the part of the landlord. Wood, Landl. & Ten. § 382; 12 Am. & Eng. Enc. Law, 722, and cases there cited.

In the present case it appeared that Mr. Voigt, defendant's agent, had occupied these premises for many years before the lease to defendant was made. Mr. Voigt was the agent of defendant, and made the arrangement for the defendant's term. If the premises were then out of repair, he had as much knowledge of it as the plaintiff. This lease was executed in February, 1891, and defendant went into possession under it, and continued in until July, 1896, before the building inspectors of the city gave the notice to repair to make the building safe. It became out of repair or became dangerous and unfit for occupancy while the defendant was in. There being no agreement in the lease that the lessor should make repairs, the lessee would be liable for rent even if the lessor did make them, unless there was an agreement that rent should not continue during that time. The court should have directed verdict in favor of the plaintiff for the whole amount claimed (that is, for the five months' rent), as there is no pretense that the plaintiff agreed to relieve the defendant

from such payment. The defendant relies upon the untenantable condition of the premises, and its exclusion during the time repairs were being made, and not upon an express contract that it should not pay rent during this time. The case is not like *Leonard* v. *Armstrong*, 73 Mich. 577. There the unhealthy condition of the premises existed when the tenant entered. In the present case the jury found that the defects which required the rebuilding of the wall, etc., were made necessary by the uses and changes of the building during the time Mr. Voigt and the defendant had control. The defendant was represented solely by Mr. Voigt, who had the entire and complete control of the business, and made the arrangements under which defendant entered. Clearly, the entry of the plaintiff, with defendant's consent, to make these repairs, under these circumstances, was not an eviction from the premises, and the case does not fall within that class of cases cited by defendant's counsel.

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

The other Justices concurred.

FOWLES v. BRIGGS.

116	425
124	39
116	425
128	655
116	425
s74NW	1046
s72ASR	537
133	426
116	425
141	214

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCY.

A shipper of lumber is not liable for injury to a railroad brakeman while coupling cars, by the shifting of the lumber because it was negligently loaded, where the accident happened after it had become the duty of the railroad company to provide for the inspection of the car.

Error to Saginaw; Snow, J. Submitted January 27, 1898. Decided March 29, 1898.

Case by John S. Fowles, administrator of the estate of Alexander T. Fowles, deceased, against Daniel W. Briggs and James Cooper, for the alleged negligent killing of plaintiff's intestate. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

George W. Weadock and *John F. O'Keefe*, for appellant.

Hanchett & Hanchett, for appellees.

MONTGOMERY, J. Alexander T. Fowles, plaintiff's intestate, on the 4th day of February, 1896, was an employé of the Flint & Pere Marquette Railroad Company. His employment was that of rear brakeman on a freight train. The defendants, lumber dealers, loaded a flat car with lumber, in their yard in the city of Saginaw, and shipped it over the Flint & Pere Marquette Railroad Company, to Toledo, Ohio. The lumber was maple, 11,000 feet, weighing about 33,000 pounds, and piled flat upon the car in two tiers parallel with the sides of the car. It was put upon this flat car by the defendants three days before the day of the accident. The testimony of the plaintiff tended to show that the railroad crew, of whom the deceased was rear brakeman, were ordered by the railroad company, on the morning of the 4th of February, to make up some freight trains for transportation; and, in the line of their duty, this car load of lumber was shunted at a rate not to exceed from three to five miles an hour upon a level track towards a box car. The deceased was upon the ground, and stepped in between the box car and the car load of lumber for the purpose of coupling the two; and, when the car of lumber came in contact with the box car, the lumber shifted 25 inches upon the surface of the flat car, and crushed to death the deceased, by pinning him against the end of the box car.

The plaintiff's declaration declares the several acts of negligence of the defendants to be:

1. That they carelessly and recklessly loaded said flat car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employé of said railroad company to couple it to another car, and that said danger was not apparent to the deceased.

2. That it was the duty of said defendants not to ship maple lumber upon a flat car without having the lumber so fastened and staked as to hold it from shifting.

3. That a piece of timber or other material should have been placed crosswise upon the floor and near the ends of said flat car, under the lumber, for the purpose of elevating the extreme ends of the lumber.

4. That the defendants loaded this lumber upon the deck of said car while the deck was covered with ice and snow and sleet, and in a slippery condition.

5. That the lumber was covered with ice and snow and sleet, and in a slippery condition.

6. That the lumber should have been placed in a box car, and not upon a flat car.

The cause was tried before a jury, and, after the proofs were all in, the trial judge said to the jury that "the evidence fails to show that the defendants violated any legal duty that they owed the deceased. Consequently, there is no question of fact to be submitted to you for your consideration. Your verdict, therefore, will be in favor of the defendants of no cause of action."

The deceased had no contract relations with the defendants, and, if his representative has a right of action based upon defendants' negligence, it must rest upon a duty owed to deceased in common with all other employés of the Flint & Pere Marquette Railroad Company, or other road over which the car in question might ultimately be shipped; in short, a breach of a duty owing to the public. An accurate statement of this duty is:

"If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence." Whart. Neg. § 437.

Yet, as stated by the same author, the confidence must be immediate, or the action fails. In other words, there must be casual connection between the negligence and the hurt, and such casual connection is interrupted by the interposition between the negligence and the hurt of an independent human agency. Id. § 438. In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question; but, before the car came to decedent, it was the duty of the railroad company to provide for the inspection. Here was the intervention of an independent human agency. A leading case is *Winterbottom* v. *Wright*, 10 Mees. & W. 109, in which case it was held that the defendant, who had contracted with the postmaster general to provide a mail coach, and keep it in repair, was not liable to an employé of one Atkinson, who had contracted with the postmaster general to provide horses and coachmen for the purpose of carrying the mail. See, also, *Losee* v. *Clute*, 51 N. Y. 494 (10 Am. Rep. 638); *Goodlander Mill Co.* v. *Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400; *Loop* v. *Litchfield*, 42 N. Y. 351 (1 Am. Rep. 543); *Roddy* v. *Railway Co.*, 104 Mo. 234 (24 Am. St. Rep. 333). In *Necker* v. *Harvey*, 49 Mich. 519, the leading cases on this point are cited with approval by Mr. Justice COOLEY.

Plaintiff seeks to bring this case within a line of cases cited creating an apparent exception to the rule stated; but we think these cases may be all classed as coming under one of three heads: *First*, as in *Johnson* v. *Spear*, 76 Mich. 139 (15 Am. St. Rep. 298), where the fault was not keeping defendant's premises in a suitable and safe condition; or, *second*, as in *Roddy* v. *Railway Co.*, *supra*, where the defendant reserves the right to direct the manner of work, or undertakes to supply the instrumentalities. Of this class is also *Elliott* v. *Hall*, 15 Q. B. Div. 315, relied upon by plaintiff, in which case it was said by the court that "the defendant had entire dominion over the truck" which caused the injury,—a fact which distinguishes the case from the present. Cases belonging

to a *third* class, more closely analogous to the case under consideration, have arisen where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. But liability in this class of cases has been limited to instruments and articles in their nature calculated to do injury. *Davidson* v. *Nichols,* 11 Allen, 514. We think the case of *Chapman* v. *Atlantic Refining Co.*, 38 Hun, 637, and 108 N. Y. 638, which counsel for plaintiff cite as fully sustaining their contention, is clearly distinguishable from the present case. The statement of facts in that case is found in *New York, etc., R. Co.* v. *Atlantic Refining Co.*, 129 N. Y. 598, from which it appears that the defendant corporation was engaged in constructing some oil tanks on the line of the New York, Lake Erie & Western Railroad Company, at a place called Dykes' Switch. The employés of defendant left a car of lumber, *after it had been delivered to defendant*, and partly unloaded, in such unsafe condition that a portion of the lumber fell upon or was blown upon the track of the railroad company, causing the derailment of the engine operated by the plaintiff, Chapman. It will be seen that the defendant had complete control over the partly-unloaded car, and whatever duty was owing was owing by defendant. In the present case the defendants had parted with the control of the car. The railroad company owed the duty to decedent of causing an inspection or of providing a rule for inspection.

We think the circuit judge was right in his holding. Judgment affirmed.

The other Justices concurred.

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PIONEER IRON CO. *v.* CITY OF NEGAUNEE.[1]

1. MUNICIPAL CORPORATIONS — TAXING DISTRICTS — LEGISLATIVE DISCRETION—REVIEW.

The fixing of city limits and taxing districts is within the legislative discretion, and the determination of the legislature in relation thereto will not be disturbed by the courts.

2. TAXATION—FRAUD—EVIDENCE.

Complainants filed a bill to restrain the collection of certain taxes against their lands, alleging a willful and fraudulent overvaluation of the same by the assessor and board of review. It appeared from the evidence that the lands were located in a mineral belt, near to developed mines, which had a large output, and that the assessment in question was made against them as mineral lands, instead of as wild lands, as had theretofore been the custom. The assessor and the several members of the board, who had some knowledge of mining and mineral lands, testified that they acted honestly and fairly in the discharge of their duties, and used their best judgment in fixing the valuations; and the opinions of other witnesses as to the value of the lands were conflicting. Complainants were heard at length before the board, but offered no affidavits or sworn witnesses. *Held*, that a finding that the allegations of fraud were not established was warranted.

3. SAME—BOARD OF REVIEW—FINALITY OF JUDGMENT.

Under Act No. 206, Pub. Acts 1893, § 76, subd. 5, providing that taxes may be held illegal if the supervisor or board of review acted fraudulently, the action of the board, where fraud is alleged, is reviewable in the courts.

Appeal from Marquette; Stone, J. Submitted January 27, 1898. Decided March 29, 1898.

Bill by the Pioneer Iron Company and the Arctic Iron Company against the city of Negaunee and others to restrain the collection of taxes. From a decree dismissing the bill, complainants appeal. Affirmed.

[1] Rehearing denied October 3, 1898.

Hayden & Young (*W. P. Healy*, of counsel), for complainants.

F. A. Bell (*Clark & Pearl*, of counsel), for defendants.

MOORE, J. The learned judge before whom the case was tried has so clearly stated the questions involved in the written opinion which he filed that I quote it here:

"The bill of complaint in this case states that the complainants are the owners of the lands described in paragraph 6; that they are situated within the corporate limits of the city of Negaunee; that said lands are for the most part, and always have been, wild and barren, and for many years have been denuded of timber, and lie for the most part at a long distance from any settled or platted portion of said city, and have never been platted; nor have any municipal improvements or charges thereof, such as streets, sewers, lights, police or fire protection, waterworks, or other like improvements, charges, advantages, or benefit, for which money is usually expended in cities, and for which money is and has been expended in Negaunee, and is now being expended, ever been asked for, contemplated, or proposed for the improvement of or benefit to such lands; nor are such lands in such locality, with reference to the platted or populated portion of said city, that they can receive now, or at any time in the future, any benefit or advantage from the expenditure of money in said city for said purposes.

"That, in the spring of 1896, the assessor of said city, and the common council, acting as a board of review, placed and fixed the valuations of complainants' lands at the several sums and values for each parcel as they appear in said paragraph 6. The bill then proceeds to state the amount of taxes for the different purposes levied in the city to be $57,827.21, and that the total valuation of all the property in said city, as appears by the tax roll, is $1,500,000, and that the city has prepared and placed in the hands of its treasurer its said tax roll for said year, in and by which it has assessed and levied upon the lands of complainants for all said purposes, as stated in said paragraph 6, $3,858.78, upon a valuation fixed at $99,800; that, after the assessment roll of said city had been completed by its assessor, complainants applied to the assessor and the city recorder and the mayor, and to every person who would be likely to have possession of

said assessment roll, for an opportunity to ascertain the valuations placed upon the lands of complainants, but were refused permission to see said assessment roll, and were refused likewise knowledge of valuations so placed thereon, upon complainants' lands; that such refusal upon the part of said city was willful, fraudulent, and wrongful as against the rights of complainants, and prevented them from making a proper showing before said board of review upon the valuations placed upon said assessment roll by the assessor.

"That in the month of July, 1896, the said board of review wrongfully refused to give complainants sufficient opportunity to show to said board of review that said assessments so made by the assessor were grossly in excess of the true cash value of said lands, and that they were assessed relatively much higher than other similar lands of like value in said city, though complainants attempted and requested permission so to do, and that complainants were practically deprived of their day in court thereon, before said board of review, without any fault or neglect on the part of complainants.

"That the values so placed upon complainants' said lands are grossly excessive; that they are greatly in excess of the true cash value of said lands, and are from ten to twenty times greater than values put upon said roll for other lands of like or similar value in said city belonging to other persons, residents of said city, and that they are willfully, fraudulently, and maliciously so unequally assessed; that said assessor, in placing values upon said lands, acted willfully, fraudulently, and maliciously, with an intention to injure complainants thereby, in placing said values grossly in excess of the actual value of said lands, and grossly in excess of the values upon property of like or similar value in said city, owned by residents thereof, and were so willfully, fraudulently, and maliciously fixed by said assessor for the purpose of making complainants pay more than their just proportion of taxes legally leviable on property in said city for the year 1896, and that said assessor did not place said lands upon said assessment roll at their true cash value, nor relatively at their true cash value, according to his best judgment and belief, but conspired with others thereabout to injure and defraud complainants; that said board of review, in its conduct thereinbefore set forth, and in finally fixing said values, and in refusing complainants sufficient hearing thereon, and in refusing to reduce said values, as requested

by complainants, did not use their best judgment thereon, but acted willfully and fraudulently, and with an intention to require complainants to pay more than their just proportion of the taxes legally leviable in said city, and that said values as so levied and fixed by said assessor and board of review are willfully unequal, fraudulent, and void.

"That the highway, fire-department, city, and special taxes are assessed and levied for purely private purposes in the resident portion of said city, and are purely local; that the incorporation of complainants' said lands within the limits of said city for the purposes aforesaid was and is a fraud upon complainants' rights.

"Complainants offer to pay their taxes, assessed upon a proportionate valuation.

"The bill claims that, for the reasons stated, the taxes so levied are fraudulent and void, and constitute an apparent incumbrance and cloud upon complainants' title; and they ask to have them declared such cloud, and removed, and the collection thereof restrained. The answers deny the substantial allegations of the bill in so far as the over valuations and assessments of complainants' lands are concerned. The case, being at issue, was heard upon the pleadings, and the testimony taken in open court.

"The right to levy a tax upon these lands for general city purposes having been sustained in the recent case of *Mitchell* v. *City of Negaunee*, 113 Mich. 359, by the Supreme Court, it will not be necessary for this court to spend any time upon that question.

"There was no evidence offered tending to show that the incorporation of complainants' lands within the city limits was fraudulent, and that subject may also be dismissed from consideration.

"The complainants complain that they did not have such an opportunity to examine the roll as the law contemplates. It is very clear that the taxpayer, under our statutes, must be allowed, at some time before the assessment roll is fully completed, the opportunity of seeing what assessments have been made against his property, and the privilege of showing that the proposed assessment is, for any cause, illegal or unjust. *Woodman* v. *Auditor General*, 52 Mich. 28. This opportunity is given at the meeting of the board of review. Under the charter of Negaunee, this board is composed of the common

council. Act No. 288, Local Acts 1895, chap. 8, §§ 2, 3. Its first meetings are on the second Monday of July, and on the day following; and the board is required to proceed to review and examine the roll in accordance with the provisions of the general laws of the State. Turning to the general laws (Act No. 206, Pub. Acts 1893, § 29), we find that at this meeting the assessor is required to submit his roll to the board, and the board shall proceed to examine and review the same; and during that day, and the day following, if necessary, said board, of its own motion, or on sufficient cause being shown by any person, shall add to said roll the names of persons, the value of personal property, and the description and value of real property liable to assessment, omitted from such assessment roll. They shall correct all errors in the names of persons, in the descriptions of property upon such roll, and in the assessment and valuation of property thereon. The board is required to pass upon each valuation and each interest, and shall enter the valuation of each, as fixed by it, in a separate column. It is evident that it was the intention of the legislature to allow the board, at this first meeting, to perfect the roll by a thorough inspection of it, and for that purpose the board has the right to use and control the roll. This right must, however, be exercised in a reasonable manner; and no taxpayer should be precluded from a reasonable inspection of the roll, even at this meeting, where it can be done without interfering with the work of the board. At the second meeting of the board, it shall, at the request of any person whose property is assessed thereon, or of his agent, and on sufficient cause shown, correct the assessment as to such property, in such manner as, in their judgment, will make the valuation thereof relatively just and equal. To that end, said board may examine on oath the person making such application, or any other person, touching the matter. After hearing the evidence in this case upon the subject, I cannot say that the complainants did not have a reasonable opportunity to examine the assessment roll. They were heard at considerable length. Many motions to reduce were made and acted upon. In some instances the motion to reduce prevailed, and in some instances it was lost. The complainants did not see fit to offer any evidence before the board, but contented themselves with arguments and protestations. The last afternoon and evening sessions were devoted to

them, and it seems to me that it cannot be said that they did not have their day in court.

"This brings us to the last, and, in my mind, the most important, question in the case: Were the assessments and valuations of the complainants' lands willfully unjust and fraudulent? The ascertainment of the value of taxable property is judicial, and requires the judgment of the assessor under his official oath. *Wall* v. *Trumbull*, 16 Mich. 236; *Woodman* v. *Auditor General*, 52 Mich. 28. The same may be said of the duty of the board of review. The law imposes this duty upon those officers; and if they act in good faith, and exercise their best judgment, mere errors in judgment will not defeat their action. The bill is very plain, and in explicit terms charges these officers not only with unfairness, but with fraud. The burden of proof is on complainants to sustain those charges by a fair preponderance of evidence. Cooley, Tax'n (2d Ed.), 784. It is undoubtedly the law that inequalities in valuation, fixed by design, or effected by resentment, cupidity, or malice, so that the exercise of proper judgment has been departed from, render an assessment void. *Merrill* v. *Humphrey*, 24 Mich. 170. This case was before the Supreme Court upon appeal from a decree overruling a demurrer to the bill; and, no evidence having been taken, the discussion is on the allegations of the bill, which were, of course, taken as true. In *Walsh* v. *King*, 74 Mich. 350, a bill was filed to cancel taxes. The bill was demurred to, and the demurrer was sustained at the circuit, and an appeal was taken from this decree. It was held that where assessing officers, by agreement with the owners of a certain class of property, assess the same at less than its cash value, a taxpayer whose taxes are thereby increased is entitled to relief in equity, and to such a reduction of his taxes as will make his burden of taxation no greater than if said property had been assessed at its fair cash value. The court said: 'This is not a case where the assessing officers, in the exercise of their judgment, have made an honest mistake, but the undervaluation of this property was deliberate, and the result of an agreement, which was fraudulent in law, if not in fact. * * * Fraud is ever open to remedy in a court of equity, and there can exist no good reason why relief against fraud in taxation, which in the end deprives a man of his property without due process of law, cannot be granted, as well as against any other

fraud.' To the same effect are the following cases: *Solomon* v. *Township of Oscoda*, 77 Mich. 365; *Auditor General* v. *Jenkinson*, 90 Mich. 523; *Auditor General* v. *Prescott*, 94 Mich. 190. In these cases there was either an intentional undervaluation, overvaluation, or omission of property. There was no exercise of that judgment by the officers which the law contemplates. There was intentional favoritism, and, as was said by the court in *Merrill* v. *Humphrey*, *supra*, 'any intentional favoritism, even though from motives of public interest, if without express authority of law, will render the tax proceedings void.'

"The complainants claim to have brought their case within the rules above stated. Have they done so by the evidence? They charge fraud and favoritism, and a scheme on the part of the assessing officers and others to place an unjust and unequal burden upon the complainants. The defendants, upon the other hand, insist that the assessing officers acted in accordance with their best judgment; that for years the property of the complainants had been assessed and valued on the rolls too low, and that complainants had not prior to 1896 borne their just burden of taxation; that, owing to the depression in the iron and general business in the city of Negaunee and vicinity, the value of residence and business property, including the operating mines, had greatly depreciated in value, and that in the assessment of 1896 these facts were all taken into consideration, and while it resulted in raising the valuation of some of the complainants' lands, and lowering that of others, yet that the officers, assessor and board of review, acted fairly, honestly, and in good faith, and that, the duty having been placed on these officers, and they having acted in the exercise of their judgment, their action is final, and that complainants are without remedy; that, it appearing that these officers have acted in the exercise of the duty laid upon them, the subject is not within the revisory power of the court. They cite, as supporting this doctrine, *McDonald* v. *City of Escanaba*, 62 Mich. 555, and *Attorney General* v. *Supervisors of Sanilac Co.*, 42 Mich. 72.

"I have no doubt that the bill of complaint states such a case as would entitle the complainants to relief, were it supported by the evidence. As stated in Cooley on Taxation (2d Ed.), at page 784: 'A tax founded on a fraudulent assessment will be enjoined. An assessment is not

fraudulent merely because of being excessive, if the assessors have not acted from improper motive; but if it is purposely made too high, through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class, and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction. So is any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers, or in which the party is deprived by like practices of important rights which the law intends to secure to him; such, for instance, as the right of appeal from an assessment, or to be heard by the board of review before his assessment should be raised. But mere irregularities in the proceedings of tax officers do not make out fraud, or even give evidence of it. And fraud must be alleged and proved; all presumptions are against it.'

"From the evidence in this case it clearly appears that there has been much discussion and agitation in Negaunee upon the subject of the taxation of complainants' lands and other lands of a like nature. They are located within the mineral belt, and are by many persons believed to be very valuable for mining purposes. Undoubtedly, this discussion and agitation have led the assessor and board of review to raise the valuation of these lands, in the belief that they have not heretofore borne their fair share of taxation. The newspaper and other discussions have been upon both sides of the question, and have, no doubt, at times been extreme. The evidence was conflicting as to the actual value of this class of property. Actual sales of property similarly situated were shown to have been made for cash where prices were obtained above the valuation fixed for assessment; notably those testified to by Samuel Mitchell and John Q. Adams. It seems to me that, although the taxing officers may have in some instances erred in judgment, yet that they honestly believed that the lands were really worth what they were assessed at, and that they acted in good faith, in the exercise of their best judgment. They have the right to consult with other citizens in arriving at the value of this property. There is no doubt of the duty of every assessing officer to inform himself, as far as he can, of the value of each parcel assessed. *Sawyer-Goodman Co.* v. *Township of Crystal Falls*, 56 Mich. 597

"It appears that the assessing officers consulted a map or diagram of these lands, with values placed thereon by another person, and that those valuations were generally followed. Yet it is testified to that in every instance the asssesor and board exercised their best judgment, aided, no doubt, by this map and other information. Should the tax be held void for this reason? I think not, in view of all the evidence in the case.

"In this case, if any relief is granted, the court must set aside the entire tax, or, do what is more difficult, fix a basis of taxation, and determine what portion of the tax levied is just. Under the evidence, I do not see my way clear to do either, and must therefore dismiss the bill, with costs to the defendants. Let a decree be prepared accordingly."

One feature of this case was very recently decided by the court in *Mitchell* v. *City of Negaunee*, 113 Mich. 359, where it was held that the fixing of city limits and taxing districts is within the legislative discretion, and the determination of the legislature in relation thereto will not be disturbed by the courts. It is now urged by counsel that this point was not involved in the case. In this, counsel are in error. The question was discussed very fully in the briefs and in the oral arguments of the attorneys. An examination of the opinion will also show that it was not overlooked by the court; and, as to that feature of this case, the case of *Mitchell* v. *City of Negaunee* is controlling.

An examination of the record shows that most of the land described in complainants' bill of complaint, prior to 1896, was assessed as wild land, and not as mineral land. On the roll for 1896 nearly all of these lands were assessed much higher than they had been assessed before, and in some instances many times higher. It is the claim of the assessor that prior to 1896 the lands had not been assessed at anywhere near their value, and that for 1896 they were assessed for what he honestly believed to be their cash value. He testified that he used his best judgment in fixing the valuation, after looking at the lands, considering their situation to other lands, and talking with other per-

sons, and after using such means of getting knowledge as were available to him. The board of review was in session four days, the full time fixed by the charter. The last day its session was extended to nearly 11 o'clock in the evening, to allow the representatives of the complainants to be heard. A good share of the day was given to them. They made arguments and representations to the board, but offered no affidavits or sworn witnesses. The members of the board of review testify that, in the discharge of their duty as a board of review, they acted honestly and fairly, using their best judgment in fixing values, and that they were not actuated by any improper motives in what they did. In the trial of the chancery case, testimony was introduced varying greatly in relation to values. It was the judgment of some of the witnesses for the defendants that a portion of these lands exceeded in value the amount assessed upon the lands. Others of them thought the lands were assessed much too high. In previous years the lands had been assessed upon the basis of their value as wild lands, and for their value as it appeared on the surface. They are held by the complainants as mineral lands. They are in the iron formation, near to developed mines, which have a large output. Men differed in judgment in relation to their value. The assessor was a man who had lived in that vicinity a great many years, and had some knowledge of mining and mineral lands. These lands were near to where the members of the board of review lived. A number of these men had some knowledge of mining and mining lands. The witnesses testified in open court. The trial judge had an opportunity to judge of their intelligence, opportunities of knowledge, and of their truthfulness. His conclusion is that complainants have not established any fraud or conspiracy upon the part of the assessing officer or the board of review. The testimony is not so overwhelming or conclusive the other way that we are led to say he erred in arriving at that conclusion.

It is urged by the defendants that the duty of review-

ing the assessment is reposed in the board of review; that their action is final; and that the court will not substitute its judgment for the action of the board of review, —citing *Attorney General* v. *Supervisors of Sanilac Co.*, 42 Mich. 72; *McDonald* v. *City of Escanaba*, 62 Mich. 555; *Tallmadge* v. *Supervisors of Rensselaer Co.*, 21 Barb. 611; *Smith* v. *Board of Supervisors*, 30 Iowa, 531. Whatever the law may have been prior to 1893, this contention cannot now be sustained, as subdivision 5, § 76, Act No. 206, Pub. Acts 1893, expressly provides that the taxes may be held to be illegal if the supervisor or board of review acted fraudulently. Before a court would be justified in holding a tax to be illegal because the supervisor or board of review has acted fraudulently, that fact should be clearly established by the evidence. We think this has not been done.

Decree is affirmed, with costs.

The other Justices concurred.

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MULLREED *v.* THUMB.

1. DEEDS—CONSTRUCTION—INTENT.

A deed, purporting to convey lands specifically described, recited, immediately after the description, that the express intent of the instrument was to convey all of the grantor's right, title, and interest in the premises "by reason of her being an heir at law of J., * * * now deceased." It afterwards developed that the parties were mistaken in supposing that the grantor had an interest as heir of J., but that she was entitled, as heir of E., to an interest considerably larger. *Held*, that the court would not subvert the clear intent of the parties by giving the deed effect as a conveyance of the entire interest derived through E.

2. SAME—REFORMATION—EQUITY.

Whether equity would so reform the deed that it should convey an interest equal to that supposed to be owned by the grantor at the time of its execution,—*quaere*.

Appeal from Wayne; Hosmer, J. Submitted January 25, 1898. Decided March 29, 1898.

Bill by George Mullreed against Anna Clark-Thumb, impleaded with Thomas P. Clark and John F. Clark, for a partition of real estate. From a decree for complainant, defendant appeals. Reversed.

Walter Barlow, for complainant.

A. F. & F. M. Freeman (*B. M. Thompson*, of counsel), for defendant.

MONTGOMERY, J. The bill in this case was filed for partition of 100 acres of land situated in the township of Van Buren, Wayne county, Mich. The land was formerly owned by Thomas Phillips, deceased, who devised it, by the terms of his last will, to his wife, and after her death to James Phillips, his son, upon condition that said James Phillips pay to testator's two daughters, Mary and Jane Phillips, $1,000 each, within three months after testator's death. This money was paid by James Phillips within the time specified in the will. The will contained the further provision that, in case of death of James Phillips without heirs (meaning issue), the real estate should go to testator's two daughters, Mary and Jane Phillips, but, in case of death of Mary or Jane without heirs (meaning issue), then their share should go to "the other sister." The testator's wife died prior to his death. Thomas Phillips, the testator, died July 1, 1877; and his will was duly probated in the Wayne probate court on August 6, 1877. Mary Phillips died June 12, 1887, without issue. Jane Phillips died February 23, 1890, without issue. Elizabeth Clark, a daughter of said testator, died July 30, 1892, leaving Thomas P. Clark and John F.

Clark, sons, and Jennie Clark-Mullreed and Anna Clark, daughters, her only children and heirs at law, her surviving. James Phillips died September 17, 1893, without issue. By a decision of this court made July 21, 1896, construing the will of said Thomas Phillips, it was held that inasmuch as James Phillips, Mary Phillips, and Jane Phillips died without issue, the title to said real estate went to Elizabeth Clark, under the meaning of the words "the other sister," contained in said will, and that her heirs and their assigns were now the owners of said land. See *Mullreed* v. *Clark*, 110 Mich. 229, 232.

Prior to the controversy over the meaning of the terms of the last will of said Thomas Phillips, deceased, Anna Clark and Jennie Clark-Mullreed exchanged real estate under the arrangement shown by their respective deeds, and the contract under which the deeds were executed. These deeds were made June 14, 1894. The deed from Anna Clark (now Anna Clark-Thumb) conveyed to Jane Mullreed (also known by the name of Jennie Clark-Mullreed) the grantor's interest in "all those certain pieces or parcels of land situate in the township of Van Buren, Wayne county, Michigan, described as follows, to wit: The east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirty (30), and also the west part of the southwest fractional quarter ($\frac{1}{4}$) of section twenty (20), town three (3) south, of range eight (8) east, containing one hundred (100) acres of land, be the same more or less,"—the lands described in the bill in this cause. The deed from Jane Mullreed to Anna Clark conveyed the S. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 19, township of Bridgewater, Washtenaw county, Mich.,—24 acres of land, more or less. The deed from Anna Clark conveyed about 25 acres of land, hers being a one-quarter interest in the 100 acres in question; and the deed from Jane Mullreed conveyed about 24 acres.

Jennie Clark-Mullreed died April 4, 1895, leaving a last will, in which George Mullreed, her husband, the complainant herein, is named as her sole legatee. Her said

will has been duly probated in the Wayne probate court, and her estate closed, and the residue assigned to George Mullreed by the order of that court.

The deed from Anna Clark (now Anna Clark-Thumb) to Jennie Clark-Mullreed conveyed lands described as follows:

"The east half of the northeast quarter of section number thirty (30), containing eighty (80) acres of land, more or less, and the west part of the southwest fractional quarter of section number twenty (20), containing twenty (20) acres of land, more or less, and all in the township of Van Buren, Wayne county, Michigan, and containing in all one hundred (100) acres of land, more or less. The express intent of this instrument being to convey unto said Jane Mullreed all the right, title, and interest of Anna Clark in and to the above premises by reason of her being an heir at law of James Phillips, who in his lifetime was possessed of said above-described premises, and said James Phillips being now deceased."

These deeds were not delivered at their date to the respective grantees, but were deposited with A. F. Freeman under an agreement executed by the parties contemporaneously with the execution of the deeds, which agreement recited that Mrs. Mullreed had filed a claim against the estate of James Phillips, which had been allowed before commissioners on claims; that Anna Clark claimed a right to contest the claim, and also a right to prefer a claim against the estate; that both were heirs of James Phillips,—and stated that "said Jennie Clark-Mullreed makes deed and conveyance of certain land she owns in Manchester, running to Anna Clark, to be delivered to her in case no appeal is taken from the allowance of the claim before commissioners;" "that said Anna Clark agrees to make no appeal from said claim as allowed, and executes a quitclaim deed and a bill of sale, also attached hereto, running to said Mullreed, conveying her interest and title in the real and personal estate of said James Phillips."

Jennie Clark-Mullreed died April 4, 1895, leaving a last

will, in which complainant is named as sole legatee. It would appear that both Mrs. Mullreed and Miss Clark supposed, at the date of these conveyances, that they were heirs of James Phillips, and that, as such, Miss Clark held a one-twelfth interest in the lands described in the deed to Mrs. Mullreed. It turns out that Miss Clark had no interest at all in these lands as heir to James Phillips, but that she did have a one-fourth interest as heir to her mother, Elizabeth Clark, who took under the will of Thomas Phillips. The sole question in controversy is, What passed by this deed? Complainant contends that whatever interest Miss Clark had at the time passed. Defendant, on the other hand, insists that the deed, at the most, conveyed no greater interest than that which the parties supposed Miss Clark to possess as heir to James Phillips. Complainant contends that the description was complete without the clause declaring the intent, and invokes the rule that a deed is to be construed most strongly against the grantor, and that when a definite description is followed by other clauses of limitation, either in the *habendum* or otherwise, the limitations are to be disregarded. Defendant's counsel concede that, if this limitation appeared in the *habendum*, it would be insufficient to limit the grant, but contend that the expression of intent should be treated as a part of the description.

The general rule is that the intention of the parties to an instrument is to be ascertained from a reading of the entire instrument. It is true, there are other rules to be observed in ascertaining the intent from the instrument, among which is the rule that the deed is to be taken most strongly against the grantor. Another rule is that a repugnancy between different clauses of the deed must be resolved in favor of the first. This latter rule is usually invoked when there has been an attempt to limit the granting clause by the *habendum*, or when there is an attempt to except something specifically granted. This rule should be acted on only as a last resort, and generally the first inquiry is, What was the intention of the parties,

as expressed by the instrument? *Bassett* v. *Budlong*, 77 Mich. 338 (18 Am. St. Rep. 404). It is true that courts have in some cases subordinated this rule of construction to that which gives preference to the first expression of the grantor, and have done so in some cases at the expense of sacrificing the intent of the parties as plainly expressed. With due deference, we think this was the effect of the decision in *Green Bay, etc., Canal Co.* v. *Hewett*, 55 Wis. 96 (42 Am. Rep. 701). This court has, however, not so applied this latter rule as to subvert the intent of the parties, when plainly expressed. *Bassett* v. *Budlong supra; Plummer* v. *Gould*, 92 Mich. 1 (31 Am. St. Rep. 567); *Powers* v. *Hibbard*, 114 Mich. 533; *Bates* v. *Foster*, 59 Me. 157 (8 Am. Rep. 406). We think the limitation immediately following the description makes clear the intent to limit the estate conveyed to such estate as comes to the grantor as heir of James Phillips. As to whether the deed should be treated as conveying nothing, or whether it should be reformed to correct the mistake under which the parties seem to have been laboring, we cannot determine on this issue. As to whether equity may afford relief in such a case, see *Renard* v. *Clink*, 91 Mich. 1 (30 Am. St. Rep. 458). If complainant so elects, the case may be remanded, with leave to amend his bill and take further proofs upon this subject; otherwise decree will be entered here in accordance with defendant's contention. Defendant will recover costs of this court.

The other Justices concurred.

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123 73

PEOPLE *v.* MARTIN.

1. TRIAL—INSTRUCTIONS—REQUESTS NOT SUPPORTED BY EVIDENCE.
   Where it appeared from the undisputed testimony of the prosecutrix, upon a trial for larceny, that the money alleged to have been feloniously converted by respondent was intrusted to her by the prosecutrix for the purpose of purchasing a bicycle for the prosecutrix, there was no error in a refusal to instruct the jury as to what should be their verdict in case they should find that the prosecutrix, at the time of the delivery of the money, intended to pass the title to the same.

2. LARCENY—WHAT CONSTITUTES—INTENT.
   One who obtains money from another upon the representation that he will procure certain property therewith for the latter, intending at the time to convert the money, and actually converting it, to his own use, is guilty of larceny.

3. NEW TRIAL—MISCONDUCT OF JURY—HEARSAY.
   An application for a new trial in a criminal case, based solely upon the affidavit of counsel that a newspaper article relating to the case was read by the jury after the cause had been submitted to them, and that he had been informed by some of the jurors that such article influenced them in arriving at their verdict, is properly denied.

Exceptions before judgment from superior court of Grand Rapids; Burlingame, J. Submitted January 28, 1898. Decided March 29, 1898.

Isma Martin was convicted of larceny. Affirmed.

McKnight & McAllister, for appellant.

Fred A. Maynard, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney (*Rodgers, McDonald & Corwin*, of counsel), for the people.

MOORE, J. The respondent was convicted in the superior court of Grand Rapids of the offense of larceny of

property belonging to Gertrude Anderson. There are many assignments of error, but the important question in the case is whether the facts shown by the testimony constitute the offense of larceny. The respondent offered no testimony. The jury, in order to convict, must have believed the testimony offered by the people, which was to the following effect: In the early part of 1897 the respondent came to Grand Rapids as a solicitor for a life-insurance company of which S. F. Angus was the Detroit manager. She made the acquaintance of Miss Earle, one of the examining physicians of the life-insurance company, and through her made the acquaintance of Miss Anderson, who was keeping house, with one servant, in Grand Rapids. She solicited Miss Anderson to become insured, but Miss Anderson did not consent. About the middle of February an arrangement was made that Miss Martin was to board with Miss Anderson, and she did so from then until the 15th of April, when Miss Martin left Grand Rapids.

Miss Anderson had a bicycle. About the 1st of March there was talk between them about purchasing a bicycle, and Miss Martin said she was going to have a new wheel, and should buy it very cheap, through a friend of hers, and, if Miss Anderson wanted one, she could get one for her, and she thought she could sell the old wheel to a lady she knew in Detroit. Miss Anderson at this time was employed in the office of the United States engineer, where there were a number of persons employed. A little later Miss Martin suggested to Miss Anderson that she thought she could get wheels for her associates in the office, considering them also as friends, at the same price. Miss Anderson decided to take a wheel, and then told her associates what Miss Martin proposed. Miss Martin came to the office March 13th, and arranged to take the orders for wheels for Miss Anderson and several of her associates. Miss Martin sat down at Miss Anderson's desk, and wrote what she said was a letter to the friend through whom she was to get the wheels, E. J. Moran.

Miss Anderson was to have a high-grade Cleveland wheel at a cost of $38, which amount she paid in cash to Miss Martin. Mr. Schauroth gave her an indorsed government check for $100 and $14 in money. Capt. Townsend gave her a check for $38. Mr. Wallace gave her $18, and Miss Martin offered to loan him $20 to make up his $38.

Miss Martin folded up what had been delivered to her, and folded up the letter, and put them all in an envelope, and asked Miss Anderson to go with her to the express office to buy the money order, which Miss Martin said she wanted to get off that night. This was between half past 4 and 5 o'clock. On the way to the express office Miss Martin said she must first go to the office of Dr. King to get the $20 she was to let Mr. Wallace have. The two went to the office, and Miss Martin went in, and, after being gone for awhile, returned, and reported that Dr. King was not in, and she would have to see him later. She then said she must go to the U. B. A. Home on business, and Miss Anderson walked up there with her. They then came down town. It was nearly 6 o'clock, and, fearing the money-order department of the express office would be closed later, they went to the express office, and arranged that the checks which had been given Miss Martin should be received and cashed by the express company, and a money order be issued to Miss Martin later, when she had collected the $20 of Dr. King. It was then so late that Miss Anderson went home, and left Miss Martin to finish the business. Miss Martin returned to the express office, and bought an order for $50, and one for $43, in favor of S. F. Angus, Detroit, and one for $28 in favor of Mrs. F. B. Martin, Detroit, and no other orders on that day or on the 14th, 15th, or 16th of March were issued to Isma Martin, and none were issued in favor of E. J. Moran. About 7 o'clock or after, Miss Martin returned to the residence of Miss Anderson, and held up a piece of paper some distance from her, and said, "Here is the receipt for that money." After this the women talked

about the wheels, which did not come. About a week before Easter, Miss Martin showed Miss Anderson a letter, which she said was from her friend through whom she was getting the wheels, saying if they would wait until Easter Monday the wheels would have the late improvements. The next Thursday after Miss Martin showed this letter, she left the house, saying she was going to Detroit, and would return the following Monday. She did not return, and Miss Anderson did not see her again until she saw her in court after her arrest. Miss Anderson never received any wheel. She testified that she never consented that Miss Martin should use the money she gave her for any other purpose than to purchase for her a bicycle.

It is the position of the people that from the foregoing facts, and the necessary and reasonable inferences to be drawn from them, the jury were warranted in finding the respondent guilty of larceny. The position of respondent is stated in a request to charge reading as follows:

"If you find from the evidence in the case that the money was delivered by Gertrude Anderson to respondent, intending at the time of the delivery to pass the title to the same, no matter how fraudulent the transaction on the part of the respondent turned out to be, you must acquit the respondent of the offense charged."

In support of this proposition counsel cite 2 Archb. Cr. Pl. 372; 1 Whart. Cr. Law, §§ 964, 965; 2 East, P. C. 668; *Ross* v. *People*, 5 Hill, 294; 2 Bish. Cr. Law, § 808; *Hildebrand* v. *People*, 56 N. Y. 396 (15 Am. Rep. 435); *People* v. *McDonald*, 43 N. Y. 61; *Zink* v. *People*, 77 N. Y. 126 (33 Am. Rep. 589).

While it is conceded by the people that Miss Anderson consented to part with the possession of her money, they contend that her consent was fraudulently obtained, and that she did not intend to part with the title of her property to Miss Martin, but that it was delivered to her for a special purpose, and for that reason the offense is

larceny; citing *People* v. *Shaw*, 57 Mich. 403 (58 Am. Rep. 372); *Stinson* v. *People*, 43 Ill. 397; *Welsh* v. *People*, 17 Ill. 339; *Murphy* v. *People*, 104 Ill. 533; *Com.* v. *Barry*, 124 Mass. 325; *People* v. *Abbott*, 53 Cal. 284 (31 Am. Rep. 59).

It is sometimes difficult to determine in a given case whether the offense is larceny or whether it is a case of false pretenses. We think the rule to be gathered from the authorities may be stated to be: In larceny, the owner of the thing stolen has no intention to part with his property therein; in false pretenses, the owner does intend to part with his property in the thing, but this intention is the result of fraudulent contrivances. If the owner did not part with his property in the thing, but simply delivered the possession, the ownership remaining unchanged, for the purpose of having the person to whom the property was delivered use it for a certain special and particular purpose, for the owner, the title would not pass, and its felonious conversion would be larceny. A distinction is made between a bare charge for special use of the thing, and a general bailment; and it is not larceny if the owner intends to part with the property and deliver the possession absolutely, although he has been induced to part with the goods by fraudulent means. If, by trick or artifice, the owner of property is induced to part with the possession to one who receives the property with felonious intent, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but right of property also, the offense of the party obtaining the thing will not be larceny, but that of obtaining the goods by false pretenses. As was said in *Loomis* v. *People*, 67 N. Y. 329 (23 Am. Rep. 123):

"There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention deter-

mines the nature of the offense. In the former case, where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established; while in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses. It will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny, and the vital point upon which the crime hinges and is to be determined."

In this case the respondent made the acquaintance of the prosecutor, and pretended he had a check he wanted cashed. The prosecutor went with him to a saloon, where they met a confederate of respondent, and dice were thrown. The respondent asked the prosecutor to lend him $90, saying he was sure to win, and that, if he did not, he had the check, which he would get cashed and pay him back. The money was loaned, the dice were thrown, respondent lost, and the prosecutor insisted upon having his money back. The check was then put up and lost, and the confederates went away carrying the money with them. The court said the respondent was properly convicted.

In *Stinson* v. *People*, 43 Ill. 397, it is said: "If the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back, and make the taking and conversion a larceny, if the goods were obtained with that intent;" and the conviction of larceny was held to be proper. This was a case where the prosecutor had been induced to wager his money with one of the respondents, and had delivered it to a third person, who was selected as a stake-holder, the other confederate depositing what was represented as a package containing a like amount of money, but which was in fact waste paper.

The case of *People* v. *Shaw*, 57 Mich. 403, is an

instructive one. Shaw and Jones were confederates. Shaw claimed to be an agent for a tea house, and explained the method of selling tea by means of cards. While he was doing this, Jones came up, and pretended to be a stranger, and took part in the transaction, which resulted in Brown letting Shaw have $80, which Shaw bet with Jones. The card was drawn, and Shaw lost, and he at once delivered the money to Jones. Justice CAMPBELL, in writing the opinion, made use of the following language: "There is some rather attenuated discrimination to be found in the books between such cheats as induce a person to give temporary custody of his property to another, who keeps or disposes of it, and those whereby he is induced to part with it out and out. We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious;" and sustained the conviction of respondents for larceny.

Applying these rules of law to this case, what is the result? It must be borne in mind that Miss Anderson was not buying of Miss Martin a bicycle for $38, but was intrusting to her, as her friend and agent, $38 to be used for a special purpose. She did not intend, when she gave Miss Martin the possession of the property, to also give her the title to it, so that it might be said the money belonged to Miss Martin. She parted with the possession so the money might be devoted to a specific purpose for the benefit of Miss Anderson. If, at the time she obtained the property, the respondent obtained it by false representations, intending at the time to convert it to her own use, and with the intent to deprive Miss Anderson of her property, she was guilty of larceny.

Error is alleged upon the conduct of the judge during the trial and remarks of the prosecuting attorney during

his argument to the jury. Error is also assigned upon the admission of evidence and to the charge of the court. It is not necessary to refer to these assignments further than to say we do not deem any of them well taken.

A motion for a new trial was made, based upon the affidavit of counsel that during the deliberations of the jury, after the case had been submitted to them, they obtained and read a Grand Rapids paper containing an article in relation to the trial which was prejudicial to the respondent, and that counsel had been informed by some of the jurors that the article influenced jurors in arriving at their verdict. This motion was overruled, and it is said that this is error. It does not very clearly appear how counsel knew that the jurors had the paper mentioned. It does appear, however, that all he knew about what effect the reading of the paper had upon the verdict was what he was told by some of the jurors. This was hearsay, and incompetent. The court did not err in refusing to grant a new trial upon the showing made.

Conviction is affirmed, and case remanded for further proceedings therein.

The other Justices concurred.

POTTER *v.* RANLETT.

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117 237

1. CONTRACTS—RESCISSION—EXECUTORS—POWER OF SALE.

One who contracts to purchase land from executors, expecting to receive a deed at once, is justified in rescinding the contract on learning that the executors have no power to sell under the will, even though they offer to indemnify him against loss if he will allow the contract to stand, and accept a deed when they can procure one.

2. SAME—DECREE—COLLATERAL ATTACK.

The executors cannot in such case defeat the vendee's right to a rescission by showing that a decree has been rendered by the judge of another circuit, in a proceeding to which the vendee was not a party, instituted after they had received notice of the vendee's intention to rescind, whereby their right to sell the lands in question is sustained; for while such decree, though erroneous, would not be subject to collateral attack, it could not control the relations of parties whose *status* was properly to be determined with reference to a time prior to the institution of the proceedings wherein the decree was rendered.[1]

3. WILLS—TRUST—POWER OF SALE.

A devise to executors in trust, to pay the income annually to the testator's daughters, and to the survivor of them, for life, the trust estate, after the death of said daughters, to go to their children in equal proportions, does not confer a power of sale upon the executors.

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[1] Upon an application for a rehearing, the court entered a supplemental decree, wherein, among other things, it was stated: "It seems to this court that complainant, in agreeing to purchase the land in question, did so expecting to get a deed for the same within a few days after he paid the $10,000 on the purchase money and executed the mortgage of $20,000 to secure the balance, and that, under the circumstances of the case, when the question of doubt arose as to the right of the trustees to sell him the land, he was not bound to wait until the question was settled, but had a right to insist upon having the money he had paid on the contract returned to him, together with his notes and mortgage. * * * This decree is made without prejudice in any respect to the decree made in the circuit court for Ionia county, in chancery."

Appeal from Cass; Coolidge, J. Submitted January 25, 1898. Decided March 29, 1898.

Bill by Willard M. Potter against David D. Ranlett, Albert Tuttle, and Oliver C. Townsend to rescind a contract for the purchase of land. From a decree for complainant, defendants appeal. Affirmed.

Howell & Carr, for complainant.

Lemuel Clute, for defendants.

LONG, J. There is little or no controversy over the facts in this case. It appears that James R. Langdon, of Berlin, county of Washington, in the State of Vermont, died September 20, 1895, testate, at the age of 82 years, leaving an estate valued at $2,320,757.20. He owned real estate in Vermont, New York, Illinois, and Michigan; that in Michigan being valued at $39,600. The land in controversy in this suit consists of 2,040 acres of woodland, valued at $30,000, situated in Crystal township, Montcalm county, Mich. It is all contiguous.

Langdon's will was probated in the probate court at Montpelier, Vt., October 24, 1895. It was also probated in Michigan on January 10, 1896, in the probate court of the county of Ionia. The two defendants David D. Ranlett and Albert Tuttle are the executors and trustees named in the will, and both reside in Vermont. The other defendant, Oliver C. Townsend, is a banker at Hubbardston, Mich., and was agent of the deceased in his lifetime, and was continued as agent by the executors after his death. The complainant, Willard M. Potter, then a resident of Petoskey, on February 25, 1896, after negotiations with the agent by letter and otherwise, purchased from defendant Townsend, as agent of the executors, the aforesaid 2,040 acres in Montcalm county, for the sum of $30,000, and made his first payment of $10,000 in cash, and took a receipt therefor. This receipt is the only writing in relation to the contract, except certain letters.

By the terms of the agreement, the remaining $20,000 was to be paid in two equal annual payments, with interest at 6 per cent., and a deed was to be executed by the executors in a few days after the first payment. By the understanding, complainant was given the right of immediate possession of the land, and the right to place his mills thereon, and operate them in cutting and removing the timber. In keeping with this understanding and agreement, the complainant did, on or about March 1, 1896, commence cutting and hauling timber, he having in the meantime moved his sawmill from Petoskey to the land, and his family to the city of Grand Rapids. Shortly after the cutting of the timber commenced, defendant Townsend informed complainant that the executors were withholding the deed until the $20,000 was properly secured. Thereupon complainant, on or about March 18, 1896, secured the payment of the $20,000 by personal security (two notes), and by a mortgage signed by himself and wife, covering 238 acres of land in Cass county, together with the land in question, and delivered the same to Townsend, who received it as agent, with the express understanding that Townsend was to hold the same in trust for complainant, and was not to deliver it to the executors, and was not to have the mortgage recorded until the deed was executed by the executors, and delivered to and accepted by him. In violation of this understanding, Townsend caused the mortgage to be recorded in the register's office of Cass county, Mich., on the 28th day of March following.

Townsend had informed complainant, and complainant believed, that the executors had the power to deed under the will; and complainant did not learn that the power of the executors to execute a deed was questioned until about May 27, 1896, and he did not know until May 29, 1896, that the mortgage was recorded. He at once visited the probate court of Ionia county, and for the first time read the will of the said Langdon, and the paragraph in the will bearing upon the executors' power, as follows:

"All the residue and remainder of my estate, of every kind and description, including the real estate not herein otherwise disposed of, I give and grant to the said David D. Ranlett and Albert Tuttle, upon trust, for the following uses and purposes, that is to say: Upon trust that the said Ranlett and Tuttle, and their successors in said trust, duly appointed, shall and do pay the income and interest arising from all of said property and estate so placed in trust, and each and every year, to my said daughters, Lucy R. and Lizzie W., for their sole use and benefit, and upon their separate receipts, in equal proportions and shares, for and during the period of their and each of their natural lives; and, upon the decease of either of them, the survivor to have the said income and interest; and, upon the decease of both said daughters, said trust funds, property, and estate is to be paid over by said trustees to the children of my said daughters, in equal shares and proportions, and so to their respective heirs."

Complainant immediately took counsel as to the power of the executors to make a deed under the above paragraph, and was advised that they had no such power. He also advised with Townsend, the agent, on the question, and notified him that he would not stand longer by the contract; and upon June 15, 1896, complainant quit cutting timber on the land, and on June 22d caused his mills to shut down, having then cut all that was hauled in, and moved his mills away, and gave notice to the defendants of his intention to revoke the contract, and demanded of defendant Townsend the repayment of the $10,000, less the stumpage value of the timber cut, his notes and the mortgage, and also that the mortgage be discharged; whereupon the defendants offered to indemnify him if he would stand by the bargain, and accept a deed when they could procure one. But he refused to accept the indemnity and to stand longer by the contract, and filed his bill in this case, in the Cass county circuit court, in chancery, on the 30th day of June, 1896.

When it was fully learned that the executors, as trustees, had no power to deed under the will, they, on June 24, 1896, commenced proceedings in the circuit court for

the county of Ionia, in chancery, making the devisees and legatees in the will parties defendant, two of whom were minors and one insane, and praying for a construction of the will, and asking that a decree be granted empowering the executors to sell the lands of the estate in Michigan, at public or private sale. The complainant was not made a party to this bill.

The bill in the present case was filed for the purpose of obtaining the cancellation and discharge of the mortgage above referred to, covering the 238 acres of land in Cass county, and also for the purpose of relieving the complainant from the obligation of the contract to purchase the land. To the bill of complaint, defendant Townsend answered, August 13, 1896. He admits his agency. He admits the receipt of the $10,000, and the fact that he forwarded it to the executors. He admits the demand on him by the complainant for the mortgage and notes, and the notice of the repudiation of the contract by complainant. He admits the delay in the making of the deed. He admits the executors' inability to make the deed. The joint and several answer of the other two defendants, Ranlett and Tuttle, was not put in until December 29, 1896. They admit the agency of Townsend, and his authority to contract for the sale of the land. They also admit the receipt of the $10,000, and the fact that complainant's possession of the land, and his right to cut and remove timber, were with their full knowledge and consent. They allege that they filed a bill as complainants in the circuit court of Ionia, in chancery, submitting the question of their power as trustees, by virtue of said will, to the opinion and direction of said court; and their answer contains a copy of the decree of the Ionia circuit court, in chancery, which bears date September 15, 1896. This answer concludes with prayer for benefit of cross-bill, under Chancery Rule No. 11. To the cross-bill feature of this answer, complainant filed his answer January 1, 1897, denying, among other things, the power of the circuit court of Ionia, in chancery, to give the two

defendants Ranlett and Tuttle, as trustees, the power to make and execute a good and sufficient deed to said land, and denying the jurisdiction of the court and the relevancy of its proceeding to the present case.

The decree of the Ionia circuit court, in chancery, was rendered September 15, 1896. On November 18, 1896, the defendants tendered to complainant a warranty deed of the premises covered by the contract, with covenants in due form. This deed was afterwards tendered in open court at the trial, but both offers were refused by complainant. On January 14, 1897, the defendants presented to the circuit court of Cass county, in chancery, in this case, a petition praying for the appointment of a receiver to take possession of the land, and look after it, and to protect it from the cutting of wood and timber by trespassers; and, on the 21st of January, an order was made by that court appointing Ethard P. Clark such receiver. On the 13th of April, the receiver petitioned the court to sell the down timber and wood. The prayer of this petition was granted, and on June 9th the receiver reported to the court that he had made a public sale of all the down timber, including all that had been cut by complainant, and not hauled away, and that he realized from such public sale the sum of $750. The decree gives this sum to the executors.

The court below found that the decree of the circuit court of Ionia county, in chancery, was not binding on the complainant in this case, he not being made a party; that it would not furnish him a clear protection; and the decree declares that the contract shall be of no effect, and that the mortgage and notes be canceled and delivered up to the complainant by the defendants. The court also found that the complainant removed, from the land, timber to the value of $1,646.09, which he should account for; that the defendants Ranlett and Tuttle were indebted to him in the sum of $10,808.30, that amount being the first payment, and interest thereon at 6 per cent. from February 26, 1896, to June 30, 1897, the date of the

decree; and that from this amount should be deducted the $1,646.09; and that the balance, $9,162.21, should be paid by the defendants to the complainant in 90 days. The complainant was given a lien on the land in Montcalm county for the same, together with his costs, to be taxed, and a solicitor's fee of $100.[1]

The defendants contend:

1. That the executors had power under the will to make the deed.
2. That, when the right to convey was questioned, it became the duty of the trustees to take the advice of the court of chancery of Ionia county as to such power.
3. That the decree of the Ionia court is conclusive that the executors had such power.
4. That the interests of the unborn children of the two daughters were virtually represented by the executors.
5. That time was not of the essence of the contract, and that, therefore, the executors had a reasonable time in which to make and deliver the deed.

Whether the court below was correct or not in his views upon the various questions raised, we need not consider, as we are satisfied that the conclusion reached was correct. This property was apparently purchased by the complainant principally for the valuable timber thereon. At a large expense, he had removed his mill to the land, and commenced the manufacture of this timber into lumber, when he was advised that the executors had no power under the will to make the deed which his contract called for. He was then confronted with the question whether he should go on with his work, and take the further chances that, in the end, he might not only lose the land, but also be compelled to pay the residuary legatees under the will whatever damages they might suffer by reason of the removal of the timber. The fact that the circuit court, in chancery, of Ionia county, thereafter decreed that the executors had power to make the deed, has no bearing upon the question here involved,

[1] This item was disallowed by the Supreme Court on the application for rehearing.

as the complainant was not made a party to that proceeding; the real question being the *status* of the parties at the time complainant filed his bill. In order to fix such *status*, we must determine whether the will empowered the executors to make the deed. It is true that the complainant could not capriciously refuse to accept a deed, and it may be that the deed was tendered in time, if the executors, at the time of making the contract, had the power to make such deed

The provisions of the will under which the executors claimed to have power to deed have been set forth. This clause gives to the executors the property, upon trust to pay the income and interest arising each year to the two daughters for the period of their and each of their natural lives, and to the survivor of them. Upon the decease of both, the "said trust funds, property, and estate is to be paid over by said trustees to the children of my said daughters, in equal shares and proportions, and so to their respective heirs." The language is clear and unmistakable, and the intent is plain that the executors shall hold this residue and remainder of the estate (the property in controversy being included within those terms) during the lives of both daughters and the survivor of them, and then pay it over to their children or their respective heirs. It is too plain for argument that no power of sale is included in this provision. The executors only hold the estate to collect the income, and pay it over. The will itself provides where the estate after the death of the daughters shall vest.

When complainant had been advised that the executors wanted more time, and he learned of the will, he made an examination of it, and then for the first time discovered this want of power, and at once filed his bill to set aside the contract. Any other course would have been but an experiment, and might have cost him serious loss. He could not say that a court would give construction to the will permitting the executors to make sale of the

property, but had good reasons to believe that such construction would not be given.

It is not to be understood by what we have said that, if the court of chancery in Ionia county had jurisdiction of all the parties and the subject-matter, we hold the decree is not now valid and effectual, and does not give the executors power to make a conveyance of the premises. It was not appealed from, and, in a collateral proceeding, undoubtedly could not be attacked except for want of jurisdiction.

Counsel for defendants contends that the court below was in error in the amount of damages. We have carefully examined that question, and find no necessity for discussing it, as we are satisfied, not only with the method of computation, but also with the amount found.

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

The other Justices concurred.

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GRATTAN *v.* VILLAGE OF WILLIAMSTON.

1. PERSONAL INJURIES—TRIAL—DECLARATION—AMENDMENT.

A declaration in an action for personal injuries caused by a defective sidewalk, alleging that the place of the injury was at a point about 264 feet west of a given street, may on the trial be amended to correspond with the proof that the place was in fact about 364 feet west of such street, where it is evident that the defendant was not misled.

2. SAME—DUE CARE—EVIDENCE—HARMLESS ERROR.

Error in permitting plaintiff in an action for personal injuries to state that, at the time, he was endeavoring to exercise care and caution, is harmless to defendant, where plaintiff had already testified fully as to what he did at the time of the accident, and the trial judge directed the jury that, in

determining whether plaintiff exercised due care and caution, they must take into consideration the entire circumstances.

3. SAME—SIDEWALKS—KNOWLEDGE OF DEFECT.

The fact that a person injured by a defective sidewalk had knowledge of the defect may be taken into account by the jury in determining whether he used due care, but it is not conclusive against his right to recover. *Graves* v. *City of Battle Creek*, 95 Mich. 271, followed.

4. SAME—NOTICE—INSTRUCTIONS TO REPAIR.

A resolution of the common council of a village, requiring a new sidewalk to be built at a place at which plaintiff was subsequently injured, is admissible to show knowledge on the part of the village authorities of the defective condition of the old walk.

5. SAME.

Proof that the authorities of a village had knowledge that a sidewalk on which plaintiff was injured was defective for its entire length is sufficient, without showing that they had notice of the particular defect which caused the injury.

6. SAME—DAMAGES—INSTRUCTIONS.

An instruction, in an action for personal injuries, that the jury might consider plaintiff's infirmities if resulting from the injury's having caused his "rheumatism to centralize," could not have misled the jury into believing that they might award damages for an aggravation of an existing disease, which was not alleged, where, in other parts of the charge, they were told that plaintiff could not recover such damages, as he had denied the existence of rheumatism before the injury.

Error to Ingham; Person, J. Submitted February 1, 1898. Decided March 29, 1898.

Case by Alexander C. Grattan against the village of Williamston for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

W. F. Cairns and *Howard Wiest*, for appellant.

Smith & Hood, for appellee.

MONTGOMERY, J. The plaintiff recovered a judgment of $500 for injuries received by stepping into a hole in a defective sidewalk. The defendant brings error.

1. The plaintiff, in his declaration, alleged that he was injured on the sidewalk of the defendant, on the north side of Grand River street, at a place or point about 264 feet west of Putnam street. On the trial, the evidence of the plaintiff disclosed that the place where the injury occurred was in fact about 364 feet west of Putnam street. Motion to strike out the testimony was denied, and, at the close of the testimony, the court permitted the plaintiff, by an amendment, to state the correct location in his declaration. This is assigned as error. It is evident to us from the testimony offered by the defendant that the real issue was understood from the first. The president of the village testifies that he was familiar with the walk in front of the Bowerman and Fleming place, in 1893, and that, after he heard of the injury to plaintiff, he went up there, to examine it. The walk in front of the Bowerman and Fleming place corresponds in distance from Putnam street to the averment in the amended declaration. It is evident, therefore, that the defendant was not misled. There was no suggestion of surprise, and we think the amendment was warranted.

2. Plaintiff's counsel was permitted to ask him whether, at the time, he was endeavoring to exercise care and caution. We think this question might well have been omitted, as the jury should draw the inference from what was done by the plaintiff whether he was in the exercise of due care and caution; but we are convinced from this record that the defendant suffered no harm from this question being put and answered. The witness had already, upon cross-examination, testified fully as to what he did do in passing over the walk; and the circuit judge, in his charge to the jury, directed them, in substance, that, in determining whether plaintiff was exercising due care and caution, they must take into consideration the entire circumstances, — what he knew about the walk, what he had known about it, the time of night, the character of the night, and the manner in which he was walking,— and see whether he did exercise due care and caution.

This instruction practically excluded all other considerations than those relating to what the plaintiff actually did, and we think the jury could not have mistaken the issue.

3. It is also claimed that, as the plaintiff had knowledge of the defect in the sidewalk, this knowledge was evidence of contributory negligence. This is undoubtedly true, and, as stated before, the circuit judge directed the jury to take into account the knowledge which the plaintiff had of the condition of the walk, in determining the question of whether he used due care. This was all defendant was entitled to. *Graves* v. *City of Battle Creek*, 95 Mich. 271 (19 L. R. A. 641, 35 Am. St. Rep. 561).

4. The court permitted the plaintiff to introduce in evidence a resolution of the common council introduced in May, previous to the time of the injury to plaintiff, requiring a sidewalk to be built from Horton's store, a short distance east of the place of the accident, to the property of C. W. Carr, a point west of the place of the accident. This was received for the purpose of showing knowledge on the part of the authorities of the condition of the walk, plaintiff's counsel at the time disclaiming that it was offered to show what this condition was. We think it was entirely competent for the purpose offered. It is not to be assumed that the council would have ordered the construction of a new walk without previously having informed itself as to the condition of the existing walk.

5. Some criticism is made of the charge of the court upon the effect of the testimony that the entire walk in front of the Fleming place was in bad condition. The court charged the jury as follows:

"If the sidewalk generally was in bad shape otherwise than the particular plank, or plank and a half, if the ends of the boards were loose, and if it was in such shape that plank were liable to get out, because not nailed, and because the stringers were rotten, and that such a defect as the removal of a plank might be expected, then I charge you that if the removal of such a plank would cause a dangerous

place, would render the sidewalk unfit for travel, I charge you that the general condition was a thing that the village should have had notice of, and repaired it; and if they did not know that this particular plank and a half were gone, if they knew that the sidewalk was so defective, and had been in the same general bad condition, and that an accident was expected and likely to happen, that would be notice that required them to go on, and fix and take care of it."

We think there was no error in this instruction. See *Edwards* v. *Village of Three Rivers*, 102 Mich. 153, and cases cited.

6. Error is assigned upon the instruction of the court upon the subject of damages. The declaration did not aver an aggravation of an existing disease. The defendant excepts to that portion of the charge reading as follows:

"If the accident, however, in case one occurred, caused the rheumatism to centralize, and become located in the hip, and thereby resulted in precipitating and bringing about such infirmities and disabilities as the plaintiff claims, you may then consider such infirmities and disabilities as a direct result of the accident, and take them into consideration in fixing damages, if you find him entitled to recover."

We need not determine whether this instruction, standing alone, would be open to objection, as we think the charge of the court, taken as a whole, could not have been understood as justifying a recovery for an aggravation of an existing disease. The remainder of the charge on this subject, which preceded that above quoted, was as follows

"The plaintiff, Mr. Grattan, claims that the condition of his limb and hip, whatever that is, comes directly from the accident which he claims took place on the sidewalk. He says he had not suffered with rheumatism at that point before the accident, or from rheumatism at all, and claims that, if rheumatism has since set in, such rheumatism itself is a direct consequence of the injury. In short, he claims that the entire trouble with his limb and hip

originated in and comes from the accident. He does not admit that the trouble comes from some disease, — for instance, rheumatism existing before the accident, — and that the accident simply aggravated the disease. So, you could not give him damages for such an aggravation; you could not give him damages for a thing the existence of which he denies. You give him damages, if at all, according to his own theory and claim, and not according to some theory, not only not claimed by him, but denied by him. Therefore, in case he is entitled to recover, you will determine whether the trouble to his hip and limb was caused by and originated in the accident. The burden of proof is upon him in that as in other matters. If such trouble did so originate, you will give him just damages therefor; and you will give him such damages even if rheumatism has since set in, as a result of the accident itself, and aggravated the trouble. If the hip and limb trouble did not originate in the accident, as mentioned, but in some other and earlier cause, you will not give damages therefor; not if it was even aggravated by the subsequent accident."

A careful examination of the record in this case convinces us that no error was committed to the prejudice of the defendant, and the judgment will be affirmed.

The other Justices concurred.

GRIFFIN *v.* McKNIGHT.

1. AGENCY—HUSBAND AND WIFE—EVIDENCE.
   Evidence that plaintiff's husband had general authority from her to act as her agent in purchasing contracts; that he had purchased several for her like the one in suit; that he was authorized to check her money out of the bank, signing her name to the checks, by himself, as agent; that, when the contract in suit was purchased, payment was made by giving such a check, together with certificates of deposit made to plaintiff, and indorsed in her name, by her husband as agent; and that he had authority to and did receive payments upon the contracts,—is sufficient to go to the jury on the question of the husband's authority to accept a mortgage as payment of the contract in suit.

2. APPEAL—DENIAL OF NEW TRIAL—REVIEW.
   Alleged error in refusing a new trial will not be considered on appeal, where the record does not show why the trial judge refused the motion, and there is nothing to indicate that he was requested to give his reasons.

Error to Kent; Grove, J. Submitted February 1, 1898. Decided March 29, 1898.

Assumpsit by Gertrude T. Griffin against William F. McKnight upon a contract of guaranty. From a judgment for defendant, plaintiff brings error. Affirmed.

D. E. Corbitt, for appellant.

McKnight & McAllister (*J. B. Judkins*, of counsel), for appellee.

MOORE, J. In October, 1894, Mrs. Flanagan bought a piano of Mrs. Weeden, and agreed to pay therefor $375, — $50 down, and the balance at intervals stated in a written contract made by Mrs. Flanagan to Mrs. Weeden. This contract retained the title in Mrs. Weeden until the

payments for the instrument were made in full. The payment of this contract was guaranteed by the defendant. The defendant, acting for Mrs. Weeden, negotiated a sale of this contract, through M. F. Griffin, acting as her agent, to Gertrude T. Griffin, the plaintiff. The plaintiff claimed that the amount due on the contract was not paid, and sued defendant in justice's court. The pleadings are not returned with the record, and there is very little testimony about what occurred in justice's court. Plaintiff recovered a judgment. Defendant appealed. In the circuit court there was a trial by jury, which resulted in a verdict for defendant, from which judgment plaintiff appeals.

It is the claim of the plaintiff that she was entitled to a verdict for the amount due upon the contract of $246. It was the claim of defendant that plaintiff did business for quite a period of time, in the nature of loaning money and purchasing contracts, and that she had purchased a number of contracts like this one, and that the business was done in her name by her agent, M. F. Griffin, her husband, and that he had general authority to do her business of this nature; that he was authorized to check her money out of the bank, signing her name to the checks, by himself, as agent; and that, when this contract was purchased, payment was made for it by giving two certificates of deposit made to Mrs. Griffin, the indorsement being signed with her name, by M. F. Griffin, agent, and by giving one check signed M. F. Griffin, agent. It was also claimed that Mr. Griffin had authority to and did receive pay on these contracts for her. It was the claim of the defendant that, after this contract was bought by Mrs. Griffin, an arrangement was made with Mrs. Flanagan, through the husband of Mrs. Griffin, by which Mrs. Flanagan was to give a note secured by a mortgage on a lot and on the piano, which was to be received as a payment for the piano contract, and that the note and mortgage were executed by Mrs. Flanagan in Mr. McKnight's office, to be delivered by him to Mr. Griffin, as the agent for Mrs. Griffin, in exchange for the piano contract, and

that they were so delivered, and that the contract was surrendered to Mr. McKnight for Mrs. Flanagan. It is stated by defendant that, after this was done, Mr. Griffin came to the office of Mr. McKnight, and said he wanted to use the piano contract in making a computation of interest with Mrs. Weeden, and would return it in 20 minutes. At this time the note and mortgage made by Mrs. Flanagan were left in the office of defendant. It is the latter's claim that Mr. Griffin did not return the papers as agreed.

The defendant produced a number of witnesses, who testified to the manner in which Mrs. Griffin's business was done, its nature, extent, and character, and that it was actually conducted by M. F. Griffin in the name of the plaintiff. The defendant was sworn as a witness, and testified to the agency of the husband, and swore to the defense interposed by him, as outlined above. The plaintiff claimed that the facts sworn to did not show that Mr. Griffin was authorized to act for his wife. No witnesses were produced by the plaintiff except one, whose testimony was confined solely to a computation of the amount due on the contract. The plaintiff requested the judge to direct the jury that there was no evidence showing that Mr. Griffin was authorized to make the agreement sworn to by Mr. McKnight. The court declined to do this, but submitted the question to the jury. It is not claimed that the learned judge did not charge the jury correctly as to the law of agency, but that he erred in submitting the case to the jury at all. We think that there was testimony tending to show authority upon the part of Mr. Griffin to act as he did in relation to this contract, and that it was for the jury to decide whether, by a preponderance of proof, the agency was shown. *Compton* v. *Blair*, 27 Mich. 397. See 1 Jac. & C. Dig. 727.

A motion was made for a new trial, which was overruled. The record does not show the reasons why the trial judge refused the application for a new trial, and there is nothing to indicate that he was requested to give

his reasons. Because of that, we do not feel called upon to review his action. *McRae* v. *Lumber Co.*, 102 Mich. 488.

Judgment is affirmed.

The other Justices concurred.

DOWLING *v.* KNIGHTS TEMPLARS & MASONS' LIFE INDEMNITY CO.[1]

1. MUTUAL BENEFIT SOCIETIES—NOTICE OF ASSESSMENT—FORFEITURE FOR NONPAYMENT.

   Where the constitution of a mutual benefit company provides that any member may make a deposit in advance for the payment of assessments, which money shall not be used by the company for any other purpose, and that, when an assessment is made, a notice shall be sent to members, stating "the amount due from the member to whom the notice is sent," a notice to a member, wherein no credit is given for an advanced deposit which has been made, is invalid, and nonpayment of the assessment does not forfeit the policy.

2. SAME—APPLICATION FOR REINSTATEMENT—WAIVER.

   One whose certificate of membership in a mutual benefit company has been canceled for nonpayment of an assessment, of which he received no valid notice, does not waive the defects in the notice by subsequently offering to pay the assessment, at the same time insisting that he was not in fault.

Error to Muskegon; Russell, J. Submitted February 1, 1898. Decided March 29, 1898.

Assumpsit by Annie W. Dowling against the Knights Templars & Masons' Life Indemnity Company on a policy of insurance. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

[1] Rehearing denied May 24, 1898.

Bunker & Carpenter, for appellant.

Smith, Nims, Hoyt & Erwin (*Clark Varnum*, of counsel), for appellee.

MONTGOMERY, J. The defendant is a mutual benefit company, furnishing its members life insurance on the assessment plan. The plaintiff recovered on a policy issued to her late husband, George E. Dowling. The defense interposed at the trial was that the policy of Mr. Dowling was forfeited by his failure to pay an assessment claimed to have been made November 1, 1895. It appears that a notice of a double assessment was mailed to Mr. Dowling on that date, and that the amount demanded was not paid within the time fixed by the notice,—*i. e.*, 10 days; that on the 12th of November an additional notice was sent, stating that unless the amount of $15, the amount due on the assessment, together with 50 cents as charges for the notice, should be paid within 10 days from date, the policy of Mr. Dowling would be canceled. The payment was not made within the 10 days fixed by this notice. An offer was made to pay later, but after considerable correspondence the offer was declined.

It is claimed by the plaintiff that the attempt to forfeit the policy was ineffectual for the reasons:

1. That no assessment was in fact made, no entry of an assessment on the books being recorded against the holders of the several policies.
2. That the assessment was attempted by the general manager under authority delegated to him by the board of directors, and that this was an authority which could not be delegated.
3. That there is no authority in the charter for a double assessment.
4. That the claim made in the notice was in any view too large, as Mr. Dowling had on deposit 20 cents, being a balance of money deposited by him to pay assessments, which was not credited on the assessment in question.

In the view which we take of the last question, it will become unnecessary for us to follow the very able argu-

ments of counsel on the other points made. The constitution of defendant provides that any member may make a deposit in advance for the payment of assessments, which money shall be used for no other purpose by the company. The deceased had at various times acted under this provision, and at the time of the assessment in question there was in the hands of the company 20 cents (possibly $2.20; the proofs are not clear as to the amount) unused. The article providing for a notice of assessment provides that the notice shall contain a statement of "the amount due from the member to whom the notice is sent." This precise question has been decided by the supreme court of Illinois in *United States Mut. Acc. Ass'n* v. *Mueller*, 151 Ill. 254. It appears that a custom similar to that pursued by the deceased in this case had been followed by the assured, who at the date of notiee had $1 on deposit. The notice omitted all mention of this credit, and stated the amount due to be $3. It was held that the notice was invalid, as not stating the correct amount due. To the same general effect is *Eddy* v. *Insurance Co.*, 65 N. H. 27 (23 Am. St. Rep. 17). The authorities are uniform that forfeitures are not favored, and that substantial provisions for the benefit of the assured must be complied with. Nibl. Acc. Ins. & Ben. Soc. 527. The deceased had the right to stand on the terms of his policy and the constitution.

Defendant's counsel contend that deceased waived the defects in the notice by attempting to be reinstated; citing *Hansen* v. *Supreme Lodge Knights of Honor*, 140 Ill. 301. In that case the assured acknowledged, in a formal application to be reinstated, that he had been suspended for nonpayment of the assessment in question. In the present case the correspondence shows that Mr. Dowling was insisting that he was not in fault. We think that there was no waiver of his right to insist that, before his policy should be forfeited, the company should proceed according to the terms of the policy.

Judgment will be affirmed.

The other Justices concurred.

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DROVERS' NATIONAL BANK *v.* POTVIN.

1. PROMISSORY NOTES—FRAUDULENT INCEPTION—GOOD-FAITH PURCHASER.

   The mere fact that a bank had represented in writing that a certain company was, in its opinion, reliable, has, of itself, no tendency to show that it was not a good-faith purchaser of a note fraudulently obtained by an agent of such company from one to whom the recommendation was exhibited.

2. SAME—EVIDENCE—PRIMA FACIE CASE.

   The testimony of the cashier of a bank that he had purchased, as agent for the bank, for value and before maturity, from the payee, a note which the latter had fraudulently obtained; that he had no notice of the fraud; and that the bank had no committee or agent in the matter except himself,—is a sufficient *prima facie* showing of the bank's good faith.

3. SAME—UNDISPUTED TESTIMONY—DIRECTION OF VERDICT.

   The direction of a verdict for the plaintiff in an action on a note purchased by it is proper where the only question is as to the good faith of the purchase, and there is *prima facie* evidence of good faith, which is undisputed.

Error to Alpena; Kelley, J. Submitted February 2, 1898. Decided March 29, 1898.

Assumpsit by the Drovers' National Bank against Oliver Potvin on a promissory note. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

J. D. Turnbull and *James McNamara*, for appellant.

Joseph H. Cobb, for appellee.

MONTGOMERY, J. The plaintiff recovered, by direction of the court, a verdict of $101, being the amount of principal and interest of a note of $85, made by defendant May 31, 1894, due December 1, 1894, payable to the Chi-

cago Supply Company, and indorsed without recourse by the Chicago Supply Company, by G. M. Maibe, treasurer. It was conceded at the trial by plaintiff's counsel that the note was obtained of the defendant by means of a fraud practiced upon him by the agent of the payee.

The only question for determination is whether the testimony offered by the plaintiff shows it to be a good-faith purchaser. The plaintiff offered the testimony of its cashier, taken by deposition. He testified that the note in suit was purchased before maturity at the price of $72.50, and that the bank had no notice that the maker had any defense, or that there had been a fraud perpetrated upon him by the payee. It appeared upon the cross-examination of this witness that, before the note in suit was procured of the maker, one Burton, a liveryman at Alpena, had been requested by an agent of the Chicago Supply Company to accompany him through the country and assist in procuring orders for goods. He telegraphed the plaintiff, asking if the Chicago Supply Company was a reliable firm, and whether contracts made by the company or its representative could be relied on. Plaintiff replied, "They do business with us, and we consider them responsible and reliable in every way." Defendant offered to show that these representations were exhibited to parties with whom the agent of the supply company dealt.

It was claimed that this testimony connected the plaintiff with the fraud, or, at least, tended to show that it was not a good-faith purchaser. There is, however, no evidence to show that the plaintiff or its officers knew that the supply company was engaged in a fraudulent business. On the contrary, the cashier testified that the supply company was considered a reliable and honorable concern. This testimony was not disputed, except by the fact that a fraud was perpetrated upon the defendant. We think that the circuit judge was right in holding that the fact in itself did not tend to contradict the positive testimony of the plaintiff's witness.

It is also claimed that, as all the bank officers were not

called, there was failure to show want of notice of the fraudulent character of the original transaction; but the cashier testified that the bank had no committee or agent to transact business on this loan except himself, and, while he could not know, except by hearsay, that the other officers or agents of the bank were uninformed as to the fraud, the fact that he, who acted for the bank, had no knowledge of any infirmity in the security, was sufficient *prima facie*. *Rosemond* v. *Graham*, 54 Minn. 323 (40 Am. St. Rep. 336).

When the testimony of *bona fides* is thus undisputed, it is proper for the court to direct the verdict. *Borden* v. *Clark*, 26 Mich. 410.

Judgment affirmed.

The other Justices concurred.

WILSON *v.* WRIGHT.

TRUSTS — ARBITRATION AGREEMENT — SETTLEMENT — PROMISSORY NOTES—TRANSFER AFTER MATURITY.

Defendant agreed to hold certain money in trust, pending a decision by arbitrators as to whether it should be paid to complainant or to the holder of a specified promissory note. The arbitration failed, and defendant made a full settlement with the holder of the note, who was *prima facie* entitled to the fund, and was by him released from all liability. Complainant afterwards purchased the note, which was then past due, and filed a bill to establish his right to the fund. *Held*, that he had made no case.

Appeal from Saginaw; Wilber, J. Submitted February 4, 1898. Decided March 29, 1898.

Bill by Charles M. Wilson, receiver of the First National Bank of Mt. Pleasant, against Ammi W. Wright and others, to enforce an alleged trust. From a decree dismissing the bill, complainant appeals. Affirmed.

The bill in this case was filed to enforce a trust based upon the following instrument.

"MT. PLEASANT, MICH., July 9, 1889.

"For a valuable consideration to us paid, we agree with the First National Bank of Mt. Pleasant, I. A. Fancher, John A. Harris, P. F. Dodds, F. W. Carr, and P. S. Fancher, to hold the sum of $2,447.90, to await the result of the arbitration now pending between Leaton & Upton and William N. Brown and Brown & Leaton, and, if the finding of the arbitrators be in favor of Leaton & Upton, we agree to pay said sum of money, or so much thereof as may be necessary, to retire the following described notes now held by said bank, viz.: One-half note, January 17, 1889, made by P. S. Fancher, and indorsed by I. A. Fancher and F. W. Carr, $1,000; one-half note, December 15, 1888, made by I. A. Fancher, and indorsed by D. Scott Partridge, $500; and one note July 9, 1889, by I. A. Fancher and John A. Harris, and indorsed by P. F. Dodds, $2,107.22.

"WELLS, STONE & CO.,
"Per Sharp."

Contemporaneously therewith, or a few days previous, an agreement of arbitration had been signed by the parties mentioned in the above instrument.

The bill sets forth these instruments, and further alleges that the firm of Leaton & Upton, which was engaged in lumbering, became financially embarrassed, and transferred all its property to I. A. Fancher, as trustee; that Fancher, as trustee, conveyed certain lands to the firm of Brown & Leaton for $36,000; that this money was obtained from Wells, Stone & Co., and was to be applied in payment of balances due upon contracts of Leaton & Upton, and to certain indebtedness of Leaton & Upton held by the Commercial Bank, by complainant, and other small creditors; that Brown & Leaton at the same time, by deed, conveyed the lands to Wells, Stone & Co., to secure them for the loan of $36,000; that Wells, Stone & Co. paid a part of the indebtedness due complainant, and the entire amount due said Commercial Bank, from Leaton & Upton, except two notes, the subject of this controversy. The

bill then sets forth the controversy as to the items involved in these notes. Leaton & Upton claimed that one item was a note made by them for the accommodation of Brown & Leaton, who ought to pay it. Leaton & Upton also claimed that Brown was indebted to them for lumber sold; that this indebtedness was once represented by a draft, drawn by Leaton & Upton upon Brown, which he failed to pay, and was afterwards included in a note of Leaton & Upton to the Commercial Bank. Leaton & Upton claimed that these two amounts should be allowed them, and paid by Wells, Stone & Co. out of the $36,000. It is alleged that it was agreed by Leaton & Upton, Brown & Leaton, William N. Brown, Wells, Stone & Co., and the Commercial Bank that the dispute about such liability should be submitted to arbitration; that Wells, Stone & Co. should retain in their hands the sum of $2,447.90 pending such arbitration, and should pay to complainant such sums as should be found thereby due to said Leaton & Upton from Brown & Leaton and from Brown; that the arbitration failed, and nothing was accomplished under it; that these two notes were held by the Commercial Bank, and, at the request of said bank, were renewed by giving two other notes; that, subsequently, Stella G. Leaton became the owner of one of said notes, and one Minnie K. Brown the owner of the other; that complainant purchased said notes on January 31, 1895, of Mrs. Leaton and Mrs. Brown, and thereby became the owner and entitled to the proceeds of the same; that said sum of $2,447.90 still remains in the hands of Wells, Stone & Co. in trust for the payment of said indebtedness. The prayer is for a decree against Mr. Wright, the survivor of Wells, Stone & Co., for the amount of this fund.

The answer of Mr. Wright denies any trust relation or any participation by Wells, Stone & Co. in the transaction between Leaton & Upton, through Fancher, trustee, and Brown & Leaton, except that they agreed to loan Brown & Leaton the money necessary to make their contemplated purchase from Leaton & Upton, and did so, taking secur-

ity from Brown & Leaton therefor; that because of Mr. Wright's interest as president and a stockholder in the Commercial Bank, which had a large amount of Leaton & Upton paper, and the representation of Brown & Leaton, among other things, that such paper should be taken up out of the proceeds of such loan, Wells, Stone & Co. were induced to make the loan, and were desirous of having the money loaned by them paid out in such manner as would secure the release of Leaton from Leaton & Upton indebtedness, and in having the Commercial Bank relieved of the Leaton & Upton paper, and that, in making such payment, Wells, Stone & Co. only acted under the direction of Brown & Leaton, and as agents of Brown & Leaton, and did not undertake or assume any responsibility for the application of the money, or put themselves under any obligations to any other persons than Brown & Leaton, and, so acting, paid out to and for Brown & Leaton even more than the amount which they had agreed to loan. Mr. Wright admits on information and belief that a dispute arose between William N. Brown and Leaton & Upton relative to two notes made by Leaton & Upton, and held by the Commercial Bank, amounting to $2,447.90, but denies that Wells, Stone & Co. were in any way parties to the arbitration agreement, and says that such arbitration was never acted upon, and has been abandoned, and, as to the alleged agreement claimed to have been made by Wells, Stone & Co. per Sharp, that he has no knowledge about it, and that Mr. Stone, who would have had knowledge upon that subject, is dead, and he neither admits nor denies the agreement, but leaves complainant to its proof thereof. He denies that any sum remains in the hands of Wells, Stone & Co. in trust for the payment of Leaton & Upton's indebtedness to complainant, or that they should account to complainant for, or pay it, any sum. He avers that in May, 1894, acting for Wells, Stone & Co., he made full settlements with the Commercial Bank, and with Brown and Leaton and their wives, Minnie K. Brown

and Stella G. Leaton, and took full and complete releases from them, and that, at the time of such settlement, the renewals of the two notes, aggregating $2,447.90, the subject of the dispute between Brown and Leaton & Upton, were still owned by the Commercial Bank, and were covered by the releases then given, so far as any claim thereon against Wells, Stone & Co. is concerned, and that, if complainant has such notes, it obtained them after such date as dishonored paper, and has no rights thereunder as against Wells, Stone & Co. He also avers that complainant has omitted necessary parties in not making William N. Brown and the representatives of Mr. Leaton parties defendant, and prays benefit of demurrer.

Proofs were taken in open court, and the bill dismissed.

John E. More, for complainant.

Gilbert M. Stark, for defendant Wright.

GRANT, C. J. (*after stating the facts*). This bill was filed by the First National Bank before a receiver was appointed, and the bank will be treated in this opinion as the complainant. The bank insists that this is a trust fund, to which it is entitled as the owner of the notes. Defendant Wright insists upon the correctness of the decree for the following reasons:

1. That there is no evidence to prove the authority of Sharp to sign the alleged agreement for Wells, Stone & Co.
2. That the bill is defective for omitting necessary parties, viz., Brown and the representatives of the estate of Leaton, deceased.
3. That it is not a trust fund.
4. That the First National Bank took these notes after they were past due, and therefore subject to all equities and defenses which Wells, Stone & Co. would have as against the original holders.

Wells and Stone died before this bill was filed. Defendant Wright is the surviving member of the firm. Leaton & Upton were indebted in about $72,000, of which there was due to the Commercial Bank about $20,000,

and to the First National Bank about $9,000. Mr. Wright was the president and the largest stockholder of the Commercial Bank, and insisted upon the payment of Leaton & Upton's indebtedness to it. Judge Moore, of Saginaw, was the attorney for Wells, Stone & Co., negotiated the transaction, and drew the contract between the parties. He, in behalf of Wells, Stone & Co., insisted that Mr. Leaton should be absolutely discharged from all liability for the debts of Leaton & Upton, and informed Mr. Fancher and the other parties that Wells, Stone & Co. would have nothing to do with any disputes between Leaton & Upton and Brown & Leaton and Brown as to their liability on the disputed notes, and would only make this loan on condition that Mr. Leaton should be absolutely discharged. This was evidently assented to. Discharges were executed, and $16,595.54 was paid to the Commercial Bank, and $6,396.83 to the First National Bank, by Wells, Stone & Co., each bank making a rebate in order to carry out the arrangement. The other creditors formed a syndicate, took other lands in payment of the debts due them, and released Leaton. By the agreement between Brown & Leaton and Wells, Stone & Co. for the loan of this $36,000, Brown & Leaton agreed to cut and manufacture the logs upon these lands into lumber, and turn the proceeds over to Wells, Stone & Co., in payment of the loan and for advances which they had agreed to make. Brown & Leaton appear to have run behind, and to have become indebted to Wells, Stone & Co. in an amount much greater than the $36,000. On May 15, 1894, they made a settlement, which was signed by Brown and Leaton and their wives, by Mr. Wright, and the executors of the last wills and testaments of Mr. Wells and Mr. Stone. This settlement was sweeping in its provisions, including all actions, causes of action, suits, debts, claims, and demands, in law or in equity, which said first parties, and each of them, had against Wells, Stone & Co., and the latter released and discharged Brown & Lea-

ton from all indebtedness to them. On May 16, 1894, the Commercial Bank executed a release to Wells, Stone & Co. and said Wright and the several estates of Wells and Stone from all claims and demands of every kind growing out of said agreement of July 8, 1889, and also another agreement which bore date January 12, 1889. When these settlements were made, the bank delivered to Mrs. Brown and Mrs. Leaton notes to the amount of $38,000, including the two in question. The title to some of this land conveyed to the bank under the settlement stood in the names of Mrs. Brown and Mrs. Leaton. Brown & Leaton negotiated the arrangement by which these notes were delivered. Afterwards Mrs. Brown transferred the note to the First National Bank, the sole consideration being the release of her husband from all the paper at the bank of which he was either indorser or maker. Brown at that time was insolvent. The release of Mr. Leaton upon similar notes was the consideration for the transfer by Mrs. Leaton of the note she held, Mr. Leaton also being insolvent.

Under this state of facts, we think there are two complete answers to the complainant's case:

1. The settlement of May 15, 1894, was signed by Mr. Brown, Mrs. Brown, Mr. Leaton, and Mrs. Leaton, and settled all transactions between them and Wells, Stone & Co. The settlement with the bank on May 16, 1894, recited the settlement between Brown & Leaton and Wells, Stone & Co., the transfer of certain lands to the bank, and the bank, in consideration thereof, released and discharged Wells, Stone & Co. By this settlement, Brown, Leaton, and their wives released Wells, Stone & Co. from all liabilities, which included all claim to this fund which Brown and Leaton, or either of them, ever had. They made no reservation of this claim, and as to them it was settled and disposed of. They could not revive the claim by having the notes transferred to their wives by the Commercial Bank. Evidently, the bank considered Brown & Leaton insolvent, and released them

from liability on the notes they held against them, and surrendered them. It was of no consequence to whom they were transferred by the bank.

2. If it be conceded that this fund was retained for the purpose stated, complainant has not shown that it was entitled to it. By the terms of the paper signed by Sharp, Wells, Stone & Co. were only under obligation to pay the money to the holder of the notes if it should be determined that Leaton & Upton ought to pay them. As we understand the situation, Leaton & Upton were parties to the notes, and under legal obligations to pay to the then holder, the Commercial Bank; but it was insisted that equitably, and as between Leaton & Upton and Brown & Leaton and Brown, the latter should pay, and that was the question submitted to arbitration. That question has not been determined. There is no evidence in this record by which we can determine it. If it belonged to Brown & Leaton and to Brown to pay them, they have been more than paid by Wells, Stone & Co., and they have settled it. Neither Brown nor Leaton nor their wives could recover against Wells, Stone & Co., and, if they could not, neither can their transferee, the bank, which purchased after due.

It is unnecessary to discuss the other questions raised. The decree is affirmed, with costs.

The other Justices concurred.

AYRIS *v.* AYRIS.

DEEDS—CONDITIONAL DELIVERY—EVIDENCE.

A finding that a deed, claimed by the grantor to have been delivered upon the understanding that it should be withheld from record until his death, was recorded with his full consent, is justified, where it appears that he knew of the recording at the time, but made no objection for seven years, during which time he continued in possession of the premises under a life lease from the grantee.

Appeal from Wayne; Frazer, J. Submitted February 2, 1898. Decided March 29, 1898.

Bill by John Ayris against Henry Ayris and others to set aside certain deeds. From a decree dismissing the bill, complainant appeals. Affirmed.

Oscar M. Springer, for complainant.

Jasper C. Gates, for defendants.

MONTGOMERY, J. The bill in this case was filed by John Ayris against his sons, Henry, Frank, Allen, and Charles, and their wives, to set aside three several deeds of conveyance, executed, respectively, to Henry, Frank, and Allen, made and dated November 17, 1881, whereby complainant conveyed to each of them, severally, one-third of his homestead, consisting of 80 acres, situate in the township of Greenfield, Wayne county, Mich. The grounds upon which the relief is sought are (1) that it was understood when the deeds were delivered that they would not be recorded until complainant's death; (2) that the consideration of the deeds was that the grantees should stay at home with complainant, and work his farm, without compensation, except their board and clothes, during the period of complainant's life, and that

this they had each and all refused to do; (3) that Allen and Frank left complainant soon after the execution of the deeds, but Henry remained with him for a period of nine years, during which time he shamefully treated complainant, keeping him in fear of personal violence, attempting to poison him, leaving him to care for himself, stripping him of all his property, and finally deserting him in January, 1895. Defendants answer, admitting the making of the deeds, and insisting that the deeds were delivered unconditionally, and were intended to be absolute transfers of the title; denying any agreement on their part that they would work for complainant as alleged; denying all ill treatment of complainant by Henry, and insisting that he had always treated complainant with kindness, and had cared for and supported him in a proper manner until complainant compelled him to leave the land in question in January, 1895.

On January 11, 1877, complainant made and executed his will, whereby he devised this property to his sons Henry, Frank, and Allen, just as he afterwards conveyed it to them by these deeds. When these deeds were executed, they were delivered in escrow to Walter Henderson, who appears to have been complainant's confidential adviser, with the understanding that they were to be delivered to the grantees on complainant's death. Mr. Henderson died in February, 1888, with these deeds in his possession. Thereupon his son, Edwin Henderson, returned the deeds to complainant, who thereupon delivered them to his sons. Henry, Frank, and Allen made life leases of the portions of the land conveyed to them, respectively, running to complainant, which leases were delivered to, and retained by, complainant.

The claim is made that the deeds were delivered with the understanding that they were not to be recorded during the life of the complainant; but the evidence preponderates in favor of defendants on this point. Complainant admitted that he knew of the record at about the date thereof, in 1888, and apparently was satisfied that his

rights were fully protected by the life leases until near the time of filing this bill, in 1895. This fact strongly corroborates the testimony of defendants that the record of the deeds was made with complainant's full assent. Furthermore, the bill of complaint avers "that, at the time said deeds were given, it was understood and agreed between your orator and his said sons that from that time your orator's interest in said lands was and should be a life lease of the same."

The consideration for the deeds was stated to be the sum of one dollar, and for working and caring for him (grantor) in his old age. It is claimed that this constituted a condition, and that defendants have not worked and cared for complainant. At the time the deeds were prepared, it was not intended that they should be delivered until the decease of complainant. As before stated, they were left in the custody of Mr. Henderson with that purpose. It was intended that the sons were to remain on the farm with their father, and render such services as are usual under such circumstances, furnishing a home for him. When the deeds were delivered and the life leases taken, the intention, doubtless, was to secure the complainant in the control of the property. The sons, or some one of them, continued to live on the farm and care for complainant until 1895. Then trouble arose. Complainant conceived that an attempt had been made to poison him, and this naturally resulted in the breaking up of the household, complainant leaving the premises. Henry afterwards left the premises, and complainant has since leased them to Allen.

The case really turns on the question of whether the defendants were in fault, or whether complainant rightly accused Henry and his wife of attempt to murder. There was testimony tending to show neglect and unkind treatment of complainant, but the circuit judge, who saw the witnesses, was evidently impressed that these complaints were not well grounded; and the alleged attempt to poison complainant is fully disproved. We do not find the testi-

mony in support of complainant's case sufficiently convincing to justify us in reversing the decision of the circuit judge.

The decree will be affirmed, with costs.

The other Justices concurred.

HITCHCOCK v. FRACKELTON.

1. PROMISSORY NOTES — IRREGULAR INDORSEMENT — PAROL EVIDENCE.

   In an action upon a promissory note by the payee, parol evidence is admissible to show that the defendant, who indorsed the note before delivery, was, as between the maker and himself, a surety, and that the payee had knowledge of the fact.

2. SAME—EXTENSION OF TIME—RELEASE OF SURETY.

   Evidence that a sum equal to the interest on a note for 90 days was accepted by the payee in advance from the maker, and that a notice that the note would fall due at a date three months later than the original date of maturity was sent out by the payee, is competent to show that the time of payment was extended and the surety thereby released.

3. TRIAL—JUDGMENT—DISCONTINUANCE.

   By proceeding to judgment against one of several defendants, who alone was served, plaintiff elects to discontinue as to the others.

4. JOINT DEBTORS—JUDGMENT—MERGER.

   A judgment in form against all of a number of joint debtors, one of whom only was served, does not constitute an extinguishment of the debt, so as to bar a subsequent action thereon.

5. PROMISSORY NOTES—JUDGMENT—BAR—CONFLICT OF LAWS.

   Under the laws of Minnesota, the maker of a promissory note, and a third person indorsing the same before delivery, stand in the relation of joint and several makers of the note, and a judgment against one is no bar to an action against the

other; which rule will be applied in determining the rights of the several parties under a note executed, delivered, and made payable in that State.

Error to Genesee; Wisner, J. Submitted February 3, 1898. Decided March 29, 1898.

Assumpsit by Allison L. Hitchcock against David S. Frackelton and others upon promissory notes. From a judgment for plaintiff, defendant Frackelton brings error. Reversed.

Clarence Tinker, for appellant.

Bowen, Douglas & Whiting, for appellee.

MONTGOMERY, J. This was an action commenced by declaration on the part of Allison L. Hitchcock, as nominal plaintiff, the actual plaintiff being the Security Bank of Minnesota, on three promissory notes, against the defendants nominally, but against David S. Frackelton as the only one served, upon his irregular indorsement on the back of said notes. The indorsement of defendant Frackelton was made on the back of all the notes before delivery, and the consideration for the notes for which they were renewals was placed on the books of the Security Bank of Minnesota (the actual plaintiff herein) to the credit of the Price Condit Fence Company, the maker, and by the Price Condit Fence Company checked out of said bank, and used in its business, defendant Frackelton receiving none of the consideration for any of said notes, which fact was known to the bank. Upon the 14th day of November, 1890, a suit upon these three notes was begun in the district court for Hennepin county, Minn., by the Security Bank of Minnesota against the Price Condit Fence Company, George F. Porter, D. S. Frackelton, and Ambrose W. Daynes. July 6, 1891, plaintiff took judgment against the Price Condit Fence Company alone, for the sum of $14,292.65, which judgment was duly dock-

eted on that date. On July 29, 1891, an execution on said judgment was issued against the property of the Price Condit Fence Company, and indorsed by plaintiff's attorneys, and placed in the hands of the sheriff of Hennepin county, Minn. Upon the 6th day of August, 1891, the said sheriff made his return of the said execution unsatisfied.

The present suit was started in the name of Allison L. Hitchcock, in the Wayne circuit court, December 28, 1891, and was transferred to the Genesee county circuit, on motion for change of venue. On December 10, 1891, the Security Bank, by its attorneys, moved the district court for the county of Hennepin, Minn., to amend the judgment taken against the Price Condit Fence Company on July 6, 1891, and the amended and corrected judgment was made on the 15th of December, 1891. The Price Condit Fence Company became insolvent, and on November 4, 1890, made an assignment for the benefit of creditors to Emmett P. Browning, assignee. The present case was tried in the Genesee circuit, before the court and jury. The court admitted the evidence that the defendant Frackelton was a joint maker and surety, and, at the close of the evidence, ordered the same to be stricken out; and then the case was continued for the taking of further evidence, and, by the consent of the parties, the jury was discharged from the further consideration of the case, and the court rendered a judgment in the case on December 23, 1895. The defendant in the case pleaded the general issue, and gave notice by special plea of the fact that he was an irregular indorser before delivery, and received none of the consideration, becoming thereby joint maker and surety, which fact was known to the actual plaintiff, and that, after the maturity of the notes, the same were extended, without the knowledge or consent of the defendant Frackelton, by the payment of the interest in advance by the maker, the Price Condit Fence Company, to the Security Bank, for a specified time; and of the previous judgment upon the same identical notes, which would be a bar to the present action.

The legal questions are:

(1) Was it not competent for defendant Frackelton to show by parol testimony that he was a surety on the notes, as well as a joint maker, and that that fact was known to plaintiff?

(2) Was not the evidence of the acceptance of interest in advance on these notes, after their maturity, by the payee, the Security Bank, from the maker, the Price Condit Fence Company, and the several notices sent by the Security Bank to the Price Condit Fence Company thereafter, saying these notes would be due at the various times to which such interest had been paid in advance, and the verified answer of the Price Condit Fence Company in the suit brought in Minnesota by the Security Bank, alleging the extension of these notes, and the reply of the Security Bank, admitting the receipt of the money, admissible as tending to show an extension of the notes, and without the knowledge or consent of defendant Frackelton, releasing him as surety thereon, and should not this evidence have been submitted to the jury for their determination as to whether or not the notes were extended and defendant Frackelton released, the same being a question of fact?

(3) Did not the judgment taken by the Security Bank of Minnesota against the Price Condit Fence Company, as maker of the notes, in the suit brought in the district court of Hennepin county, Minn., against the Price Condit Fence Company jointly with defendant Frackelton and others, on these same notes, amount to an election on the part of the Security Bank, and a release of defendant Frackelton, and thereby become a bar to this action?

The first and the third of these questions must be determined in accordance with the law of Minnesota, as the notes in question are Minnesota contracts.

1. It has been frequently held by the supreme court of that State that, in an action on a note by the payee against the maker or indorser, it is not competent to show by parol that there was at the time a parol agreement that such maker or indorser should not be held on the undertaking as maker or indorser. *First Nat. Bank* v. *National Marine Bank*, 20 Minn. 63; *Kern* v. *Von Phul*, 7 Minn. 426 (82 Am. Dec. 105). This holding

accords with the decisions of this court (see *Kulenkamp* v. *Groff*, 71 Mich. 675 [1 L. R. A. 594, 15 Am. St. Rep. 283]; *Phelps* v. *Abbott*, 114 Mich. 88, and cases cited), and is likewise in harmony with the great weight of authority, as we conceive. These holdings rest upon the rule that it is incompetent to vary by parol the terms of a written instrument. This rule is not, however, generally held to preclude evidence that the makers of such an instrument are, as between themselves, the one principal and the other surety, and that the payee is acquainted with that fact, not for the purpose of showing that the maker is not liable as he contracted to be, but to show that it would be inequitable to permit the payee to vary the terms of the contract or imperil the rights of the surety by an extension. This doctrine is accepted by the courts with equal unanimity. 1 Am. & Eng. Enc. Law (2d Ed.), 343; *Smith* v. *Shelden*, 35 Mich. 42 (24 Am. Rep. 529); *Stevens* v. *Oaks*, 58 Mich. 343. A careful examination of the cases cited by the plaintiff has not resulted in our finding a case decided by the Supreme Court of Minnesota in conflict with the current of authority upon this subject, while we think *Strong* v. *Baker*, 25 Minn. 442, supports it. It must be held that it was competent for the defendant to show that he was, as between the Price Condit Fence Company and himself, a surety, and that the bank had notice of this fact.

2. Was there testimony tending to show that the time of payment was extended on these notes? We think there was. It appears by the testimony that a sum equal to the interest on each of these notes for 90 days was paid in advance, and that notice that the notes would *fall due* at a date three months later than the original date of their maturity was sent out by the bank. These facts certainly had some tendency to support defendant's claim; indeed, if unexplained, would have established the fact of an extension. True, there was testimony that the payments were not received to apply on interest, but this evidence did not preclude the defendant from having the jury pass

upon the credibility, and determine whether the admissions and acts of the bank officials at the time are in accord with the actual facts.

3. Was the judgment taken against the Price Condit Fence Company a bar? The original judgment was taken in the district court of Hennepin county, Minn., against the Price Condit Fence Company alone, in an action brought by the bank against all the makers of the notes. This judgment was, as before stated, afterwards amended so as to read in form against all the defendants. The judgment in form as amended was not an extinguishment of the demand sued upon. *Bonesteel* v. *Todd*, 9 Mich. 371 (80 Am. Dec. 90); *Holcomb* v. *Tift*, 54 Mich. 647. We think the amendment of the judgment was within the authority of the court; but, if the original judgment be treated as in force, it amounted to an election to proceed against the Price Condit Fence Company alone, and worked a discontinuance as against the defendants not served. In *Schultz* v. *Howard*, 63 Minn. 196, it was held that the parties to such a note as those in suit in this case were joint and several makers, and that a judgment against one is no bar to an action against the other. We hold that, applying the law of that State to the case, there was no merger.

For the errors pointed out, the judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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LEWICK *v.* GLAZIER.

1. MUNICIPAL CORPORATIONS — SPECIAL MEETINGS OF COUNCIL — PRESUMPTION OF REGULARITY — EVIDENCE.

   Technical nicety is not required in the proofs adduced to show that a special meeting of a village council was properly called, and that notice thereof was properly served upon the members, but, where they satisfy any express requirements of the statute upon the subject, they will be aided by a presumption in favor of the regularity of the proceedings.

2. SAME — PROOF OF NOTICE.

   The general act for the incorporation of villages (Act No. 3, Pub. Acts 1895) provides (chap. 5, § 4) that the president or any three members of the council may appoint special meetings thereof, "notice of which, in writing, shall be given to each trustee, or be left at his place of residence, at least six hours before the meeting." In a suit involving the validity of a special meeting, the president testified that he called the same, and the marshal testified that he served notices thereof upon all of the trustees that he could find, and left such notices at the respective residences of the others, six hours before the time appointed for the meeting; and that, after the meeting, he made a return of service, and certified it, and gave it to the clerk. There was pasted upon the records of the council the marshal's certificate showing service of written notice in due time, but it did not appear when or by whom this certificate was attached. Only one member of the council was absent from the meeting, and he was not produced to deny the service. *Held*, that the proof was sufficient to show a valid meeting.

3. SAME — WATERWORKS — TERRITORY BENEFITED.

   The fact that a waterworks system contracted for by a village does not furnish water to the whole territory incorporated will not render the contract void.

4. SAME — VALIDITY OF CONTRACT — MONOPOLY.

   A contract entered into by village officers for the construction of waterworks, pursuant to authority conferred upon them by section 11 of chapter 11 of the general charter, accompanied by a grant of rights in the streets necessary to

the carrying out of the contract, is valid, although it creates a monopoly, to the extent of the powers delegated by the charter.

5. SAME—FORMALITIES OF ACTION TAKEN.

Since, under section 5 of chapter 5 of the general charter of villages, appropriations of money may be either by ordinance or resolution, a contract for waterworks in the form of an ordinance is valid, though lacking formalities requisite to ordinances, if action by resolution taken in the same manner would have been sustained.

6. SAME—DISQUALIFICATION OF TRUSTEE—RELATIONSHIP TO CONTRACTOR.

The fact that a proposed contractor for the construction of a waterworks system in a village is a son of one of the members of the council does not disqualify such member from voting upon the proposition.

Appeal from Washtenaw; Kinne, J. Submitted February 5, 1898. Decided March 29, 1898.

Bill by William G. Lewick and others against Frank P. Glazier and the village of Chelsea to restrain the carrying out of a contract for waterworks. From a decree for complainants, defendant Glazier appeals. Reversed.

D. B. Taylor (*B. M. Thompson*, of counsel), for complainants.

A. J. Sawyer (*Edwin F. Conely* and *G. W. Turnbull*, of counsel), for defendant Glazier.

A. F. & F. M. Freeman, for defendant village.

HOOKER, J. In the summer of 1896 the defendant Frank P. Glazier began the construction of works, and the laying of street mains, with a view to supplying the village of Chelsea with water for fire and other purposes, in reliance upon a contract which had previously been made between the village, through its common council, and himself. Some resident taxpayers filed the bill in this cause to prevent the performance of this contract, upon the ground that it was void; making Glazier and the vil-

lage parties defendant. Before the hearing, the works were completed and put in operation. The defendant Glazier has appealed from a decree granting the prayer of the bill.

The contract is alleged to be void for several reasons, viz.:

1. It was made at a special meeting, which is not shown to have been properly called, and there is no proof that notice of the meeting was properly given.
2. It has not the requisite number of votes, without counting those of several trustees who were disqualified from voting upon the subject, by reason of personal interest in the contract, and relationship to defendant Glazier.
3. The ordinance was defective in that it was not entitled as the charter requires, and was given immediate effect before publication, and no certificate of publication was ever filed.
4. The contract attempted to create a monopoly.
5. It was so unreasonable as to be beyond the power of the council.

The council consisted of six members,—the president and five trustees. The charter provided that "the president or any three members of the council may appoint special meetings thereof, notice of which, *in writing*, shall be given to each trustee, or be left at his place of residence, at least six hours before the meeting." Act No. 3, Pub. Acts 1895, chap. 5, § 4. At the meeting when this contract was made, one member was absent. The president, Schenk, testified that he called the meeting, while the marshal testified that he served notices of the meeting upon all of the trustees that he could find, and left such notices at the respective places of residence of the others, six hours before the time appointed for the meeting; that he told the president at the meeting that he had served them; and that, after the meeting, he made a return of the service, and certified it, and gave it to the clerk. He was corroborated as to some of these statements by one or more witnesses, and there was pasted upon the record of the council the following:

"George P. Glazier, A. H. Mensing, John J. Raftrey, I. Vogel.

"I, Rush Green, village marshal, do hereby certify that on this date (August 24, 1896) I served written notices on trustees George P. Glazier, J. P. Foster, J. J. Raftrey, F. Wedemeyer, and I. Vogel, relative to a special meeting of the village council to be held at 8:30 o'clock p. m. on date above mentioned, as per order of William P. Schenk, president. I further certify that all the notices referred to were served not later than 2 o'clock p. m., above date.

"RUSH GREEN, Village Marshal."

It does not appear when this was attached, or by whom.

It is contended that, inasmuch as all of the trustees were not present at the meeting, the proof is insufficient to show the regularity of the meeting, because neither the call nor the proof of service of notice appears upon the record, and for the further reason that there is no proof of the contents of the notice served. It is also said that it does not appear that the call or notice stated the object of the meeting, or was in writing.

The provision in relation to the appointment of special meetings is general. It is not, in terms, required to be in writing, or to state the object of the meeting; nor is anything said about its being filed or made a matter of record. The notice must be in writing, and must be served on each trustee, or left at his place of residence, at least six hours before the meeting. "Special meetings, properly called according to the rules laid down in the charter, are legal, and the proceedings valid, if all the members entitled to be present are properly notified." Tied. Mun. Corp. § 97; 1 Dill. Mun. Corp. §§ 263, 268. In many of the States it is held that where acts have been done by the directors or trustees of a corporation, private or municipal, the law presumes the meeting to have been properly called, unless by the terms of the statute preservation of evidence thereof is required. The opinion in the case of *State* v. *Williams*, 25 Me. 564, quotes *Thayer* v. *Stearns*, 1 Pick. 109, as authority for the proposition that "every presumption

should be made in favor of the regularity of such meetings," and states:

"The experience of all our judicial tribunals must have gone far to teach the necessity of not being hypercritical in reviewing the proceedings of our multiplied municipal corporations. We all know that those necessarily, or at least ordinarily, employed to transact the affairs of those corporations, cannot be expected to be possessed of much, if of any, legal acumen. Certainty to a common intent, and such as would suffice for all practical purposes, would seem to be all that could be expected in such cases, or be reasonably required. But, however this may be, the legislature of this State have deemed it expedient to prescribe particularly what shall be done by those who may be required to warn town meetings, and what their returns of their doings shall contain. Whenever, therefore, it shall hereafter be found that there was any deficiency in any such particulars, there would seem to be no alternative but to consider the meetings held under any such defective return to be void, whatever may be the consequences resulting from such a determination; and it may well be doubted if many of the town meetings, since the enactment of those regulations, could be held to be valid."

This doctrine was applied in *Granger* v. *Original Empire, etc., Mining Co.*, 59 Cal. 678, where a statutory notice was required. So, in Iowa, a presumption that a bill received the requisite vote of two-thirds of the council was indulged, upon the presumption that attends official action. *State* v. *Vail*, 53 Iowa, 550. In *State* v. *Smith*, 22 Minn. 218, it was held that:

"It appearing that a meeting of the council was held, at which business was transacted which it only had a right to do at a legal meeting, it will be presumed, if necessary, and nothing to the contrary being shown, that all its members were present and acted."

So, in *Chosen Freeholders of Hudson Co.* v. *State*, 24 N. J. Law, 718, the court of errors held that:

"If any proceeding of a municipal corporation be had at an adjourned meeting, it will be presumed, until the contrary appear, that the meeting was rightly adjourned. It is not necessary that the facts showing the proper con-

vening of such corporation should appear in every resolution of the body, or upon the face of the proceedings, when any part is removed by *certiorari*."

Again, in *Chouteau Ins. Co.* v. *Holmes' Adm'r*, 68 Mo. 601 (80 Am. Rep. 807), it was held:

"When it is shown that a special meeting of the board of directors of a corporation was held, and that a quorum attended, it will be presumed, in the absence of evidence to the contrary, that due notice of the meeting was given to all the directors, and that all the steps were taken which were necessary to constitute it a valid meeting."

See, also, *Rutherford* v. *Hamilton*, 97 Mo. 543; *Tierney* v. *Brown*, 65 Miss. 563 (7 Am. St. Rep. 679); *Corburn* v. *Crittenden*, 62 Miss. 125; *Brigins* v. *Chandler*, 60 Miss. 862; *Dubuc* v. *Voss*, 19 La. Ann. 210 (92 Am. Dec. 526); *Com.* v. *Slifer*, 25 Pa. St. 23 (64 Am. Dec. 680); *Culbertson* v. *Milhollin*, 22 Ind. 362 (85 Am. Dec. 428).

As to the sufficiency of the proof of notice, if we were to consider that question, the same presumption attaches. See *Briggs* v. *Murdock*, 13 Pick. 305; *Houghton* v. *Davenport*, 23 Pick. 235; and *Rand* v. *Wilder*, 11 Cush. 294. In the latter case a return by the officer that he had "posted the within warrant according to law" was held sufficient. See, also, *Barr* v. *Mayor, etc., of New Brunswick*, 58 N. J. Law, 255; *City of Auburn* v. *Union Water Power Co.*, 90 Me. 71 (38 L. R. A. 188).

In Michigan, however, a contrary rule has been applied to special meetings of township boards, in cases cited by counsel. The first of these is the case of *Township Board of Beaver Creek* v. *Hastings*, 52 Mich. 528, where it was sought to compel a clerk to record the proceedings of a meeting when it did not appear that the meeting was "duly called and notified." Manifestly, this case did not turn on the effect of action by such a meeting, or the perpetuation of proof of its validity, but, in a direct proceeding, raised the question of its validity. *Harding* v. *Bader*, 75 Mich. 320, indicates

the necessity of proof of the regularity of the meeting; and this is followed by the case of *Auditor General* v. *McArthur*, 87 Mich. 464. None of these cases go so far as to lay down the broad proposition that, in the absence of a statutory requirement, the journal or record of proceedings must contain evidence of service of a notice of the meeting. In *Boyce* v. *Auditor General*, 90 Mich. 325, it is said that it is common to file it when the statute does not prescribe a method of proof, and that it is not usual to record it; that, when so filed in a public office, such proof constitutes a part of the records of that office.

In this case a paper bearing the genuine signature of the marshal is attached to the record. It is objected to as insufficient, because—*First*, it is not filed; and, *second*, it is not sufficiently specific as to the character of the service. We think we should not hold this proof defective merely because the village clerk pasted the return upon the page of the journal of the proceedings, instead of keeping it as a file. It is none the less authentic; it is more accessible and certain to be found; and, furthermore, if he had destroyed or lost it, it might have been proved by oral testimony. It is corroborated by the testimony of the marshal, and by the fact that, with one exception, the entire council knew of and attended the meeting, and the absent member is not produced to deny such service. Upon the whole record, we are convinced that notice was properly served, even if the proof is lacking in technical nicety. In cases cited we have seen that too great strictness may be required in such proof, and that presumptions of regularity may afford aid to substantial proof. We are of the opinion that the meeting was a lawful one.

Next we may say that the contract was one which the charter gave the village council the power to make. *Monroe Water Co.* v. *Heath*, 115 Mich. 277; Act No. 3, Pub. Acts 1895, chap. 11, § 11. And, under the case of *Mitchell* v. *City of Negaunee*, 113 Mich. 359 (38 L. R. A. 157), we cannot hold it void because of the extent

of territory incorporated which was beyond the protection of the waterworks. Nor should we set it aside upon the ground that it creates a monopoly; for if this is true, and the agreement for the monopoly void, there is yet sufficient consideration to support the contract of the defendant Glazier. The promise to pay for water is valid, and the grant is valid, to the extent of the power delegated to the council. For a discussion of this subject, see 1 Pars. Cont. (8th Ed.)* 457, and note 1, and cases cited; *Stewart* v. *Railroad Co.*, 38 N. J. Law, 505; *Presbury* v. *Fisher*, 18 Mo. 50; *Erie R. Co.* v. *Union, etc., Express Co.*, 35 N. J. Law, 240; *Ohio* v. *Board of Education*, 35 Ohio St. 519. See, also, Clark, Cont. 474, and *People* v. *Railway Co.*, 92 Mich. 522 (16 L. R. A. 752).

An ordinance was unnecessary in the making of a contract of this kind. It might be done by resolution. And we therefore find it unnecessary to consider the manner in which it was entitled or published. Act No. 3, Pub. Acts 1895, chap. 5, § 5.

The remaining question relates to the interest of the trustees in the contract. It is urged by the complainants that, previous to the action of the council, it was arranged by Glazier and the electric light company that, if he obtained the projected contract, they should furnish power for pumping the water, for a consideration, and that three of the members of the council were members of the electric light company at the time the contract was made, and that another member was Glazier's father. If any two of these four persons were disqualified, the action of the council was void. It is admitted that Wedemeyer was a member of the electric company. The other two explicitly state that they were not during the year 1896, when these transactions occurred, and there is no testimony that they were, unless we are to so conclude from the failure to produce the books of the electric company, which the witness Davis, president of the company, professes to have lost. What the books would have shown is a matter of conjecture, and we do not feel justified in concluding that either

of these men was such member, in the face of their sworn testimony to the contrary. Trustee Glazier was not disqualified by reason of his relationship to the defendant.

The decree of the circuit court in chancery is reversed, with costs to the defendant Glazier against the complainants. The defendant village will not recover costs, as it is here in the attitude of complainant.

The other Justices concurred.

RANDALL v. TOWNSHIP OF SOUTHFIELD.

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BRIDGES—NOTICE OF DEFECT—EVIDENCE.

In an action against a township for damages occasioned by the collapse of a bridge, evidence that there was a decayed spot in the stringer, the breaking of which caused the accident, which looked darker than the other portions of the stringer, at least when it was wet, does not show conclusively that the township had constructive notice that the structure was in need of repair, but its force as bearing upon that question is for the jury.

Error to Oakland; Smith, J. Submitted February 4, 1898. Decided March 29, 1898.

Case by George E. Randall against the township of Southfield for damages caused by a defective bridge. From a judgment for plaintiff, defendant brings error. Reversed.

Samuel W. Smith and *A. & S. H. Perry*, for appellant.

Sayles & Sayles and *James H. Lynch*, for appellee.

MONTGOMERY, J. The plaintiff brought this action to

recover damages for injuries to a traction engine which fell through a bridge over the River Rouge within the limits of defendant township. The case was tried before a jury. Plaintiff recovered a verdict of $745, upon which judgment was entered, and defendant brings error.

The accident occurred on September 27, 1890. The bridge was a truss bridge, and gave way because of the breaking of one or more of the outside stringers of the bridge. The questions involved were whether the stringers in question were in fact defective (and of this, as to one of them, there was abundant proof); whether the defect was of such an obvious character that the officers of the defendant charged with the care of its bridges should, in the exercise of due care, have known of the defect, and repaired it (and on this point the evidence was conflicting); and, lastly, whether the plaintiff was free from contributory negligence (which last question was left to the jury under proper instructions).

The principal questions discussed in this court relate to the instructions upon the subject of constructive notice to the township of the defect or defects in the stringers. The plaintiff called two witnesses, who testified as to the condition of the stringers previous to the injury. Will Cook testified on direct examination as follows:

"We started to water our horses there, I think, in the latter part of May, but I couldn't state when I first saw it. I first noticed the defect when riding a horse down there to water. *There was a little decayed spot, six or seven feet, I should judge, from the west end of the bridge, on the south. It extended a foot and a half along the stringer, I should judge, and two or three inches up and down along the face. There was an old check running each way from the rotten spot. It ran east from the spot perhaps two feet. It might not have been so far, I couldn't say. I should judge it ran about the same distance west of the spot. It could not have been so much. I never made any closer examination than from the back of a horse at times when I was down there.*"

On cross-examination the witness testified that the

defect did not particularly attract his attention, and that he did not regard it as anything serious; that "the decayed spot was a little darker than the other; certainly it is when it is wet; of course, it would dry up, and look like the rest of the stick;" and further, by question and answer, as follows:

"*Q.* Then, when it wasn't wet, it looked more like the rest of the stick,—is that right?

"*A.* It looked a little darker, but, of course, it looked more like the rest of the stick.

"*Q.* When it wasn't wet?

"*A.* When it wasn't wet; and when it was wet it looked dark."

The witness further stated that the rotten spot was at about the center of the stringer, on the flat side.

Edward Prince testified, on direct examination, that he noticed a rotten spot in the stringer, six, seven, or eight feet from the west end; that it was on the top side of the stringer. On cross-examination the witness locates the decay at a point where an iron rod ran through the stringer,—a point a much greater distance from the west end,—and testified: "I did not see any decayed spot on the stringer myself six or seven feet from the west end."

The circuit judge, in instructing the jury on the question of notice, used the following language:

"It is his [plaintiff's] theory that the bridge, or south stringer of the bridge, was decayed, and broke; or, as one of the witnesses states it, that it had a decayed spot, and that they noticed it some months previous to the 27th day of September. I refer more especially to the testimony of witnesses Cook and Prince; and, that being true, the township is chargeable with constructive notice. I think I ought to say to you, and it is my duty to say to you, that if you believe the testimony of witnesses Cook and Prince, more especially the testimony of Prince, that such a decayed spot was existing in that stringer as described, and that the plaintiff did not by his own negligence contribute to the injury, that he is entitled to recover from the township."

The substance of this instruction was also embodied in a request preferred by the plaintiff and given by the court.

We think these instructions were error. The instructions amounted to holding that, as matter of law, such a decayed spot as described by either of these witnesses was enough, in and of itself, to amount to notice that the sleeper was unsafe. That this question was competent to be considered by the jury cannot be gainsaid, but it was insisted by counsel for the defendant, and we think rightly, that the effect of these defects as notice should be determined by the jury. The cross-examination of Cook leaves it doubtful whether the discoloration was perceptible in dry weather, and the question of the extent of the discoloration, the appearance of the spot, its location, and what it would suggest to those having charge of the bridges of the town, were questions for the jury; the test being whether the appearances were such as to suggest to a person of ordinary skill and judgment the fact of unsafety or the necessity of further investigation, and whether such defective appearances existed for such a length of time as that their inspection at reasonable intervals would have disclosed their appearance to the inspectors. *Woodbury* v. *City of Owosso*, 64 Mich. 239; *Blank* v. *Township of Livonia*, 95 Mich. 229; *Township of Medina* v. *Perkins*, 48 Mich. 67; *Alberts* v. *Village of Vernon*, 96 Mich. 549; *Snyder* v. *City of Albion*, 113 Mich. 275; *Moore* v. *Township of Kenockee*, 75 Mich. 332 (4 L. R. A. 555).

We think none of the other questions require discussion. The judgment is reversed, and a new trial ordered.

The other Justices concurred.

PEOPLE, *ex rel.* WARD, *v.* GREEN.

1. MUNICIPAL CORPORATIONS—COMMON COUNCIL—GRANT OF RIGHTS IN STREETS.

   Under 1 How. Stat. § 3621, authorizing a majority of a city council, in writing signed by them, to grant a right to construct a plank road in a street, such a right is obtained by a conveyance executed by the mayor and two of the four aldermen of a city whose charter makes the mayor and aldermen the common council.

2. CORPORATIONS—ARTICLES OF ASSOCIATION—AMENDMENT—EXTENSION OF CORPORATE EXISTENCE.

   An amendment of the articles of association of a corporation, extending the period of its existence at a time when there was no statute allowing such an amendment, which provision is continued in a subsequent amendment of the articles, made after the passage of an act authorizing such an amendment, operates as a valid extension of the corporate existence, even though the preamble to the amended articles does not refer to the proposed extension.

3. SAME—PLANK-ROAD COMPANIES.

   Under 1 How. Stat. § 4866, providing that any corporation may amend its articles of association in manner consistent with the provisions of the act under which it was organized, a plank-road company incorporated under 1 How. Stat. § 3597 *et seq.*, may, by amendment, continue its corporate existence beyond the time fixed by the original articles, provided the entire term does not exceed that for which it might have incorporated in the first instance.

Error to Oakland; Smith, J. Submitted February 4, 1898. Decided March 29, 1898.

Quo warranto proceedings by the people, on the relation of Willis C. Ward, against Hartwell Green and others, to inquire into the corporate existence of the Pontiac & Orchard Lake Gravel-Road Company. From a judgment for respondents, relator brings error. Affirmed.

Fred A. Maynard, Attorney General (*James H. Lynch* and *Chamberlain & Guise*, of counsel), for appellant.

Aug. C. Baldwin and *A. & S. H. Perry*, for appellees.

LONG, J. This proceeding is by information in the nature of a *quo warranto*, filed under section 8635, 2 How. Stat., for the purpose of testing the validity of the existence of a corporation known as the Pontiac & Orchard Lake Gravel-Road Company, which claims the right to operate a toll road from Williams street, in the city of Pontiac, over Orchard Lake avenue, in said city, and highways adjoining thereto in the townships of Pontiac, West Bloomfield, and Bloomfield, — altogether a distance of about 10 miles.

It appears that on September 9, 1865, a corporation adopted articles of association to construct a gravel road "from the corporate limits of the city of Pontiac on the Orchard Lake road; thence, along the line of said road, to a point about 10 rods west of the outlet of Orchard Lake, a distance of four miles." These articles were filed with the secretary of state on October 13, 1865. These articles did not provide the period of corporate existence, and it was evidently thought that they were defective; for, on March 23, 1866, other articles of association were filed in the office of the secretary of state, bearing date of March 2, 1866. They were filed under Act No. 155, Laws 1851 (1 How. Stat. § 3597 *et seq.*) The period of existence was fixed at the term of 30 years, with capital stock at $5,000. The corporation was organized to construct a gravel road "from the intersection of the Orchard Lake road with Williams street; thence, upon the line of said Orchard Lake road, to a point where the road, passing around the north shore of Orchard Lake, first strikes said Orchard Lake, a distance of four and one-half miles," —thus including other territory than that embraced in the former articles. It is recited in the preamble that "permission has been given in writing by the supervisors,

township clerks, and highway commissioners of the respective townships through which said gravel road is to pass, and also by the common council of the city of Pontiac, which permits have been duly filed in accordance with the law in such cases made and provided." On July 14, 1866, this corporation adopted amended articles. In the preamble thereto it is recited that "it was deemed necessary, in order to complete the road and construct suitable bridges and culverts, to increase the capital stock of the company, and also to change the terminus of the road." These articles provided a capital stock of $10,000, and extended the line of the road to five miles. These amended articles were filed with the secretary of state July 17, 1866. They also fixed the period of the corporate existence at 50 years.

In November, 1869, another corporation, known as the Lake Shore Gravel-Road Company, was organized to construct a gravel road from the western terminus of the Pontiac & Orchard Lake Gravel-Road Company's road southerly about two miles. January 11, 1875, at a meeting of its stockholders, the Pontiac & Orchard Lake Gravel-Road Company adopted amended articles of association. These were filed with the secretary of state January 25, 1875. The preamble to these amended articles recites that it "was resolved to amend the charter of said company so as to embrace the territory included in the franchises of the Lake Shore Gravel-Road Company, and to increase the capital stock, amending articles two and five, respectively, in the articles of association of the Pontiac & Orchard Lake Gravel-Road Company so that said articles shall read as follows." Article 2 provided a capital stock of $20,000, instead of $10,000, as provided under the articles of July, 1866. Article 5 provided an extension of the line, so as to include the other company's line and other lines, embracing in all about 10 miles of road. Article 8 provides that "the period for which this organization shall be a body corporate shall be 50 years from the date of the original organization of the company,

September 9, 1865,—which amended articles of association were unanimously adopted at a meeting of all the stockholders of said corporation at the meeting aforesaid." The Pontiac & Orchard Lake Gravel-Road Company thereafter assumed control over and operated the routes previous to that time operated by itself and the other company.

1. It is contended by relator that this corporation never obtained any legal grant from the city of Pontiac to operate over any of the streets of said city. At the time the right was granted the corporation to occupy the streets of the city of Pontiac, the charter made the mayor and aldermen the common council. Act No. 192, Laws 1861, § 36. There were two wards in the city, and consequently four aldermen, who, with the mayor, made five members of the council. Two aldermen and the mayor signed the conveyance of the right of way over the streets of the city. Section 3621, 1 How. Stat., relating to such corporations, in force at the time when this conveyance was made, provides:

"Whenever such company may wish to use any part of a street in any city * * * for the construction of their plank road, * * * such company shall apply to the common council * * * for the right to construct their plank road thereon; and it shall be the duty of such common council * * * to examine, at the expense of such company, so much of any such street as may be wanted, * * * and if, in the opinion of a majority of such common council, * * * the public interest would not be prejudiced by granting the application of such company, said common council * * * may, in writing signed by them, grant to such company a right to enter upon, take, and use such * * * street, * * * and, upon filing such grant in writing in the office of the register of deeds, * * * the said company may forthwith enter upon, take, and use such street," etc.

We think, under this statute and from the conveyance taken, it cannot be said that the company did not obtain a legal grant from the city of Pontiac.

2. It is contended that the period of existence of the corporation expired not later than March 23, 1896. It is

evident that the learned counsel for relator fix this period for the expiration of the charter as the limit of the 30 years from the time the articles of association of March, 1866, were filed with the secretary of state. The question for consideration is, therefore, whether the articles of association have been legally and properly amended so that the period of the life of the corporation is extended to 50 years from its organization. The only power to amend the articles of association was in reference to the increase of the amount of the capital stock, until Act No. 86, Laws 1871, was passed. That act amended section 7, chap. 55, Rev. Stat. 1846, and, among other things, provided:

"Such corporation may at any time amend its articles of association by filing amended articles of association in the office of the secretary of state, which said amended articles of association shall be made in all respects consistent with the provisions of the act or acts under which such corporation may be organized, and shall be executed by said corporation under its corporate seal, and by stockholders of said corporation owning at least a majority of all the capital stock of said corporation, under their seals, and duly acknowledged." 1 How. Stat. § 4866.

It is not contended but that this amendment, made in 1875, complied in all respects with the requirements of this statute; but the claim is that, as in July, 1866, when the amended articles were filed providing for an existence of the corporation for 50 years, there was no statute allowing such an amendment, therefore no amendment has ever been made to that section of the articles continuing the corporate existence beyond the time fixed in the articles in March, 1866; that the action taken, as recited in the amended articles filed January 25, 1875, does not amount to an amendment of article 8, which is a mere repetition of the article adopted in July, 1866; and that the preamble rebuts any presumption that it was intended by the stockholders to amend that article continuing the life of the corporation 50 years from date of organization. This preamble has been given.

We cannot agree with this contention. While it is true

that the amendment of July 17, 1866, had no legal effect, because there was then no power to so amend, yet the articles contained the provision for a continued existence of 50 years when the amendment of 1875 was adopted, and that provision was continued in the articles when the amendment was made in 1875. There is nothing to show that the stockholders or directors had any doubt whatever of the efficiency of that amendment, and it is significant that there was incorporated in the articles the very provision which continued it for 50 years. The articles were so adopted and filed with the unanimous consent of all the stockholders.

Counsel cite *People* v. *Plainfield Ave. Gravel-Road Co.*, 105 Mich. 9, and contend that that case sustains their claim that the amendatory act of 1871 did not confer the right to extend the term of existence of that corporation. In that case, however, the company sought to abandon a part of its road, and it was held that it could not abandon that part. It appeared that that part had been included in its line by an amendment of its articles, and the company, in order to get rid of that portion, and the expenses incident to the building of a bridge thereon, sought to again amend its articles and exclude that portion. The amended articles were filed, and thus that part abandoned, so far as the company could abandon it. After citing the statute (1 How. Stat. § 4866) it was said:

"Under this act these corporations may amend their articles in all those matters which do not affect the public, and with which, therefore, the public is not concerned, such as increase or decrease of their capital stock. As already shown, they cannot appropriate to their use or benefit any portion of an existing public highway without the assent of the proper public authorities."

Having amended by taking in this part of the road, it was said: "They cannot receive the benefits without accepting and bearing the burdens." It was therefore held that the statute did not confer the right to abandon this portion.

Clearly the statute (section 4866) gives the right in most explicit terms to amend; the amended articles, however, to be made in all respects consistent with the provisions of the act or acts under which the corporation was organized. The act under which the company here was organized permitted a corporate existence of 50 years, and the amendment made was within the terms of that act.

It may be further added, in reference to the claim that the preamble does not show any attempt to amend the article extending the time of corporate existence, that the court below found that "there was no intention on the part of the Pontiac & Orchard Lake Gravel-Road Company, when it attempted to amend its articles of association on January 11, 1875, to change article 8 thereof. The company treated the amended articles of July, 1866, as properly made and filed, and in 1875 copied article 8 therefrom."

We think the court below very properly entered judgment in favor of the respondents. That judgment must be affirmed.

The other Justices concurred.

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CHILDS *v.* NORDELLA.

1. TRIAL—FINDINGS OF FACT—APPEAL.
   Special findings of fact in a case tried before the court without a jury have the force of a verdict, and will not be disturbed if there is any testimony to support them.

2. SAME—EXCEPTIONS.
   Rulings to which no exceptions were taken will not be reviewed on appeal

3. SAME—GARNISHMENT—EVIDENCE.

Where, in garnishment proceedings, the only material issue was whether the principal defendants were indebted to one to whom before garnishment they had assigned their claim against the garnishee, it was not error to exclude testimony bearing upon their insolvency.

Error to Kent; Grove, J. Submitted February 4, 1898. Decided March 29, 1898.

Garnishment proceedings by William H. H. and Eversley Childs against Joseph G. Nordella and Rollin H. Owen, as garnishees of John T. and Theodore W. Elliott. Caroline S. Elliott claimed the fund as assignee, and had judgment. Plaintiffs bring error. Affirmed.

H. B. Fallass and *G. A. Wolf*, for appellants.

Taggart, Knappen & Denison, for appellee Caroline S. Elliott.

MOORE, J. The plaintiffs sued John T. Elliott & Son, the principal defendants, and garnished Nordella & Owen, who disclosed that they were indebted to the principal defendants, but had been notified that the amount of their indebtedness had been assigned to Caroline S. Elliott. The case was tried in justice's court, and from there appealed to the circuit court, where it was tried by the judge without a jury. The judge made a written finding of facts, and found, among other things, that on September 19, 1896, the plaintiffs sued the principal defendants, and had a writ of garnishment issue to the garnishee defendants; that the principal defendants had, the day before, assigned, in writing, their claim against the garnishee defendants, to Caroline S. Elliott, and delivered the assignment to her.

The only question involved is, Was that assignment made for an existing indebtedness to Mrs. Elliott? It was the claim of Mrs. Elliott that the principal debtors had collected rents belonging to her for a series of years,

agreeing to apply them in paying taxes on her property, and interest upon mortgages that were upon her two houses, and the surplus to be applied in reducing the principal of the mortgages. It was also her claim that, when Elliott & Son made their contract with the garnishee defendants, it was agreed that the proceeds of that contract should be used to pay the interest on her mortgages, which would come due in September. The amount the garnishee defendants owed to Elliott & Son when they were garnished was $204. The circuit judge found that Elliott & Son had collected rent belonging to Mrs. Elliott, under the agreement stated, and that they owed her to exceed $250 at the time this assignment was made. It has been repeatedly held by this court that the special findings of fact in a case tried before a judge stand the same as a verdict of a jury would stand if the case were tried before a jury, and that, if there was testimony tending to sustain the findings of fact, this court would not set them aside. In this case, both Mr. and Mrs. Elliott swore to the indebtedness. They were cross-examined at great length, and counsel insist that, when their testimony is taken as a whole, it is shown no indebtedness exists, and therefore the findings must fail. It was the judgment of the judge that a different conclusion should be reached from the testimony from that drawn by counsel. There was testimony tending to sustain the conclusion reached by the trial judge, and we cannot disturb his findings of fact.

It is said error was committed in the exclusion of testimony. In most instances counsel yielded to the rulings of the court without taking any exception. In those cases we cannot consider the assignments of error.

It is said the court did not allow, on cross-examination, counsel to pursue the question of the insolvency of the principal debtors, and that this was error. We do not see how it could affect the result in this case if the inquiry had been pursued. There is no dispute but the assignment in this case was made and delivered the day before

the suit was instituted. The only question involved was whether Elliott & Son were in fact indebted to Mrs. Elliott. If it had been shown that Elliott & Son were insolvent, it would not throw any light whatever upon the question as to whether they owed Mrs. Elliott.

Judgment is affirmed.

The other Justices concurred.

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LA PONTNEY *v.* SHEDDEN CARTAGE CO.

CONTRIBUTORY NEGLIGENCE — ELECTRIC CARS — COLLISION WITH VEHICLE.

A motorman who runs an electric car, upon a foggy morning, at a rate of speed which does not permit of its being stopped in time to avoid collision with a vehicle after the same becomes discernible upon the track ahead, is guilty of contributory negligence.

Error to Wayne; Lillibridge, J. Submitted February 5, 1898. Decided March 29, 1898.

Case by Joseph La Pontney against the Shedden Cartage Company, Limited, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

L. C. Stanley (*Geer & Williams*, of counsel), for appellant.

Edwin F. Conely and *Orla B. Taylor*, for appellee.

MONTGOMERY, J. The plaintiff brought an action for negligent injury, and recovered a verdict and judgment. Defendant brings error.

The testimony offered at the trial tended to show that the plaintiff was at the time of the injury a motorman on one of the cars of the Citizens' Street Railway. Defendant company is engaged in the business of trucking. On

the 6th of September, 1895, at 4:05 a. m., defendant's employés were engaged in trucking a "merry-go-round" from one part of the city to another. This "merry-go-round" was 8 to 12 feet high, about 40 feet across, and covered with canvas. The defendant's driver, in moving this machine, proceeded along Gratiot avenue, upon which street is located a track of the street railway. The plaintiff was running a motor car on this street, and at the time stated there occurred a collision between the front portion of the car and the rear of defendant's truck, in which collision plaintiff was injured. The testimony tended to show that there was some fog that morning, and plaintiff testified that the headlight did not throw a light more than 20 feet ahead of the car. The defendant's servants did not have a light on the rear of the vehicle to give warning.

We need discuss but a single question in the case, as we are all agreed that the plaintiff was himself guilty of such contributory negligence as precludes recovery. He knew it was entirely proper for drivers of vehicles less easy to be discovered than that driven by defendant's agent to be traveling the highway ahead of him, and that he owed a duty to such occupants of the street, as well as to himself, to use care to avoid a collision. Plaintiff testified that he did not ring the gong while running the last 657 feet before the collision, and did not see the vehicle until within 20 feet of it, and that it required 25 feet to stop the car. It was the duty of plaintiff to have the car under such control as to admit of its being stopped after he became able to discern objects on the track, and before a collision with such objects should occur. *Winters* v. *Railway Co.*, 99 Mo. 517 (6 L. R. A. 536, 17 Am. St. Rep. 591); *Mahoney* v. *Railway Co.*, 110 Cal. 471; *Gilmore* v. *Railway Co.*, 153 Pa. St. 31 (34 Am. St. Rep. 682).

The judgment will be reversed, and no new trial ordered.

The other Justices concurred.

WEBB *v.* DETROIT BOARD OF HEALTH.

116 516
125 6

116 516
s74NW 734
s72ASR 541
129 s249
129 s256

116 516
140 309

1. BOARDS OF HEALTH—QUARANTINE—COMPENSATION.
A municipal board of health will not be required to allow compensation for losses occasioned by the quarantining and disinfecting of premises infected with smallpox, where the only use made of the premises was such as was necessary for the proper care of the patients who were there found suffering from the disease.[1]

2. SAME—NEGLIGENT DISCHARGE OF DUTY—LIABILITY.
If the officers of a municipal board of health are negligent in the matter of disinfecting property, and thereby cause unnecessary damage, such officers, as individuals, and not the municipality, are liable, if any liability attaches.

Certiorari to Wayne; Hosmer, J. Submitted February 1, 1898. Decided March 29, 1898.

Mandamus by Lucy A. Webb to compel the board of health of the city of Detroit to audit a claim for damages. From an order denying the writ, relator brings *certiorari*. Affirmed.

John J. Speed, for relator.

Arthur Webster (*C. D. Joslyn*, of counsel), for respondent.

LONG, J. On July 23, 1897, relator filed a petition in the Wayne circuit court, praying for a writ of *mandamus* against the respondent to compel it to allow her bill for losses occasioned by smallpox infection. The bill was for amount due her "for loss and for compensa-

[1] A note on quarantine regulations by health authorities is found with the case of *Hurst* v. *Warner*, (Mich.) as reported in 26 L. R. A. 484.

tion by reason of the infection of the premises No. 33 Baltimore avenue west, in the summer of 1894, by smallpox:

Cost of renovation, etc., after disinfection	$107
Loss of rent	80
Furniture, bedding, and other articles destroyed	40
	$227"

An issue having been made upon the petition and answer, the same came on for hearing before the court and a jury. At the conclusion of the testimony, the court denied the writ, without taking the verdict of the jury upon the questions of fact. The court said:

"It is obvious that where the city takes property as a smallpox hospital, or where the property of another has become infected by the act of the city or any of its agents, the city would be liable to respond for the value of such property. The case at bar, however, presents no such question. Mrs. Brown, the tenant of relator, had a case of smallpox in her house, and subsequently a second case broke out. Whatever infection came to the premises or the property therein came in consequence of these cases of smallpox, and without any fault on the part of the board of health, and not as the result in any way of their action. The property had become infected even before any action was taken on their part. It does not appear from the evidence that any measures they took to disinfect the premises injured the property which relator afterwards destroyed, and for which relator seeks compensation. A suggestion has been made that she is entitled to receive compensation on account of the moving back, after the removal, of the first patient. But it will be remembered that Mrs. Webb was not in possession of the property, but that she had leased the premises to Mrs. Brown; and, if any right exists against the board of health, it does not belong to relator. For this reason a *mandamus* must be denied."

The case comes into this court by writ of *certiorari*. The testimony is all returned in this record.

We are satisfied that the court below was correct. The smallpox broke out through no fault of the health board. As soon as the first case in this house was reported, the

patient was removed by the health board to the hospital, and the house quarantined. It was quarantined nearly two weeks, when the second case broke out. This patient was not removed to the hospital, but the house was continued to be quarantined by the board. During all this time it was rented to Mrs. Brown, who continued to live there, and who, the relator testified, paid the rent until the middle of June, and then, because of the small-pox, was not able to pay more rent. But we think no claim can be made for the rent of the house under the circumstances here shown, as the question is ruled by *Farnsworth* v. *Supervisors of Kalkaska Co.*, 56 Mich. 640. The house was infected before it was quarantined. The proofs show that the goods, after being disinfected, were destroyed by the relator or under her directions, and not by the respondent. She destroyed them, not because they were injured by disinfection, but because they had been infected with the disease. *Safford* v. *Detroit Board of Health*, 110 Mich. 81 (33 L. R. A. 300), has no bearing upon this case. The board did not make a hospital of relator's house, or make any further use of her goods than was necessary to the proper care of the patients who were there found suffering from the disease. It was the duty of the respondent to quarantine the relator's house, and, for the protection of the public, to disinfect the property. The municipality is not liable for injury to property resulting from the performance of this duty by its officers. If the officers have done their work negligently, and thereby caused unnecessary damage, such officers, not the municipality, are liable, if any one is. *Shipman* v. *State Live-Stock Sanitary Commission*, 115 Mich. 488.

The order of the court below is affirmed.

The other Justices concurred.

APRIL TERM, 1898.

MURRAY *v.* RUGG.

1. EVIDENCE—INSTRUCTIONS.

   It is error for the court to exclude testimony tending to show that a trust mortgage purporting to be executed by a corporation was not authorized by the board of directors, and afterwards leave it to the jury to determine whether it was authorized or not.

2. ESTOPPEL—MORTGAGES—DEFECTIVE EXECUTION.

   The fact that the holder of an indorsed note of a corporation had some correspondence and conversation with the indorsers, advising them to take security for their claims, and thereby protect his interests as well as their own, and that, after what purported to be a trust mortgage for the benefit of all the creditors had been given to one of the indorsers, he wrote the latter with reference to his management of the business, will not estop him from attaching the property under a claim that the mortgage was never authorized by the directors of the corporation, and that he had never assented thereto, where he acted in entire ignorance of the fact that the indorsers were insolvent, and had covered up their individual property, and of the fact that the mortgage was unauthorized.

Error to Kalkaska, Aldrich, J. Submitted November 6, 1897. Decided April 5, 1898.

Trover by James H. Murray against Rolando F. Rugg. From a judgment for plaintiff, defendant brings error. Reversed.

C. L. Bailey and *W. S. Mesick* (*Fitch R. Williams*, of counsel), for appellant.

Pratt & Davis and *Totten & Phelps*, for appellee.

LONG, J. On April 3, 1893, the Michigan Handle Company, a corporation organized under the laws of this

State, made a mortgage upon all its real and personal property to the plaintiff, as trustee, in trust to secure all its creditors. The trustee took possession soon after the giving of the mortgage. The Antrim County State Savings Bank was a creditor to the amount of $4,325, and was secured to that amount in the mortgage. On May 18, 1893, that bank sued out a writ of attachment, and the sheriff under that writ took into his possession all the personal property conveyed by this mortgage. It appears that the plaintiff, James H. Murray, and Wilbur W. Peck were indorsers on the notes given by the Michigan Handle Company to the bank, and that John H. Edmiston was the president and general manager of the company. These parties were all made defendants with the Michigan Handle Company in the attachment proceeding. That proceeding went to judgment, and the property was sold under an execution. This suit is in trover to recover from the defendant, the sheriff who seized the property, the value of the property taken on the attachment. On a trial before a jury the plaintiff had verdict and judgment for $7,025. A motion for new trial was made and overruled, and defendant brings error.

It is conceded that every debt secured by this mortgage was *bona fide*, and most of the creditors secured accepted under it at once. The bank is situated at Mancelona, Antrim county. The plaintiff resides at South Boardman, in the same county. The Michigan Handle Company is also situated at South Boardman.

The plaintiff testified that, some two or three days before the mortgage was given, he talked with Mr. Knickerbocker, president of the bank, about taking security for the indebtedness of the Michigan Handle Company to himself, as he and Mr. Peck were indorsers upon all the paper of the company to the bank, as well as indorsers upon other paper of the company to other parties; that on April 1st, and after this talk, he received a letter from Mr. Knickerbocker, advising the taking of the security. The letter is as follows:

"J. H. MURRAY, Esq.,

"*Dear Sir:* As per your request when I left you last night, will say I have given your business very careful thought; and, knowing something of the outside feeling about the financial condition of the Handle Company, my advice would be for you and Mr. Peck to file your claim. The suggestion he made to buy it out is the best one, but still you can't do that without giving notice, and holding a meeting of the shareholders, and the consent by ballot of two-thirds of them. So you see, if you wait to do that, it will require time, and allow others to undermine you. If you thought best, and wire me, I will come down on the 4 p. m. train, and bring Mr. Bailey, also the State laws, so you can see for yourself the condition of affairs.

"If I understand it correctly, which I think I do, by you and Mr. Peck taking that into your own charge now, and cutting up that timber, you can get nearly enough out of what is there, and sell the team and equipments, to save yourselves clear, and then, if you don't want any more of it, turn it back to him, and let him go on with the business. I think, if this scheme was carefully considered, you would all agree with me, and by so doing save yourself and us; otherwise you will both lose heavily, and you can't avoid it. I wish you would send me a statement of the indebtedness of the firm, and the amount you have indorsed with him at other places than here, and the amount of judgments he has confessed, and claims upon which suit has been begun. It seems there has been an inclination to keep these things from us, and we feel that we are entitled to know the facts just as they are, without any hesitancy on the part of any one. I feel that, as you said last night, we are secured by your indorsements. Still, if we know your interests are secure, ours is just that much more secure. I trust you will wake up to a realization of the condition, and not subject yourself to such robbery any longer. Trusting to hear from you by return mail the full facts, I am,

"Yours truly,

"H. KNICKERBOCKER."

The plaintiff testified further that this letter referred to the making of a mortgage, and that the property to be taken into the possession of himself and Mr. Peck, and run by them, was the property of the Michigan Handle Company; that Knickerbocker said that they ought to be

protected for their own interest, and for the interest of the bank and all others; that they had explained to him the indebtedness to others, as they had indorsed paper to other parties for the Handle Company in the various amounts mentioned in the mortgage; that is: The Traverse City State Bank, $1,810; A. F. Young, $990; Old National Bank of Grand Rapids, $650; John De Vries, $610; H. M. Keys, $390; Darragh Bros., $300; A. A. Bleazby, $200; W. W. Peck, $458.59; Peck & Murray, $647.86; that there was also due to different parties from the Michigan Handle Company some $2,500, indorsed by Mr. Murray. The plaintiff further testified that, after the mortgage was executed, he was at Mancelona, and told Knickerbocker that it was on file, and that all the parties were secured; that it was then talked that himself and Peck should take the property, and that the bank should help run the mill; that afterwards, and on April 15th, he received a letter from Mr. Knickerbocker, as follows:

"PECK & MURRAY,

"*Gentlemen:* I have been unable to get our committee together, owing to some being absent, but I will say that those I have seen think that we ought to have 10 per cent. on the whole amount. But, through my urgent request to help you people out, they have decided to make 8 per cent. rates on $2,500, and 10 per cent. on sums above that amount.

"Trusting this will meet your approval, I am,

"Very truly yours,

"H. KNICKERBOCKER.

"P. S. Please let me know what your decisions are."

Plaintiff further testified that this letter was received after he had taken possession of the property as trustee, and had reference to himself and Peck taking hold of the business and running it; that they operated the property about a week, when the attachment was served on May 18, 1893; that in the meantime a meeting of the creditors had been called, at which meeting the Antrim County State Savings Bank was represented by its attorney; that the purpose of taking hold of the business with Mr. Peck was to pay the claims of the creditors.

It appears that, soon after this mortgage was given, Mr. Murray and Mr. Peck also gave chattel mortgages on their individual property to secure their creditors, and at the time of the trial it was admitted that Mr. Murray was insolvent.

On the part of the defendant, it was contended, and testimony was introduced to show the fact, that, a few days before this mortgage was given, Mr. Knickerbocker went to South Boardman, and there had a talk with Mr. Edmiston and Mr. Murray about securing the bank for the indebtedness due it from the Michigan Handle Company; that at this time Mr. Knickerbocker knew nothing of the indebtedness of the Handle Company, except that to the bank, and $400 or $500 outside of that; that at this time an arrangement was made with the Handle Company, through Mr. Edmiston, that a mortgage should be given to the bank to secure it and the indorsers of the notes; that, when the arrangement was to be carried out, Mr. Knickerbocker was to be notified, and bring his own attorney down there to draw the papers; that this arrangement was not carried out, but he learned a day or two later that the mortgage to Murray as trustee had been executed; that he never accepted the terms of this mortgage. His explanation of the letter of April 1st is that while he was in South Boardman, a few days before, he had his suspicions aroused; that while there he heard that the company had been sued and had confessed judgment, and he wanted to know what it meant; and that the letter was not written to have any indebtedness included in the mortgage, except that of the bank. Mr. Knickerbocker further testified that, at the time the letter of April 15th was written, he did not know that Murray and Peck had executed mortgages upon their stocks, or that they were insolvent; that, a day or two before that letter was written, Murray and Peck came to him, and wanted to run the plant, and put in $200 on it, in improvements, if their indebtedness could be reduced that amount; that it was in response to that request that the letter

was written; that he did not understand by that that he was accepting the terms of the mortgage; and that he told Murray and Peck in that talk that he would not accept the terms of the mortgage. He further testified that: "My idea was that it would be better for Murray and Peck to take charge of it, and go on with the business, if they were better financiers than Edmiston; and I thought they were." He further testified that under this arrangement he expected to look to the parties for the payment to the bank. He denied that the bank had ever accepted the terms of the mortgage, but affirmed that, when the matter was submitted to it, the bank absolutely refused to recognize the mortgage, and refused to make any claim under it, and that the board of directors of the bank, by a unanimous vote, directed the commencement of the attachment proceedings.

It does not appear that Mr. Knickerbocker, by any affirmative act, accepted the terms of the mortgage. All that can be said of the testimony is that, when he found that the mortgage had been given, he sent the attorney of the bank to look it up, and, on ascertaining the true state of facts, reported them to the bank, and the bank refused to accept the terms of the mortgage, and made no claim under it.

After the plaintiff's case was closed, the defendant sought to show that the execution of the mortgage was never authorized by a majority of the directors or stockholders of the corporation, and that it was made with the fraudulent purpose of putting the property into the hands of Mr. Murray, who was insolvent at the time. The court refused to receive this testimony. The court charged the jury that, if they found that there was a meeting of the directors of the corporation held for the purpose of authorizing the trust mortgage, yet if the legal directors were not all there, and had not all been notified of such meeting, and reasonable time given in which to let the absent ones reach the meeting, then any action taken at the meeting was invalid; that, if they found that the mortgage was executed

by the president and secretary, their power must be derived from a resolution of the board of directors; and that, if these officers were not so authorized, the mortgage was not authorized, and plaintiff must fail, "unless the jury find that the mortgagee accepted the trust in good faith, and the same was treated by the Handle Company as a valid instrument, and the Antrim County State Savings Bank accepted the terms of said mortgage by its authorized agents." It therefore appears that the court, after ruling out the testimony of the defendant to show that the trust mortgage was not authorized, left the question to the jury to determine whether it was so authorized. The plaintiff's title to the property was in issue. If the mortgage was never authorized by the board of directors, it conveyed no title to the plaintiff. The court very properly so stated to the jury, but, in ruling out the testimony offered to show that it was not authorized, the court was in error.

The court was also in error in submitting to the jury the question of the acceptance of the terms of the mortgage by the bank. It appears conclusively that whatever was done by Mr. Knickerbocker or the bank in reference to that mortgage was in entire ignorance of the insolvency of Murray and Peck, and in ignorance of the fact that the mortgage was never authorized by the board of directors. With those facts ascertained, the bank would not be estopped from making claim under its attachment. The first letter from Mr. Knickerbocker to plaintiff was written before the mortgage was made. When the letter of April 15th was written, Mr. Knickerbocker knew nothing of the insolvency of Murray, though it appears that, 11 days prior to that, Murray and Peck both had conveyed all their property for the benefit of their individual creditors, and Murray had assigned his interest in this very trust mortgage. Neither did Knickerbocker know at this time that the mortgage was not authorized by the board of directors. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is

set up, and does material acts relying upon conduct well calculated to mislead him. *Palmer* v. *Williams*, 24 Mich. 328; *De Mill* v. *Moffat*, 49 Mich. 125. We find nothing in this record which should estop the bank from showing that the mortgage was not authorized.

The judgment below must be reversed, and a new trial ordered.

The other Justices concurred.

MAINS *v.* HOMER STEEL-FENCE CO.

1. PLEA IN EQUITY—REQUISITES.
   A plea to a bill in equity must reduce the cause to a single point.
2. SAME.
   This is properly done by averring facts not appearing on the face of the bill, or by denying specifically facts stated in the bill; a general denial of particular averments being insufficient.
3. SAME—OBJECTIONS FOR WANT OF EQUITY—DEMURRER.
   Objections to the equity of complainant's claim as stated in the bill should be taken by demurrer, and not by plea.
4. SAME—DUPLICITY.
   A plea to a bill for an accounting and for a receiver, which raises the question of jurisdiction on two distinct grounds, and alleges that the charge of defendant's insolvency is false, and also contains a general denial of all the material averments of the bill, is bad for duplicity.

Appeal from Jackson; Peck, J. Submitted November 6, 1897. Decided April 5, 1898.

Bill by John Mains against the Homer Steel-Fence Company, Charles R. Mains, and Horace V. Swartwout

for an accounting and for other equitable relief. From a decree dismissing the bill on pleas in bar thereto, complainant appeals. Reversed.

Frederick Mains, for complainant.

Mains & Cavanagh, for defendants.

MONTGOMERY, J. This is an appeal from a decree entered in favor of defendants on two several pleas, the one interposed by the individual defendants, Mains and Swartwout, and the other by the defendant corporation. The question to be determined is the sufficiency of these pleas; but, for the proper understanding of this question, it is necessary to state somewhat at length the charges contained in the bill of complaint.

The bill alleges that on January 11, 1894, complainant, one George A. Aldrich, and the two individual defendants, Mains and Swartwout, formed a copartnership, to be known as the "Homer Steel-Fence Company," and agreed that each member of the firm should contribute $1,050 to the capital stock; that complainant and Aldrich each paid a portion of their contributions to the capital stock, viz., two-thirds thereof, or $700 each, and complainant stood ready to contribute the balance of his share; but that defendants and Aldrich, at the suggestion of defendant Charles R. Mains, "in violation of said agreement, and without the knowledge and consent of complainant, and without first requesting complainant to contribute the balance of his share," borrowed, upon the credit of the copartnership (which credit is alleged to have been largely, if not wholly, due to the financial responsibility of complainant), the sum of $1,500, and that Charles R. Mains gave a writing to Aldrich, purporting to discharge him from his obligation to pay the balance of his share of the capital stock; and charges that neither of the defendants has contributed to the capital stock, except the sum of $700 contributed by Aldrich, as before stated. The bill further alleges that Charles R. Mains is an

attorney at law, a son of the complainant, and has for several years past been the regularly-employed counsel and attorney of complainant; that complainant was induced to enter into the copartnership agreement, relying upon representations of Charles R. Mains that Aldrich and Swartwout (particularly the former) were men of good business ability, and that they, as well as the said Charles R. Mains, were responsible financially, and relying on the promise of Charles R. Mains that the company would be kept free from debt, and that no other or further capital than that provided to be contributed would be necessary in carrying on said business, and that complainant would be incurring no financial risk in entering into said agreement. The bill further alleges that—

"The copartnership business was entered upon immediately, and was continued by Aldrich, as manager, until June 9, 1894, when, owing to a dispute and irreconcilable difference which had arisen between the said defendants and the said Aldrich in relation to the management of the business by the said Aldrich, and because, as your orator charges upon information and belief, of the desired purpose on the part of the said Charles R. Mains to secure the exclusive control and management of the said business and the financial affairs of said company, the defendants Charles R. Mains and Swartwout, without consulting your orator, and without his knowledge and consent, and in violation of the rights and wishes of your orator and the said Aldrich, assumed exclusive possession and control, as against said Aldrich, of the books, correspondence, office, business, and property of the said copartnership. Your orator shows that as a result of such action on the part of said defendants, and because thereof, the said Aldrich withdrew from said copartnership, selling his interest therein to the remaining copartners. Your orator shows that the treatment of the said Aldrich, as aforesaid, was wholly in violation of the desire and purpose of your orator, and that his final withdrawal from said company and the continuation of the business thereafter was only with the forced acquiescence of your orator; that your orator never agreed that the said remaining copartners, the said defendants and your orator, would pay the said Aldrich to exceed the sum of $2,000 for his interest as aforesaid, but,

notwithstanding this fact, the said defendants Charles R. Mains and Swartwout caused to be executed and delivered to the said Aldrich, in payment of his said interest, the promissory notes of the said company in the aggregate sum of $2,150, payable to the order of the said Aldrich, and the same were soon after by him negotiated.

"Your orator further represents that, prior to the withdrawal of Aldrich, Charles R. Mains had frequently represented that the affairs of the company were in a prosperous condition; that he assured complainant that he would keep the finances of the company well in hand, and that in the future the business would pay its own way, and asked complainant to trust him (Charles R. Mains) to keep the company out of debt, assuring complainant that he was no more in favor of the company getting into debt than complainant; that, at such time and afterwards, complainant acquiesced in the continuing of the business, relying upon the representations made as aforesaid; that from June 9, 1894, to April 8, 1896, Charles R. Mains continued in possession and exclusive control and management of the business; that, soon after Charles R. Mains assumed the management of said business, the company became and was hopelessly insolvent, and that, during the nine months immediately following the formation of the copartnership, defendants and Aldrich borrowed at least $7,000, in addition to the $1,500 before referred to, on the credit of the firm; that upon learning of this indebtedness, and then learning for the first time that he might be held personally liable therefor, complainant protested, and was informed by Charles R. Mains that the defendants had deemed it necessary to contract the indebtedness, and that the money realized had been used in the business, but assured complainant that in the future it would be unnecessary to contract any further indebtedness; but that, notwithstanding this assurance, said defendants continued to contract further debts, and, upon the maturity of the debts previously contracted, secured an extension of time, and that still later complainant was obliged to extend his own individual credit by signing paper of said company in order to save the company from financial wreck.

"Your orator further shows that the company became more and more embarrassed, and its liabilities continually increased, and have continuously been far in excess of its

assets; that owing to the unsatisfactory condition of the company, and the aforesaid mismanagement of the same, complainant made various attempts to sever his connection with the same; that he offered to transfer his entire interest to Charles R. Mains upon his (Charles R.'s) promise to pay $700, and agreeing to save complainant harmless as regards debts, and also tried to get defendants to contribute each $1,000 (offering to do the same himself) to increase the capital stock, but defendants declined and circumvented complainant's proposition by all manner of dilatory excuses, plausible pretensions, and fraudulent representations that the said company was in good financial condition, and that it would soon be free from debt.

"Your orator further represents that at various times Charles R. Mains expressed a desire to incorporate the firm, and held out to complainant that, in subscribing to the stock, he (complainant) would incur no personal liability, and that the corporation would assume the payment of the partnership debts, and that, upon the debts being paid, complainant would be free from liability because of his connection with the copartnership; that in the month of August, 1895, complainant expressed a willingness to carry out the proposed arrangement in relation to incorporating the company, but that steps for the incorporation were delayed until February, 1896, when articles were prepared, and finally, on the 8th of April, 1896, complainant and defendants Mains and Swartwout signed the articles of association."

These articles state the amount of capital stock actually paid in at $100,000. The articles were recorded in the offices of the secretary of state and the county clerk of Calhoun county.

The bill further alleges that subsequently, on July 18, 1896, an agreement was executed between the parties (complainant still relying on the representations of Charles R. Mains) by which the copartnership transferred to the corporation all of its property, including patents, and the corporation assumed the payment of all the debts of the copartnership due and owing, or that might become due and owing, to John Mains, and accounts due Charles R. Mains for services, and further providing that any sum that the said John Mains should pay, growing out of

the breach of the undertaking of the corporation to pay debts of the copartnership, should be payable forthwith, and draw interest at 7 per cent. This agreement is signed by the corporation, by "Charles R. Mains, Manager," and by the complainant, and by the individual defendants, comprising the corporation and the copartnership as well.

The bill further alleges that the complainant, relying on the supposed incorporation of the said copartnership, and the binding and legal effect of the agreement last above recited, and supposing that it was sufficient to bind the corporation to pay all the debts of the copartnership, and not simply the debts owing to the complainant, sold and transferred his one-third interest in the stock of the corporation to Charles R. Mains for $700, accepting the note of Charles R. Mains therefor, which note complainant still has, and is willing to return to defendant if the court shall so order or decree. The bill further alleges that, at the time of the incorporation, complainant requested of defendant Charles R. Mains that actual notice be given to persons with whom the copartnership had been dealing of the incorporation, but defendant Charles R. Mains assured him that it would be unnecessary, and that the record of the articles of association would be sufficient; that, however, Charles R. Mains promised to change the letter-heads and other stationery so as to plainly indicate thereon the incorporation of said company, but this, it is charged on information and belief, the defendant Charles R. Mains has persistently and fraudulently neglected to do, and that the defendants have studiously and fraudulently neglected to give any notice of the attempted transfer of stock by the complainant, and that complainant had attempted to sever his connection with the said Homer Steel-Fence Company, but, on the contrary, the said defendants have, by artifice and deceit, expressly and by implication conveyed the impression to creditors and others that complainant was still a member of said firm; that defendant Swartwout has re-

cently stated to complainant that he claims, as matter of law and fact, that said attempted incorporation of said company was a mere nullity, and that complainant and defendants were still liable as copartners for the obligations and contracts since the attempted incorporation.

The bill further alleges that no meeting of the stockholders was ever assembled; that the subscribers to the stock never met and appointed any one to act as the agent or representative of the corporation; that no by-laws were ever adopted; that no seal has been adopted; that no record was ever made of any proceedings of the corporation; that Charles R. Mains still neglects to give actual notice of the attempted incorporation of said company, alleging as an excuse therefor that it might result in said Homer Steel-Fence Company being obliged to pay certain corporation taxes or fees for the privilege of doing business in other States; that, since the attempted incorporation, the business has been done by Charles R. Mains, assuming to act as manager, and that he, as such, signs the name of the Homer Steel-Fence Company to negotiable promissory notes, but without indicating whether such obligations are those of the copartnership or corporation, except by appending in some instances the term "Manager" to his name; that, so far as the complainant has acquiesced or assented to the conduct of said defendants since the incorporation, it has been because of his reliance on the advice, counsel, and representation of the said defendants, and particularly Charles R. Mains, and in further reliance that the transactions relative to such incorporation were legal, and that not until recently did complainant learn that the legality of such transactions was questionable. The bill further alleges the indebtedness of the Homer Steel-Fence Company to complainant and others, aggregating $17,000; alleges that the assets, aside from patents, amount to $12,820, and that this latter sum includes the accumulated bad debts of the concern; that suit has been brought against the corporation; that on learning of the questionable legality of the attempted incorporation, and of said at-

tempted transfer of stock, complainant applied to Charles R. Mains to be permitted to participate in the prosecution of the business of said company, and that complainant be restored to his rights as copartner, but this was denied; that complainant protested against signing said articles of incorporation, because of the large amount of capital stock designated in said articles as paid-in stock, but was finally induced by said Charles R. Mains to sign the same, he claiming and representing to complainant, and advising him, that he would incur no personal liability, and that the assets of the copartnership to be turned over to the corporation were well worth $100,000.

The prayer of the bill is as follows:

"That an account may be taken of all and every one of the partnership dealings and transactions, from the time of the commencement thereof (up to the time of the formation of said attempted incorporation), and also an account of all the moneys received and paid by your orator and the said defendants, or either of them, respectively, in regard thereto, your orator being ready and willing and hereby offering to so account; and that the said partnership may be dissolved, and its affairs wound up, and its assets devoted first to the payment of its creditors, and balance remaining distributed among the several partners, as their interests may appear; and if it shall appear to the court that a corporation was legally organized, by virtue of the acts and proceedings hereinbefore set forth, then that the said corporation be dissolved by reason of its insolvency and fraudulent inception and practices, as hereinbefore set forth, and its assets and business and affairs committed to a receiver, to carry on the business thereof, for the purpose of winding up its affairs, and paying the indebtedness of said partnership under the agreement hereinbefore set forth, and its own indebtedness; and that, in case it shall appear to the court that no corporation *de facto* or otherwise exists, then that there be a partnership accounting of the entire business of said partnership, as hereinbefore prayed; and that in the meantime the said defendants may be restrained, by the order and injunction of this honorable court, from collecting or receiving any partnership debts or other moneys; and that some proper person may be appointed to collect and receive the same."

This is followed by a prayer for injunction restraining defendants from receiving any moneys due, or from selling any property except in the usual course of trade, and by prayer for subpœna. The bill also contains a prayer for general relief.

It will be seen from this extended synopsis of the bill that complainant's equities, if he has any, grow out of transactions arising after the attempted incorporation, or out of alleged imperfections in the incorporation, or fraud practiced upon him in connection with the incorporation. The previous history of the copartnership dealings is unimportant, except as that history bears upon these questions, as it is not alleged that the complainant was uninformed as to the condition of the company and its indebtedness when the articles of incorporation were signed by him.

The following is the plea of the defendant corporation:

"The plea of the Homer Steel-Fence Company, a corporation, to the bill of complaint of John Mains, complainant: This defendant, by protestation, not confessing or acknowledging any or all of the matters or things in the complainant's said bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea says: That by the transfer of the interest of the partners and the copartnership heretofore existing between said John Mains, Charles R. Mains, and Horace V. Swartwout, the said Homer Steel-Fence Company, as a copartnership, the Homer Steel-Fence Company, as such corporation, became possessed of, and is now the owner of, and by virtue of the said transaction claims all the right, title, and interest in, any and all of the property theretofore owned by said copartnership; and included in said assets so transferred to it (said corporation) by said copartnership are certain lands and real estate lying in the city of Battle Creek, county of Calhoun, State of Michigan, and the tenements and hereditaments situated thereon, including factory building, which land is described as follows, to wit: 'City lots 171, 172, 173, and the east half of lot 174, of A. C. Hamlin's addition to the city of Battle Creek, as appears by the plat of said addition, recorded in the office of register of deeds of the county of Calhoun,'—which

said land, with the buildings thereon, is of great value, to wit, valued at $2,500, and of which land the said Homer Steel-Fence Company, a corporation, would be the legal and equitable owner; and this defendant pleads in bar of this, to wit, that owing to the fact that the title and ownership of said land is involved, and in the determination of this case would be disposed of, and it would not be possible to dispose of the case on any theory of it without disposing of the right, title, and ownership of said land as between said copartners and said corporation, or by the disposing of the land in the winding up of the affairs of this corporation, and because thereof, defendant alleges, in bar of this suit, that, for said reason, this court has not, and under the law of this State cannot acquire any, jurisdiction to dispose of and determine this case and the issues involved in it; that, the issues involving the title of said land, and to dispose of it, being local, the said Battle Creek being the home office of said corporation, and it being a resident of said city, under the law of this State, the circuit court for the county of Calhoun, in chancery, is the only court possessed of and entitled to entertain jurisdiction of the subject-matter of this suit. The transfer of said property (land) to this defendant having been made in good faith and for a valuable consideration, and without any fraud, concealment, or deception, the title to said land is legally and equitably vested in this defendant; and defendant denies in this connection any and all charges of wrongdoing, fraud, misrepresentation, or other wrong alleged in complainant's bill, which could or might entitle him in a proper court to equitable relief and consideration.

"And for answer to the remainder of complainant's said bill, this defendant says that, in justice and equity, the complainant is not entitled to any relief, and hereby expressly denies each and every one of the material allegations of complainant's bill that would in any manner entitle him to equitable relief, or the right to maintain this case; and the defendant alleges that the charge of insolvency is absolutely untrue and false, as this defendant can maintain and prove; and said bill should be dismissed, and this defendant discharged, with its reasonable costs in and about the defense of this suit sustained. Therefore this defendant doth plead the same in bar to the entire action of the complainant, and to the entire relief prayed in the complainant's bill, and prays the judgment of this honor-

able court whether it should be compelled to make any further answer to the whole or any part of said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained."

The plea of defendants Mains and Swartwout is as follows:

"The plea of Charles R. Mains and Horace V. Swartwout to the bill of complaint of John Mains, complainant: These defendants, by protestation, not confessing or acknowledging the matters or things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill, say: That for a valuable consideration to these defendants and said complainant, John Mains, duly paid by the Homer Steel-Fence Company, a corporation, these defendants and the said John Mains, then and there composing the Homer Steel-Fence Company, a copartnership, then and there, and for said consideration, as aforesaid, by an agreement dated on the 1st day of May, 1896, freely and in good faith executed and delivered to the said corporation, said Homer Steel-Fence Company, the contract and agreement set out in complainant's bill of complaint, and thereby, and for such consideration, then and there transferred all right, title, and interest of these defendants and said complainant, comprising the said Homer Steel-Fence Company, a copartnership, to the said Homer Steel-Fence Company, a corporation, and the said complainant and defendants then and thereby transferred any and all interest of every name and nature in and to all the property, real, personal, and mixed, of said copartnership, and thereby divested themselves of all title thereto; and because thereof said Homer Steel-Fence Company, a corporation, became and then was invested with all of the right, title, and interest thereto, and these defendants and complainant, as said copartners, lost all right and authority over and to the title and possession of said property, and complainant and each of these defendants thereby lost and parted with all right to demand of or from any person possession or an accounting for said property, or any part of it, the amount or extent thereof, and the right to demand an accounting in relation to said property thereby became invested in the Homer Steel-Fence Company as a corporation, and any and all other persons thereby were divested of said right.

"Defendants say and allege that said transfer was made in good faith, without any fraud or concealment, for a valuable consideration, and for the mutual benefit and best interest of all concerned therewith; and because of such transaction, the good faith and valuable consideration upon which it is based, the said complainant, these defendants, and every one connected therewith, is denied the right to, and should be estopped from, setting up any right, title, or interest in any of said property as against the Homer Steel-Fence Company, a corporation, and should be estopped from denying the legal existence of said corporation; at the date of such transfer, these defendants and complainant knowing each and every one of the facts as they existed then, and are existing now.

"In answering said bill, these defendants expressly deny each and every one of the allegations of fraud, misrepresentation, and other wrong charged in complainant's bill of complaint, and every allegation that would in any manner, under any circumstance, and any theory in this case, entitle the complainant to relief, equitable or otherwise, in this court.

"And defendants allege that complainant has parted with all his title, right, and interest that would have enabled him otherwise to have maintained this suit for a partnership accounting, and that these defendants, as individuals, are not interested in any other matter in litigation in this suit; they being improperly joined as defendants if complainant claims to have filed this bill as a creditor, under the statute, asking for the winding up of the affairs of said corporation; they, as individuals, not being interested as individuals, could not legally be joined.

"And, further answering, these defendants allege that said corporation claims to be the legal and equitable owner, and is the legal and equitable owner, of all of the copartnership assets owned by said copartners before the making of said agreement before mentioned, and that a part of said assets consists of land described as lying and being in the city of Battle Creek, county of Calhoun, State of Michigan, and specifically described as lots 171, 172, 173, and the east half of lot 174, according to the plat of A. C. Hamlin's addition to the city of Battle Creek, of great value, to wit, the value of $2,500, and that the home office of said corporation is at the city of Battle Creek, aforesaid, and that it is a resident of said city; and

these defendants, in answer, allege that the circuit court of the county of Calhoun, in chancery, is the proper court and has jurisdiction to settle and dispose of the matters and controversy in complainant's bill mentioned, and that this court has no jurisdiction. Therefore these defendants do plead the same in bar to so much of said complainant's bill as is hereinbefore in particular mentioned, and pray the judgment of this honorable court whether they should be compelled to make any further answer to said bill as is hereinbefore pleaded to, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained."

Are these pleas double? The rule is well settled that a plea to a bill in equity must reduce the cause to a single point. 6 Am. & Eng. Enc. Law, 791; Story, Eq. Pl. § 652; *Albany City Bank* v. *Dorr*, Walk. Ch. 317. This is properly done by averring facts not appearing on the face of the bill, or by denying specifically facts stated in the bill,—that is, stating that a certain fact is not as stated in the bill,—when the effect of such denial is to reduce the case to a single point in bar. *Farley* v *Kittson*, 120 U. S. 303. If this be attempted, the defendant is required to deny the specific facts alleged in the bill, and may not content himself by a general denial of particular averments. *Goodrich* v. *Pendleton*, 3 Johns. Ch. 384. Nor are objections to the equity of complainant's claim as stated by the bill to be taken by plea. This must be done by demurrer. *Farley* v. *Kittson*, *supra*. If this bill be taken as true, complainant occupies the position of creditor of the corporation, and, as such, is entitled to take proceedings, under sections 8150 and 8152, 2 How. Stat.

This bill asks for a receiver, and also an injunction. The plea of the corporation seeks to raise two questions: (1) The question of jurisdiction, resting on two grounds, and (2) the question of insolvency of the corporation,—and also contains a general denial of complainant's averments. The plea of the other defendants sets up estoppel, the question of jurisdiction, and also certain sweeping

denials of complainant's averments. The pleas are each double, and should be overruled.

The case may be remanded to the circuit for further proceedings.

The other Justices concurred.

BUTTS v. CITY OF EATON RAPIDS.

1. DEFECTIVE SIDEWALKS—EVIDENCE—INSTRUCTIONS.
   Where the plaintiff, in an action for injuries sustained by falling upon a defective sidewalk, testified that the place where she fell was only three or four feet west of a certain private walk, and her husband testified that he found the walk broken, and the boards and stringers rotted, at such point, and defendant's witnesses claimed that the defect which caused the injury was located some 12 feet west of the private walk, and consisted of a board which had been broken only a short time before the accident by a heavily-loaded wagon passing over it, but which was otherwise comparatively sound,—the court properly refused to charge that the "undisputed evidence" showed the facts to be in accord with defendant's theory.

2. SAME—NOTICE—GENERAL CONDITION—INADEQUATE REPAIRS.
   Evidence that a walk in front of certain premises had been, for its full length, in a rotten and loose condition for some six months previous to an accident thereon, is admissible on the question of notice, even though it appears that some repairs were made upon the walk two months before the accident, where there is testimony tending to show that the general condition of the walk was not improved by the repairs.

3. PERSONAL INJURIES—EVIDENCE—EXCLAMATIONS OF PAIN.
   Former decisions of the court upon the admissibility of evidence of exclamations of pain by a plaintiff suing for personal injuries are referred to with approval.

Error to Eaton; Smith, J. Submitted January 4, 1898. Decided April 5, 1898.

Case by Mary E. Butts against the city of Eaton Rapids for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

C. O. Markham and *John M. Corbin*, for appellant.

J. B. Hendee and *Garry C. Fox*, for appellee.

LONG, J. This action is brought to recover damages for injuries sustained by plaintiff which she claims to have received by stepping upon a broken board, or by catching her foot in a broken plank, causing her to fall. The place where the accident is claimed to have occurred is described as being upon the north side of East Hamlin street, in front of property owned by D. B. Hosler. The declaration charges that this walk in front of these premises had been for six months in a broken, dangerous, and unsafe condition, the planks rotten, broken, loosened, and displaced; that the stringers had become rotten and decayed, and the nails rusted and broken; that the city had due notice and knowledge of the dangerous condition of the walk, and, after such notice and knowledge, had sufficient time to put the same in repair prior to the time of the injury complained of.

It appears that the plaintiff, in company with one Mrs. Lavilla Boatman, was going along this walk on the morning of October 14, 1895, when she claims the injury occurred. She testified:

"We were going to our work. I stepped on a board, and the board went down with me, and I tried to save myself, and in some manner, I don't know, I think my toe on the left foot caught, and it threw me, and I stumbled. I tried to save himself, and it threw me very hard against the edge of the walk."

She describes the place where she fell as being about

three or four feet west of the walk that leads up to the Hosler house. Mrs. Boatman was called as a witness for plaintiff, and testified that the place where plaintiff fell was 11 or 12 feet west of the walk that leads to the house; that she saw plaintiff fall, but could not describe how she fell; that before the fall she had seen no broken board, but that after the fall she saw a broken board, and she and plaintiff threw it out of the walk; that the board was not broken straight across; that she visited the premises after the accident, with Mr. Butts, Mr. Hendee, and her husband, and pointed out the place, fixing it 11 or 12 feet west of the walk leading to the house. Plaintiff's husband testified that he went to the place of the accident with Mrs. Boatman and her husband. He says that he found the broken board, and a part of it thrown out, about the width of the walk west of the walk leading up to the Hosler house; that he examined this board, and found it rotten on the underside, and the stringer under it very much decayed; that this board was broken diagonally across; that he laid it down in the place it had apparently come out, and this place was where the plaintiff described the injury as having occurred. He also testified that he found other boards west of these that were loose, and tipped backward and forward when they were stepped on. There was also other testimony tending to corroborate the plaintiff in reference to the general bad condition of the walk, and which will be spoken of later.

The defendant introduced testimony tending to show that on October 12th, two days before the injury, some man whose name was unknown drove a wagon loaded with wood across this walk at the point where Mrs. Boatman testified that the accident occurred. Mrs. Hatfield, who lived in a part of the Hosler house, testified that she saw this man drive the load of wood across the walk, at about 12 feet west of the walk that leads to the Hosler house, on Saturday afternoon before the injury, about 4 o'clock. She told the man not to drive across there, as he would break the walk. When he drove across she heard

the boards crack. Mr. John Hatfield testified that he was over this walk 10 or 15 minutes after the plaintiff was injured. He saw the broken board at the point testified to by Mrs. Boatman, and saw the tracks indicating that a narrow-tired wagon had recently crossed the walk at that point; that he put in a new board there on the next day. Alderman Jenne testified that the next day after the injury he visited the place with Aldermen Miller and Crawford; that they saw where the new board had been put in; saw the wagon tracks, which were yet fresh, across the walk; and that there were no other broken boards in the walk west of the Hosler house. Mr. Boatman viewed the premises within a few minutes after the injury. He went with his wife, Mr. Hendee, and Mr. Butts. He saw the fresh wagon tracks about 11 or 12 feet west of the walk, saw the broken board there, and found no other defect. Edward Britton, the former city marshal, testified that he heard of the injury to plaintiff, and soon thereafter went over to the place; that he found the board out at the place testified to by Mrs. Boatman; that he fixed it up temporarily; that he saw the fresh wagon tracks there of a narrow-tired wagon. None of these witnesses found, as they claim, any other board out of the walk, or any defect in the walk, except at this place. It appears from the testimony that the city, in the August preceding, had notified Mr. Hosler to repair this portion of the walk, and that he had repaired it then, and that the walk was accepted by the city.

The court charged the jury that, if they found the injury occurred on account of a defect in the walk made by the passing over it of a team and loaded wagon on Saturday afternoon or evening previous to the injury, and that the city did not have actual notice or knowledge of such defect, and reasonable time after such notice or knowledge to repair it, then it would not be liable. Counsel for defendant had asked the court to charge that the undisputed evidence showed that plaintiff was injured by stepping on the plank that was broken the Saturday previous, and

that, it being in an outlying portion of the city, plaintiff could not recover. This was refused. After verdict and judgment in favor of plaintiff, a motion for new trial was made upon the ground, among others, that the verdict was against the evidence. This was denied. Claim is now made that the court should have granted a new trial for the reason above given.

We are not prepared to say that the court erred in this. There was evidence tending to show that the plaintiff was injured at a place east of the point where the wagon passed over. The plaintiff testified to it, and her husband corroborated her testimony. He also testified that the board he found was rotten, while the other witnesses testified that the board which the wagon passed over was comparatively sound. We think the court very properly submitted that question to the jury under the evidence produced upon the trial.

The court permitted the plaintiff to give evidence of the condition of this walk in front of the Hosler place during the fall, summer, and spring previous to the injury. It is claimed that, inasmuch as the city had caused the walk to be repaired in August previous to the injury, this testimony was misleading to the jury. There would be some force in this contention if it had not appeared by the testimony of witnesses that the walk continued to be in about the same condition after the claimed repairs were made. The witnesses testified that this walk, during the fall, summer, and spring previous to the injury, was in bad condition its entire length in front of the Hosler premises; that the boards were rotten and loose, and would rock under the foot while walking over them; that the sleepers were rotten; that the walk was built in 1882 or 1883. Testimony was then given tending to show that, while Mr. Hosler made some repairs by putting in a new board where one was badly broken, yet the general condition of the walk remained about the same when the injury was received. One of the witnesses said:

"In a few places they mended the boards where the horses went over. They put in some second-rate lumber, and repaired that. * * * They would nail down a place, and maybe in a day or two you would find that same place would roll with your feet, and, when you would go to walk, would catch your toes. You could pick up the board maybe, and turn it around. I have picked up boards, and tried to fasten them in, so I could get over carefully.

"*Q.* This continued up to the time of the accident?

"*A.* Yes, sir."

The only purpose of this testimony was to show negligence and notice to the city. The court confined it to that, and we think there was no error in permitting the plaintiff to go back over a period of six or eight months to show the walk's general bad condition.

It was not error to allow the plaintiff to show that the whole length of the walk in front of the Hosler premises was out of repair during this time. Those were the premises described in the declaration, and the claim was made that the general bad condition of the whole walk was such that the city should have found and repaired the place where the plaintiff was injured. The entire walk was all built about the same time, some 12 or 13 years before the accident. This rule is supported by *Campbell* v. *City of Kalamazoo*, 80 Mich. 660, and other cases in this court.

It is contended that the court was in error in permitting certain testimony as to exclamations of pain by the plaintiff. The injury seems to have been a very severe one. The plaintiff was confined to her house and bed for a considerable length of time. She was attended by physicians, and consented on the trial that her own physician might testify to her condition, such as he found it from his examinations. He testified to certain exclamations of pain. Other witnesses also testified to such exclamations. Many of the questions relative to this testimony were objected to on the ground that the time was too remote. We have carefully examined the whole case in reference to this testimony, and find no error in admitting it. These questions have all been passed upon heretofore, and need no

discussion here. In *McKormick* v. *City of West Bay City*, 110 Mich. 265, the general rule is laid down as to what is admissible in such cases, and need not be repeated here. See, also, *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496. We find nothing in the testimony as to such exclamations but what comes within the rule there stated.

We think no other questions need be discussed.

The judgment is affirmed.

The other Justices concurred.

SHERIDAN *v.* PENINSULAR SAVINGS BANK.[1]

1. BREACH OF CONTRACT—CHANCERY APPEAL—EVIDENCE.
   So much of a decree as awarded damages to complainant, based upon a finding that, as a part of the contract between the parties, defendants were to make certain advances to aid in its performance, which they failed to do, was reversed, as not warranted by the evidence.

2. VENDOR AND PURCHASER—INSURANCE—RIGHT TO FUND.
   A vendee in a land contract requiring him to keep the premises insured, who takes out insurance payable to himself as his interest may appear, is entitled to the proceeds of the policy, as between himself and the vendor, where the damage sustained is repaired by him at his own expense.

Appeal from Kent; Adsit, J. Submitted January 5, 1898. Decided April 5, 1898.

Bill by Thomas J. Sheridan against the Peninsular Savings Bank of Detroit, and others, for the cancellation of a contract and for other relief. From a decree for complainant, defendants appeal. Modified.

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[1] Rehearing denied June 28, 1898.

The following is the contract referred to in the opinion:

"Memorandum of agreement, made this 24th day of March, 1896, between Thomas J. Sheridan, of Grand Rapids, Kent county, Michigan, party of the first part, and Charles I. Farrell and Frank Howard, of Detroit, Michigan, and S. H. Lasley, of Muskegon, Michigan (constituting a committee heretofore appointed to bid in and sell the Whitehall Lumber Company's sawmill property at Cheboygan, Michigan, in the foreclosure suit of S. H. Lasley, Trustee, v. The Whitehall Lumber Company and I. M. Weston, of Grand Rapids, Michigan), parties of the second part, witnesseth that—

"*Whereas*, the said first party has heretofore made a proposition to purchase the property of the said Whitehall Lumber Company, and to make certain improvements thereon, which is hereby deemed a part hereof, and is desirous of obtaining immediate possession for the purpose of making such improvements, and in order to close contracts for the sawing and manufacturing of lumber, as well as other purposes; and—

"*Whereas*, the parties of the second part are desirous, in case said Whitehall Lumber Company's property be bid in by them, or by anybody in their behalf and interest, of selling the same to the said party of the first part, and are therefore willing that said party of the first part should have immediate possession of said property for the purpose of making the improvements contemplated, and running and operating said plant until said foreclosure sale; and—

"*Whereas*, in order to effect said sale, the property will have to be hereafter advertised, thereby necessitating a delay until on or about July 1st next, at which time it will be too late to make the repairs contemplated, or to obtain contracts for sawing and manufacturing lumber for the season of 1896:

"Therefore it is hereby mutually agreed as follows:

"(1) That the said party of the first part hereby agrees to purchase said property, known as the 'Whitehall Lumber Company's Property,' consisting, generally, of mill, land, booms, machinery, appurtenances, water rights, privileges, easements, and advantages, intending to constitute the entire plant and outfit of the said Whitehall Lumber Company at Cheboygan, Michigan, from the said parties of the second part, in case it be sold to them, or anybody in their behalf and interest, and to pay therefor

the sum of twenty-nine thousand ($29,000) dollars over and above the improvements to be placed thereon, which payment shall be made as follows: Twenty-five thousand ($25,000) dollars thereof to the said parties of the second part, or to whomsoever they shall direct, and four thousand ($4,000) dollars thereof to Thomas F. McGarry, of Grand Rapids, Michigan, or to whomsoever he shall direct,—which payment shall be made as follows: Twenty (20) per cent. two (2) years from date hereof, twenty (20) per cent. three (3) years from date hereof, thirty (30) per cent. four (4) years from date hereof, and the balance five (5) years from the date hereof, with interest thereon at the rate of six (6) per cent. per annum upon all sums unpaid, payable semi-annually.

"(2) And the said party of the first part further agrees, in consideration of the premises aforesaid, to improve and place improvements upon said property during the year 1896 in manner and form satisfactory to said party of the first part, not less than three thousand ($3,000) dollars, nor exceeding in amount the sum of six thousand ($6,000) dollars, and to immediately, upon obtaining possession, commence making such improvements; also, to pay all taxes on said property from the date hereof, and to keep the said property insured in amount of fifteen thousand ($15,000) dollars in good board insurance companies, which amount may be decreased in proportion as the principal is reduced by payment.

"(3) And the said parties of the second part hereby agree, in consideration of the premises aforesaid, in case they purchase or bid in said mill at said foreclosure sale, or in case the same be bid in or purchased by any person or persons in their behalf and interest, they will immediately close contract with said party of the first part for the sale and purchase thereof, retaining the title in themselves until paid for, upon the terms and conditions above set forth. And it is further agreed that the said party of the first part may take immediate possession of said sawmill property for the purpose of making the necessary repairs and improvements, as well as for doing any other business during the coming sawing season, and may operate said mill until said foreclosure sale is made.

"(4) And it is further agreed that, in case the said second parties, or any one in their behalf or interest, should not become the purchaser or purchasers at said sale, and said property should be sold to some third or outside party,

who will not carry out the above-mentloned contract, then, in that event, the said party of the first part shall be entitled to have refunded from proceeds of sales of the property to him, from the avails of said property, from the said parties of the second part, all moneys expended for repairs and improvements, insurance and taxes, and any other necessary expenditures or disbursements, together with ten ($10) dollars a day for his time spent in or about said business, and to be relieved and saved harmless from any contracts for repairs, betterments, or improvements which may not at any time be fully consummated or concluded, as well as to be indemnified and saved harmless from any and all sawing contracts for the sawing or manufacture of lumber, at not less than two ($2) dollars, which said party of the first part may prior to that time enter into, said party of the first part paying ten ($10) dollars per day rental for the use of said mill and property for each and every day that same shall have been operated; which payment to said first party by said second parties shall be made within a reasonable time after such sale, the said first party retaining possession of said mill and operating the same until said payment shall be made.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"C. I. FARRELL.
"FRANK HOWARD.
"THOMAS J. SHERIDAN.
"S. H. LASLEY."

Uhl, Hyde & Earle, for complainant.

Brennan, Donnelly & Van De Mark, for defendants Peninsular Savings Bank of Detroit and Frank Howard.

U. Grant Race, for defendants Home Savings Bank of Detroit and Charles I. Farrell.

Kingsley & Kleinhans, for defendants Whitehall State Savings Bank and S. Henry Lasley.

George W. Bell, for defendants First National Bank of Cheboygan and W. J. Stewart, Jr.

George W. Radford, for defendant First National Bank of Chicago.

LONG, J. This bill is filed to cancel a certain contract and for an accounting. It appears that the Whitehall Lumber Company, in January, 1893, owned a sawmill plant at Cheboygan, this State. It had become largely indebted, and to secure that indebtedness made a trust mortgage for about $54,000. The Whitehall State Savings Bank was the principal secured creditor, holding about 60 per cent. of the indebtedness. The other defendant banks and defendant Stewart were the other beneficiaries. S. Henry Lasley was named as trustee. Isaac M. Weston was president of the Whitehall Lumber Company, and indorser upon a large amount of the paper secured by the trust mortgage. The property was to be sold under this mortgage, when, on March 12, 1896, the following written authority to act was made:

"We agree that Charles I. Farrell and Frank Howard, of Detroit, and S. H. Lasley, of Muskegon, Michigan, shall be a committee representing the creditors under a mortgage to S. H. Lasley, trustee, covering the Whitehall Lumber Company's sawmill property at Cheboygan, Michigan, which is soon to be sold under said mortgage, to bid in said property, in the name of some person to be selected by them, in behalf of said creditors, for $25,000, unless a better bid is made; and said committee shall have power and authority to resell the said property to the best advantage at a price not less than $25,000, or they may operate or lease said sawmill property in case it cannot be resold."

This agreement was signed by all the bank defendants and by defendants Weston and Stewart. The property was purchased in at the foreclosure sale on June 5, 1896, in the name of Mr. Farrell, and a deed subsequently given on such sale.

The complainant's claim is that in January, 1896, and before Mr. Farrell took title to this property, one Charles F. Cobb, of Grand Rapids, claiming to have this property for sale, made representations to him of its great value, and offered to sell it for $35,000; that, upon a written statement made by Mr. Weston, which Cobb pro-

duced, he went to Cheboygan, and looked the property over; that on his return he wrote Cobb, if the owners would put in a new battery of boilers and smokestack, he would take the property at the price named; that, after this letter was written, complainant had an interview with defendants McGarry and Weston, who complainant now claims represented the mortgage creditors at that time, and then made the same proposition to them which he had made in his letter to Cobb; that Mr. Weston refused to submit this proposition; that he then submitted to Weston the proposition that the owners furnish $3,000, as he estimated it would require about $7,000 to complete the necessary repairs. In this proposition complainant proposed, if the owners would furnish that amount:

"I will give them security on my block on Kent street, this city, for same, and purchase the mill at the price named,—I to get credit for the $7,000 needed to repair the mill; I to pay the $3,000 loan advanced on my block within 20 months from date of contract."

Complainant claims that this proposition was objected to by Mr. Weston on the ground that, if a battery of boilers not paid for was put in, and the complainant failed to pay, it would be taken out of the mill, and leave it unfit to run; that a new proposition in writing was then submitted to obviate that objection, in which the old boilers were to be left in and repaired, and certain other improvements made, which complainant claimed would give 75 additional horse power. This writing then stated:

"This, although not giving us the necessary horse power for a double band mill, will give us about 60 horse power more than there is at present, and, with the Allis hog, which I intend to put in for cutting up edgings and other refuse to mix with the sawdust for fuel, will give a much better and steadier fire, and consequently the old battery should furnish more steam than it has heretofore. In regard to payments on the mill, as I have no stock of logs on hand, I would not want to pay more than the interest, taxes of the current year, and improvements the first year," etc.

On February 3, 1896, a new proposition was submitted, in writing, which recites the condition of the mill, the needed improvements and repairs, that it would take about $7,000 to make them, that complainant would make them if the owners would loan him $3,000 on his Kent-street property, and that he would take the mill at the price named, and would pay the loan within 20 months. It also mentioned the same mode and terms of payment as the other proposition. Complainant contends that this proposition was satisfactory to Mr. Weston, who then said he wanted but two things more, and he would go to Detroit and see the banks: *First*, a statement of complainant's reputed worth; and, *second*, an estimate of the cost of these repairs; that the estimates as to cost of repairs were furnished, and also a statement showing that complainant was a man of considerable means, but had no ready money; and that Mr. Weston took these propositions to Detroit, and, on returning, said the parties were satisfied.

It is further claimed that Mr. Weston told the Detroit creditors that the complainant had made a proposition to purchase, but to make no cash payment,—the improvements to stand as first payment. It is further claimed that Mr. Haass, who represented the Detroit creditors, did not inquire whether this proposition was in writing or not, but that he afterwards came to Grand Rapids, and met complainant, Weston, McGarry, and Cobb; that an understanding was had before that between McGarry, Weston, and Cobb that they were to have $4,000 as commissions on the sale to complainant; that, while Haass was in Grand Rapids, McGarry finally agreed to raise the $3,000 on the Kent-street property in consideration thereof, and Haass was informed that McGarry would raise the money; that complainant made a deed of the property, with defeasance back, so that McGarry could raise the money; that on March 14th complainant prepared a statement as to what he should require in the way of a preliminary contract, stipulating that the contract should be

"executed in accordance with my proposition of February 3, 1896;" that the parties met in Detroit on March 24th to arrange for this contract; and that before that time Mr. Weston told Mr. Haass and other Detroit creditors, and Mr. Lasley, of Muskegon, that McGarry was going to raise this $3,000, and had made arrangements with Ionia parties for it.

It is further claimed that, after reaching Detroit, and before meeting with the Detroit creditors, Mr. McGarry drafted a contract, which was thereafter submitted to the committee of the creditors, consisting of Farrell and Howard and Mr. Weston, acting for Mr. Lasley; that Mr. Haass was also present, and suggested that the contract be submitted to the attorneys of the creditors; that this was agreed to, and the contract, after being so submitted, and signed by Farrell and Howard, was to be forwarded next day to complainant. In this connection, it is contended that Farrell and Howard stated that the contract was satisfactory, and that Farrell asked complainant if it was satisfactory to him, and that he responded that it was if the $3,000 was furnished as soon as the contract was signed, and that he proposed to secure the advance of the $3,000 on his Kent-street property, which they could examine. Three copies of the contract drawn by McGarry were made, and complainant signed one of them, and left it with the committee, who, it is claimed, agreed to sign next day, and return it to complainant. Before this contract was finally signed, and on April 3d following, the committee wired McGarry that the complainant would be required to give a bond to secure the outlay of $2,000 or more within 40 days from the date of delivery of contract. This bond was given, and the contract finally signed, on April 11, 1896. A copy of this contract will be found in the statement. It appears that McGarry failed to arrange for the money. The complainant entered upon the contract, got the mill ready, and commenced operations on June 2d. It is contended by complainant that he was unable to raise this money, and, consequently, he was un-

able to increase the power of the mill, which resulted in a serious loss to him of from $30 to $50 per day while the mill was running.

Complainant procured insurance, as provided in the contract, on the property, for $3,500,—loss, if any, payable to himself as his interest might appear,—and on July 25th the docks connected with the mill were burned. The complainant at once notified the committee of the loss, and asked that money be advanced by it to enable him to rebuild the docks; and it is claimed that Mr. Haass, for the committee, promised that it should be advanced. The docks were reconstructed by complainant's brother for the $3,500. No moneys were furnished for the payment of this amount, and the committee refused to allow the insurance money to be paid to complainant. The claim is that by reason of the failure of the committee to raise this $3,000, and the withholding of the insurance money, the complainant was unable to meet his obligations, and was compelled to shut down the mill. The bill is filed to obtain a cancellation of the contract, for an accounting for the moneys expended by the complainant in the repair of the mill, for damages caused by a breach of the contract, and to recover the insurance money or the cost of rebuilding the docks, and to restrain the payment of the insurance money to Mr. Farrell. All of the defendants answered the bill, except defendant Stewart.

It will be noticed that the theory of the bill is that this committee was fully authorized by this power of attorney to enter into this contract, including in it a promise to advance the $3,000, and that under the arrangement defendants became bound to advance that sum. It is also insisted that the testimony introduced showed clearly that the preamble in the contract, when taken in connection with the propositions made by complainant, meant that the defendants should furnish the $3,000, and that testimony was properly received to explain the preamble. It is also claimed that Cobb, Weston, and McGarry were the agents of the sellers, and that the arrangements made by them in

reference to the $3,000 are binding upon the defendants, who were represented by this committee.

We find nothing in the record showing that those parties were the agents of the sellers. It appears that an arrangement was made between the parties by which they were to have a commission of $4,000. It was specified in the contract that the purchase price should be $29,000, and out of this McGarry, Cobb, and Weston were to receive their commission of $4,000. These parties were never employed to sell these lands. Mr. Cobb, learning that the lands were for sale, approached complainant, and asked him to buy. Weston and McGarry were let into the arrangement, and McGarry was to raise the $3,000 on the Kent-street property with which to make the improvements. The improvements were expected to cost about $7,000; but, as the contract was finally drawn (and it was drawn by McGarry in presence of complainant), complainant was to put on improvements of not less than $3,000, and possibly $6,000, if necessary. Mr. Haass testified that, while at Grand Rapids, he told complainant he would not advance any money for repairs, and that complainant must arrange the matter in Grand Rapids, and that McGarry thought he could get the money from Ionia parties, taking security on complainant's Kent-street property. The committee who were authorized to make the sale had never been notified that they were expected to advance the $3,000. Two days before going to Detroit, Weston wrote to Haass that the parties were coming, and that complainant had arranged to raise the $3,000. But complainant testified that he told Farrell, in Detroit, at the time the contract was drawn, that he expected the committee to raise the $3,000. This is denied by Farrell and Howard; and they say that they asked complainant how he was going to get the money, and he said that he had his arrangements all made to raise it on his Grand Rapids property. When we take into consideration the letter written by Weston that complainant had so arranged, and the fact that McGarry expected

so to arrange it, we are satisfied that Farrell and Howard were right in saying that they were not to advance the money. Even as late as August 5th, complainant wrote Mr. Lasley, asking friendly assistance, and in that letter no claim is made that the committee was to furnish this money, and no complaint that it was not so furnished. Another circumstance that tells strongly against the complainant is that he started up the mill on June 2d without asking the committee for the money, though he had been informed, the latter part of May, that McGarry could not raise it. It also appears that, while complainant, Weston, and McGarry were on the train from Grand Rapids to Detroit, Mr. Weston drew up another proposition, which Weston testifies the complainant looked over and assented to. This, Mr. Weston testified, was the only proposition which he submitted to the committee, and it contained no provision for advancing to complainant $3,000 for repairs.

The court below made a decree finding that the proposition of February 3, 1896, was a part of the contract; that complainant sustained damages by its breach to the amount of $6,824.87; and that complainant recover from the defendants, except McGarry, Weston, and the Globe Insurance Company, the said damages. This part of the decree must be reversed. The court also made a decree disposing of the insurance money, which had been paid into court, providing that, after payment to the insurance company of its costs, etc., the balance be paid over to complainant's solicitors, and then directed the disposition which should be made of the fund by them; that is, in the payment of the labor bills for the construction of the trams and docks and other improvements. We do not think this part of the decree should be disturbed, as the insurance money was to be paid to complainant as his interest might appear. He rebuilt the docks, costing about the amount of the insurance. Defendants will recover their costs of this court.

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

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PEOPLE *v.* FOGLESONG.

1. CRIMINAL LAW—JURORS—CHALLENGE FOR CAUSE.

   It is not error, upon a prosecution for murder by poisoning, to refuse to excuse for cause a juror who testifies upon his *voir dire* that he has heard that poison was found at the inquest upon the body of the deceased, and that, from what he has heard, it is his impression that the deceased died from the effects of poison, and that he does not know but it would take evidence to remove such impression, where he further testifies that he has no impression as to the guilt or innocence of the respondent, and that he has no such fixed opinion as to the poisoning as would prevent him from giving the respondent a fair and impartial trial.

2. SAME—EXPERT WITNESSES—HYPOTHETICAL QUESTIONS.

   It is not essential that a hypothetical question propounded by the people to an expert witness should embrace all the proofs in the case, but it may be based solely on those adduced by the prosecution.

3. SAME—OBJECTIONS—DEFINITENESS.

   To lay the foundation for an exception to the form of a hypothetical question, the particulars wherein the question leaves out anything that ought to be embraced within it, or embraces anything that ought to be excluded, should be clearly pointed out.

4. EVIDENCE—WITNESSES—IMPEACHMENT.

   Evidence that a witness had expressed an opinion that his brother and a certain woman were guilty of improper conduct is not admissible to impeach his testimony that he had never seen anything improper in their relations.

5. SAME—INSTRUCTIONS—PREJUDICIAL ERROR.

   The admission of such evidence upon the trial of the brother for murder is reversible error, where the prosecution are proceeding upon the theory that the alleged improper relations furnished the motive for the crime; and the error is emphasized by the refusal of the circuit judge to charge that the evidence of the statements previously made by the witness can be used, if at all, only for the purpose of impeachment.

6. SAME—TESTIMONY OF PHYSICIAN—CONDITION OF PATIENT.
Upon a prosecution for murder by poisoning, a physician whom the deceased consulted about a month before her death may testify as to what she told him about her condition at the time of the consultation, but not as to her statements concerning previous symptoms.

Error to Hillsdale; Lane, J. Submitted January 28, 1898. Decided April 5, 1898.

Myron P. Foglesong was convicted of murder in the first degree, and sentenced to imprisonment for life in the state prison at Jackson. Reversed.

Stone & Twiss and *O. A. Janes*, for appellant.

Fred A. Maynard, Attorney General, and *S. D. Bishopp*, Acting Prosecuting Attorney (*F. A. Lyon*, of counsel), for the people.

MOORE, J. The respondent was convicted of murder, and sentenced to state's prison for life. It is claimed that error was committed in not excusing jurors for cause. One of the proposed jurors testified, in substance, that he had heard the facts talked about, but that, from what he had heard, he did not have an impression regarding them; that he had heard about their claiming poison was found at the inquest upon the body, and that, from what he had heard, it was his impression that the wife of respondent died from the effects of poison; that that was his opinion then; that he did not know but it would take evidence to remove it. He testified that he had no impression as to the guilt or innocence of the respondent, and that he had no such fixed opinion as to the death from poisoning that he could not give the respondent a fair and impartial trial. It is said that this juror should have been excused for cause. It is the contention of counsel that three things must be shown by the people before a conviction can be had: *First*, death by poisoning; *second*, that the poison was administered by the accused; *third*, that it was

given for an unlawful purpose; and it is argued that, if the juror begins the trial with an opinion as to either of these material things, it cannot be said that the juror is unbiased and impartial. Counsel rely upon the recent case of *People* v. *Thacker*, 108 Mich. 652. It must be conceded that there is language used in that case which tends very strongly to support the contention of counsel. An examination of the case of *People* v. *Thacker* will show that the juror had conversed with a member of the coroner's jury, and with others, and that from what he had heard he had formed an opinion, not only that Mrs. Thacker had been poisoned, but had formed an opinion as to the guilt of the respondent, based upon what he had heard, and the supposition that what the member of the coroner's jury had told him was true, and that, at the time he was examined, he said it would require testimony to remove the opinion he had formed. In the disposition of that case, it was not necessary to use the following language found in the opinion:

"This fact, if it was a fact, that poison was found in the stomach of Mrs. Thacker, was one of the most important things in the case for the people to establish. A juror who believed that fact to exist cannot be said to be in a condition to act fairly, candidly, and impartially."

This language is not in harmony with previous decisions of this court. See *Stewart* v. *People*, 23 Mich. 63 (9 Am. Rep. 78), where it was held that a belief on the part of the juror that the crime charged had been committed by some one did not disqualify the juror if he had no opinion as to whether the respondent committed the offense. See, also, *Cargen* v. *People*, 39 Mich. 549, where it was held that, though the juror had a positive opinion that the deceased was murdered, this did not disqualify him if he had no opinion of the guilt or innocence of the respondent. See, also, a collation of cases in note to *Smith* v. *Eames*, 36 Am. Dec. 530 (4 Ill. 76); also, *State* v. *Thompson*, 9 Iowa, 188 (74 Am. Dec. 342). We are satisfied with the ruling in the case of *People* v. *Thacker*, *supra*, but think

the language before quoted is not a correct statement of the law. In this case the proposed juror stated that he had no opinion as to the guilt or innocence of the accused, and we do not think he was disqualified. It is not possible for a murder to be committed without it being the subject of wide-spread comment, and it becomes the subject of many newspaper articles, so that wideawake and intelligent men, who read newspapers, are almost sure to learn something of what is claimed in relation to whether a crime has been committed or not, and who committed it. It is not desirable that the rule in relation to the competency of jurors should be so fixed that only the ignorant and unfit can do jury service in these important cases. On the other hand, the accused is entitled to be tried by jurors who are not biased, and who do not have such fixed opinions of his guilt as will preclude them from acting impartially in his case. In addition to the cases cited, see *Holt* v. *People*, 13 Mich. 224; *People* v. *Barker*, 60 Mich. 277 (1 Am. St. Rep. 501). We do not think the court erred in overruling the challenges to the proposed jurors.

Complaint is made of certain hypothetical questions which were propounded by the people to the expert witnesses. The respondent was not represented in the trial of the case by the attorneys who present the case here, but he was represented by very able counsel. When they interposed the objection to the questions, they were asked by the trial judge to indicate wherein the question left out anything which ought to be embraced in it, or wherein it included anything which ought not to be included. Counsel were either unable or unwilling to indicate to the court in what particular the question was wrong. A careful examination of the record has not disclosed to us that any of the essential things shown by the testimony on the part of the people to exist were omitted from the question, or that there was embraced in it any essential element in relation to which there was no proof offered on the part of the people. It is now claimed that there should have been

embraced in this question, not only the proof offered upon the part of the people, but that which was offered upon the part of the respondent. It is said that it is the duty of the prosecuting officer to lay all the facts before the expert; citing *People* v. *Vanderhoof*, 71 Mich. 177.

In the second edition of Rogers on Expert Testimony (section 27), the rule is stated as follows:

"Counsel, in framing the hypothetical question, may base it upon the hypothesis of the truth of all the evidence. or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. The question is not improper simply because it includes only a part of the facts in evidence. And, if framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist. 'The claim is,' says Chief Justice Folger in *Cowley* v. *People*, 83 N. Y. 470 (38 Am. Rep. 464), 'that a hypothetical question may not be put to an expert unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes — assumes — something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice.'

"It is therefore the privilege of counsel to assume any state of facts which there is any evidence tending to prove, and to have the opinion of the expert based on the facts assumed. The fact that counsel make an error in their assumption does not render the question objectionable, if it is within the possible or probable range of the evidence. But the testimony should tend to establish the facts embraced in the question. A court, however, has no right to reject a question which counsel claims embraces facts which the evidence tends to prove, simply because, in its opinion, the facts assumed are not established by a preponderance of the evidence. The question should be allowed if there is any evidence tending to prove the facts assumed; for what facts are proved in a case, when there is any evidence tending to prove them, is a matter for the

jury, and not for the court. But, if the hypothetical question is clearly exaggerated and unwarranted by any testimony in the case, an objection to it will be sustained. To allow on the direct examination an hypothetical question to be put which assumes a state of facts not warranted by the testimony is error, and counsel will never be permitted on the direct examination to embrace in an hypothetical question anything which the testimony does not either prove or tend to prove. * * * A question based on an assumption which the evidence neither proves nor tends to prove is misleading.

"But, to lay the foundation for exceptions on the ground that the hypothetical question embraces facts not in evidence, the attention of the trial judge should be called to the specific objection, in order that he may determine, as he must in the first instance, whether there is sufficient evidence tending to prove the facts stated to authorize the question. For the rule is a general one that objections to testimony should be specifically stated to the trial court, and that only such objections as are so stated can be considered on appeal."

And see *Turnbull* v. *Richardson*, 69 Mich. 413.

We do not think any error was committed in relation to the hypothetical questions.

The respondent is a physician. It was the theory of the people that the wife of the respondent was taken ill upon her return from a visit to the brother of respondent, and that the respondent administered hypodermic injections of strychnine to his wife, for the purpose of killing her, and continued the treatment until it resulted in her death. It is also claimed that his motive in poisoning his wife grew out of his intimacy with one Mrs. C. It was the claim of the respondent that his wife was ill of heart trouble and with brain trouble, and that the strychnine was properly administered as a medicine, and without any unlawful purpose. To show the illness of Mrs. Foglesong, the brother of the respondent was sworn on the part of the respondent, and testified that, while the wife of the respondent was visiting him, she was ill, and was ill when she returned home, and he described her illness in detail.

No allusion was made in his direct testimony to the relations of the respondent with Mrs. C. In answer to questions put to him by the people on cross-examination, he stated when and where he had seen Mrs. C. and the respondent together, and said he had never seen anything improper between them. He then identified a letter he had written to Mrs. Gray in September following the death of Mrs. Foglesong, and, against objections, portions of that letter were received in evidence. He wrote Mrs. Gray that he was sorry she honored Mrs. C. enough to go to her house, and stated that they tried their best to get that on him, but that he frankly said, "No. I did not notice that [using an epithet that indicated Mrs. C. was a bad woman], or speak to her." He also wrote:

"I had to go back Tuesday morning, to attend court, and in it I made application to have a guardian appointed for Myron; and, when I came to Bronson, he gave me fits, but he has a guardian just the same. * * * I don't think he is as crazy as he is devilish."

He testified that, when he wrote of Myron, he referred to the respondent. He was also required on cross-examination to testify to expressions of opinion he had made to Mrs. Gray and others concerning the relations of the respondent and Mrs. C., and to his having on one occasion prayed that his brother might mend his ways with Mrs. C., and other statements of that character. If this cross-examination had related to any statements the witness had made to others of anything he had seen between respondent and Mrs. C., it might be urged with a good deal of force that it was testimony of an impeaching character; but, at most, these statements were but expressions of opinion of the witness, not based upon anything he knew; and the respondent should not be held responsible for any ill opinion which his brother might at one time have entertained of him. These expressions did not contradict any statement the witness had previously made of the relations between the respondent and Mrs. C. They had no tendency to impeach the witness. They were well

calculated to prejudice the jury against both Mrs. C. and the respondent, and ought not to have been received in evidence.

The court was requested to charge the jury that these statements could be used only for the purpose of impeaching the witness, but declined to do so, and made no allusion to the subject in his general charge. As already stated, this testimony was not competent, but, if it was to be received at all, the jury ought to have been clearly instructed as to the purpose for which it could be used, and it was error not to do so. It can easily be seen that these statements made by a brother of the accused were well calculated to prejudice the jury, and work great harm to the respondent.

To show the state of health of Mrs. Foglesong during the month previous to her death, which occurred August 9, 1891, Dr. Sayles was called as a witness by the respondent. He testified that Mrs. Foglesong, on the 18th day of July, called on him for treatment for brain trouble, and other ailments which the doctor described. He was then asked what Mrs. Foglesong told him about vomiting before coming to see him. This testimony was excluded, and its exclusion is said to be error. The court allowed the witness to state fully what Mrs. Foglesong had told him about her present condition, and the excluded testimony referred to her statements of what her experience had been before she came to see him the last time. We do not think the ruling of the court was error. *Kelley* v. *Railroad Co.*, 80 Mich. 237 (20 Am. St. Rep. 514).

We do not deem it necessary to discuss the other assignments of error. Some of them are not well taken. The others relate to matters which are not likely to occur in a new trial. For the errors above stated, the judgment of the court below is reversed, and a new trial ordered.

The other Justices concurred.

CITY OF DETROIT *v.* GLEASON.

LANDLORD AND TENANT—HOLDING OVER—RENT.

A tenant of a city in possession of a stall in a market, who continues in possession after the adoption of an ordinance discontinuing the market, is liable thereafter only for the reasonable worth of the premises, without regard to the rent provided for in the lease.

Error to Wayne; Aldrich, J., presiding. Submitted February 1, 1898. Decided April 5, 1898.

Assumpsit by the city of Detroit against Marcellus Gleason for rent. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

William S. Sheeran (*F. A. Baker*, of counsel), for appellant.

C. D. Joslyn, for appellee.

MOORE, J. Prior to 1892, defendant had been in possession of a stall in the old Central Market in Detroit at a rental of $35 a month. The rents were collected by the market clerk. In April, 1892, the council passed a resolution that the stalls should be rented for a year; the rent to be paid monthly in advance; the leases to be given with the express condition that they could be terminated upon one month's written notice. In May, 1892, the council directed the controller to notify defendant of the termination of the lease, which was done. On the 5th of July, 1892, the council adopted an ordinance discontinuing the market, and providing that the building should be torn down, and the ground should be used as a park; the ordinance to take effect July 1, 1892. The defendant paid

rent up to July 1, 1892, but paid none afterwards. He continued to occupy the building for 19 months after that date. Prior to July, 1892, the city warmed and lighted the building, and hired janitors to take care of it, and to remove the garbage and care for the property. Farmers' and market gardeners' wagons were allowed about the building, and it was a busy, central market, doing the business incident to a large market. After July 1st the city did not care for the building and remove the garbage; it did not light and heat the building; it did not allow farmers and market gardeners to congregate about the building. On the contrary, it caused the heating apparatus to b broken, and the farmers and market gardeners to be kept away from the building, and the occupants of the stalls did but little business. The defendant, with others, attempted to prevent the city from putting them out of the market, and for that purpose commenced a legal proceeding, which finally found its way to this court, in the case of *Petz* v. *City of Detroit*, 95 Mich. 169. After July 1, 1892, the market building was warmed, lighted, and cleaned at the expense of the occupants of the building.

In this case the city sued the defendant to recover rent for the 19 months defendant used the building without paying rent. The court directed the jury to find a verdict for the city at the rate of $35 a month, less 40 per cent. for expenses in heating, lighting, and caring for the building (which per cent. was agreed upon as the reasonable cost of doing so). The defendant claimed that as the city did not recognize him as its tenant after July 1, 1892, it could not treat the lease as in force, and oblige him to pay the rent fixed in the lease, but that he should pay only what the use of the premises was reasonably worth. One cannot read the record without seeing that the city did not consent to the occupancy of the premises by defendant after July, 1892. The court found in the case of *Petz* v. *City of Detroit* that the defendant had no right to continue in possession after July, 1892, and the court

said: "In order to make the holding over of a tenant effective as creating a new tenancy, there must be either the express consent of the lessor, or some act from which his consent may be implied. * * * Complainants' tenancy, whether from year to year or from month to month, was subject to the exercise by the common council of the power of removal vested in that body,"—and decided against the right of the occupants of the stalls to hold them after July 1, 1892.

After the action taken by the city to terminate the tenancy of the defendant, we do not think it can be said the defendant was a tenant at will. Neither the city nor the defendant was bound by the terms fixed in the lease, in deciding what compensation should be paid by the defendant. Suppose the rental value had been many times greater after July 1, 1892, than it had been before; could it be said that the city could not recover what the use of the premises was reasonably worth? Under the opinion of the court in *Hogsett* v. *Ellis*, 17 Mich. 367, we think the jury should have been instructed to return a verdict in favor of the city for what the use of the premises was reasonably worth during the time they were occupied by the defendant.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

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DEFOE v. BAY CIRCUIT JUDGE.

1. APPEALS FROM PROBATE COURT—CONDEMNATION PROCEEDINGS—CONFLICTING CLAIMS—DISPOSITION OF FUND.

   An order of the probate judge determining who is entitled to moneys paid into court under 1 How. Stat. § 3338, as compensation for lands condemned for railroad purposes, is appealable, under 2 How. Stat. § 6779, providing for appeals from probate court in cases "not otherwise provided for."

2. SAME—STATUTES.

   A statute requiring judicial action by the probate judge, and the entry of a final order or decree, passed subsequent to 2 How. Stat. § 6779, will be presumed to have been framed with reference to the provisions of the existing statute, where there is nothing in the later statute to indicate that the legislature deemed an appeal from the order inexpedient.

3. SAME—STAY OF PROCEEDINGS.

   It cannot be successfully urged that a probate order is not appealable because no provision is made in the statute relating thereto for a stay of proceedings in case of an appeal, as 2 How. Stat. § 6788, provides for such stay "after an appeal is claimed" from any order of the probate court.

4. SAME—NOTICE OF APPEAL.

   The circuit court has jurisdiction to entertain an appeal from probate court, although notice thereof was not given to all of the adverse parties, if the appellant has complied with 2 How. Stat. § 6781, which provides that notice shall be given in such manner as the probate court shall direct; it being within the power of the circuit judge to require notice to be served upon any other necessary parties.

Mandamus by Joseph Defoe to compel Andrew C. Maxwell, circuit judge of Bay county, to vacate an order dismissing an appeal from probate court. Submitted February 23, 1898. Writ granted April 5, 1898.

Simonson, Gillett & Courtright, for relator.

U. R. Loranger, for respondent.

MOORE, J. In 1896 the Detroit & Mackinac Railway Company condemned, by proceedings in probate court, certain lands formerly owned by Francis Defoe, who is now dead. These lands were found in the proceedings to be worth $890. A dispute arose about who was entitled to this fund. The relator claimed it belonged to him, except the widow's right of dower therein; while the heirs at law of Francis Defoe, deceased, claimed it belonged to the administrator of his estate. The probate court, acting under the provisions of section 3338, 1 How. Stat., after setting aside a portion of the fund as dower to the widow of Francis Defoe, directed that the balance be paid over to the administrator of his estate. The relator, within the time allowed by the statute providing for appeals from probate court, appealed his case to the circuit court, giving such notice to the adverse party, and such bond, as he was directed to give by the probate judge. The case was noticed for trial at two terms, when a motion was made to dismiss the appeal upon the ground that no appeal would lie from the finding of the probate court in relation to the disposition of the fund. The appeal was dismissed by the circuit judge, and this is a proceeding to have the appeal reinstated.

The important question is, Will an appeal lie from the action taken by the probate court, acting under the provisions of 1 How. Stat. § 3338? It is conceded that, by the terms of the act under which the condemnation proceedings are conducted, no provision is made for an appeal from the action of the probate court in deciding who is entitled to the fund which has been paid into court. It is claimed on the part of the respondent that no appeal will lie from its action; citing *Clark* v. *Raymond*, 26 Mich. 415; *Smith* v. *Superintendents of Poor*, 34 Mich. 58; *Sparrow* v. *Ingham Circuit Judge*, 109 Mich. 272; and other cases. Unfortunately, this feature of the statute has never been construed, and none of the cases cited relate to its provisions. On the other hand, it is said that the order made by the probate court is final; that it is

judicial in its character; that it is not ancillary; that it is not a discretionary order; that there is no reason why an appeal should be inexpedient; and that appeal from it would not prevent the execution of the principal purpose of the statute. It is insisted that the case comes within section 6779, 2 How. Stat., which provides for appeals from probate courts to the circuit courts in certain cases. We think it very clear that the appeal ought not to be defeated on the ground that it is inexpedient, and would defeat the purpose of the legislation, and that the *Sparrow Case* has no application to this one. It is also true that the action of the court in making the order is judicial, and the order is final, so that the cases cited by counsel for respondent do not apply. For cases holding in favor of a right of appeal, though not specially authorized by statute, see *Goss* v. *Stone*, 63 Mich. 319; *First Nat. Bank of Detroit* v. *E. T. Barnum Wire & Iron Works*, 58 Mich. 315; *Hart* v. *Shiawassee Circuit Judge*, 56 Mich. 592.

It is claimed that 2 How. Stat. § 6779, does not allow the relator to appeal, for the reason that it was in existence long before the legislature had provided for the condemnation of lands for railroad purposes. We think this argument is answered by saying that, when the legislature passed the act providing for condemnation proceedings, they knew of the existence of section 6779, and, while they were careful to provide in section 3337 for an appeal which should be heard in a speedy way, because of the necessities of the case, from the appraisal or report of the commissioners or jury, they did not deem it necessary to provide for an appeal from the acts authorized by section 3338 in relation to the payment by the railroad company of the money into court, and in cases of doubt had authorized the court to determine who was entitled to the money. We think it entirely improbable that they intended the action of the court in that respect to be unappealable, but, on the contrary, it can well be assumed that the legislature presumed that, as a speedy hearing as to the dis-

position of the fund was not so essential as the other portions of the proceeding, the proceedings on appeal could well be left to the provisions of section 6779, relating to appeals. We can see no reason why a party aggrieved by a final order in any proceeding should have an appeal which does not apply with equal force here. It was the claim of the relator that he was entitled, as owner of the land, to the fund which was paid into court, less the amount which was conceded to belong to the widow as dower. His claim was denied, and the probate court made an order that the fund did not belong to the relator, but belonged to his father's estate. This was a final disposition of the fund. It was a judicial finding. It related not to the necessity of taking the land, or to the appraised value thereof, but related solely to the question as to who was entitled to the fund.

It is urged that this cannot be an appealable order, because no provision is made for a stay of proceedings in case of an appeal. We think this a mistaken view, as 2 How. Stat. § 6788, provides, after an appeal is claimed, for a stay of proceedings.

It is also urged that the appeal must fail because notice was not given to all of the adverse parties. 2 How. Stat. § 6781, provides that notice shall be given to the adverse party in such manner as the probate court shall direct. This was done, and we think the court obtained jurisdiction to entertain the appeal. If there are other persons who are necessary parties,—and upon that question we express no opinion,—the court can require notice to be given to them. *Strang* v. *Hillsdale Circuit Judge*, 108 Mich. 227.

We think the order was an appealable one, that the court had obtained jurisdiction, and that the appeal should not have been dismissed. The writ will issue as prayed.

The other Justices concurred.

GRAHAM *v.* MUSKEGON COUNTY CLERK.

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1. RELIGIOUS SOCIETIES—STATUTES—REPEAL.
   Act No. 110, Pub. Acts 1895, entitled "An act for the organization of corporate Methodist Episcopal Churches," was superseded by Act No. 209, Pub. Acts 1897, entitled "An act to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies."

2. SAME—CONSTITUTIONAL LAW—SUFFICIENCY OF TITLE.
   Act No. 209, Pub. Acts 1897, entitled "An act to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies," is constitutional, so far as it affects churches, whether or not the provisions embodied therein relative to "societies for the diffusion of moral or religious knowledge" are within the title.

Mandamus by John Graham and others to compel R. Andrew Fleming, clerk of the county of Muskegon, to record the articles of association of the Moorland Methodist Episcopal Church, preferred under Act No. 110, Pub. Acts 1895. Submitted February 15, 1898. Writ denied April 5, 1898.

Cutcheon & Swarthout, for relators.

Fred A. Maynard, Attorney General, and *Drury & Strong*, for respondent.

MONTGOMERY, J. Petitioners allege, in the first four paragraphs of their petition, that they are all members of the Methodist Episcopal Church, and that John Graham is the presiding elder of the Grand Rapids district, within whose bounds the proposed Moorland Methodist Episcopal Church is to be located; that it has been agreed by the proper church authorities that the said church shall be organized at Moorland; that on January 7, 1898, petitioners executed articles of association under Act No. 110, Pub. Acts

1895, entitled "An act for the organization of corporate Methodist Episcopal Churches;" that on January 17, 1898, they presented their said articles, drawn up and certified properly under said statute, to the Muskegon county clerk, for record in his office pursuant to said act; that said clerk refused to record the articles, on the ground that Act No. 209, Pub. Acts 1897, entitled "An act to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies," provides, in section 10, that "all churches, religious societies, Sunday schools, or other societies for the purpose of diffusing moral or religious knowledge, hereafter incorporated, shall be incorporated under this act." The answer admits all of the above allegations. The petitioners aver that the said refusal is illegal upon two general grounds: (1) That the act of 1897 does not repeal or supersede, expressly or by implication, the Methodist Church act of 1895; and (2) that the act of 1897 is unconstitutional. The answer denies both these propositions. Relators ask a *mandamus* directing respondent to file their articles of association preferred under the law of 1895.

1. Does the act of 1897 supersede, as to churches to be organized after the act took effect, the Methodist Church act of 1895? We think this question must be answered in the affirmative. The title of the act of 1897 is most comprehensive. It is "to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies." The plain purpose of this enactment, as expressed in the title, was to collect such provisions as were essential to the incorporation of ecclesiastical bodies and embody them in one law. Any other construction would do violence to the language employed. An analogous question was discussed in both opinions in *Attorney General* v. *Parsell*, 100 Mich. 170, and little need be added. In the opinion in that case the writer said: "The use of the word 'consolidate' indicates very clearly that the purpose of the legislature was to collect in one act the law relating to the subject." See, also, *Tafoya* v. *Garcia*, 1 N. M. 480;

Roberts' Case, 51 Mich. 548. That a later act which covers the whole subject repeals prior acts repugnant thereto is established doctrine. *Shannon* v. *People*, 5 Mich. 85; *Feige* v. *Railroad Co.*, 62 Mich. 1; *Attorney General* v. *Parsell*, *supra*, and cases cited.

2. It is contended that the act conflicts with article 4, § 20, of the Constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title. Section 1 of the act provides that it shall be lawful for any five or more persons of full age to become incorporated as a church, religious society, Sunday school, or other society for the purpose of diffusing moral or religious knowledge, by complying with the following conditions. Section 10 provides that all churches, religious societies, Sunday schools, or other societies for the purpose of diffusing moral or religious knowledge, here after incorporated, shall be incorporated under this act. It is not contended but that church societies fall within the express terms of the act. This being so, it is not essential, for a determination of this case, to decide whether societies for the diffusion of moral and religious knowledge may be properly designated as "ecclesiastical bodies." The rule is that if, by striking from an act all that relates to an object not indicated by the title, that which is left is complete in itself, and sensible, and wholly independent of that which is rejected, it must be sustained as constitutional. Cooley, Const. Lim. (6th Ed.) 177. Thus, under a title, "An act concerning promissory notes and bills of exchange," provisions were incorporated affecting alike bills of exchange, promissory notes, *and other written instruments.* The act was sustained so far as it affected promissory notes and bills of exchange, and declared invalid in so far as it attempted to affect other written instruments. *Mewherter* v. *Price*, 11 Ind. 199. It must be held that the act in question is valid, at least to the extent that it affects churches.

We do not think the act is subject to the other objections urged against it. If its provisions are not found

well suited to meet the church polity of the Methodist Episcopal Church, this fact is proper to be considered by the legislature, but does not justify us in declaring the act unconstitutional.

The writ of *mandamus* will be denied.

The other Justices concurred.

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d125 578
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139 [9]698
e140 [6]429

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142 [5] 15

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f143 [5]356

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147 [6]332
147 [6]333

AUDITOR GENERAL *v.* SPARROW.

1. TAXES—EQUALIZATION—PRESUMPTION.

   In the absence of a contrary showing, it will be presumed that the equalization of the several assessment rolls of a county by the board of supervisors was based upon the valuation of the real estate, as required by the statute, and not upon that of both the real and personal property.

2. SAME—SUFFICIENCY OF RECORD.

   Hence, the statutory requirement that the amount added to or deducted from the valuation of the real estate as assessed be entered upon the records of the board is sufficiently complied with where the record discloses the aggregate valuation of the real and personal property as assessed and as equalized.

3. SAME—CLERICAL ERROR.

   The use of the term "taxes," instead of "valuation," in the record of equalization, is not a fatal defect, where it is manifest that the latter term was intended.

4. SAME—ABSENCE OF DOLLAR SIGN.

   The absence of the dollar sign in the record of the equalization and apportionment of taxes by a board of supervisors does not invalidate the action taken, where the figures are separated in such manner as to indicate places for dollars and cents.

5. SAME—ASSESSMENT ROLL—DESCRIPTION OF LANDS—SUFFICIENCY.

   The description of the several quarters of a quarter section of land in an assessment roll is sufficient to authorize a decree against them for the amount of the tax, where one of the

quarters is identified by the abbreviations "N. E.-N. E." under the heading "Description," and by the appropriate figures under the respective headings "Sec.," "Town," "Range," and "Acres," and the other quarters in their order by the abbreviations "N. W.," "S. W.," and "S. E.," respectively, placed directly under the first abbreviation "N. E." (indicating the particular quarter), and by the figures "40," repeated in each instance under the heading "Acres," although the second abbreviation "N. E." (indicating the quarter section), and the number of the section, town, and range, are not repeated or indicated by ditto marks.

6. SAME—COLLECTION BY SUIT IN CHANCERY—DEFENSES—ABSENCE OF WARRANT—UNVERIFIED RETURN—DEFECTIVE CERTIFICATE OF BOARD OF REVIEW.

Under the method of enforcing the payment of delinquent land taxes by a foreclosure of the lien in chancery, and particularly in view of the curative provisions of the tax law (Act No. 206, Pub. Acts 1893, § 99), irregularities in the prior proceedings which do not prejudice the property rights of the person whose land is taxed will not defeat the claim of the State. Thus, it is no defense to the entry of a decree against the land—

(1) That no warrant was annexed to the tax roll delivered to the collecting officer;

(2) That the return of delinquent taxes was not verified; or

(3) That a majority of the board of review did not sign the certificate attached to the assessment roll.

7. SAME—UNAUTHORIZED ACTION BY BOARD OF REVIEW.

But a change of valuations in a township assessment roll by the board of review, upon its own motion, after the expiration of the time allowed for that purpose by section 29 of the tax law of 1893, invalidates the entire tax.

8. SAME.

And, likewise, the addition of lands to a roll by the board after the expiration of such period invalidates the tax as to the lands so added.

9. TOWNSHIP TAXES—AUTHORITY OF TOWNSHIP BOARD.

Under 3 How. Stat. § 750, authorizing the township board to vote the sum necessary to be raised by tax for the ordinary expenses of the township in case the qualified electors, at the annual township meeting, shall "neglect or refuse" to do so, a tax levied for such purpose is invalid if based upon a vote of the board without a previous submission of the question to the electors.

10. SCHOOL TAXES—AUTHORITY OF BOARD OF EDUCATION.
And taxes levied for school purposes in a township school district are subject to the same consideration, under Act No. 176, Pub. Acts 1891, § 9, conferring like authority upon the board of education of such district with respect to school taxes.

11. HIGHWAY TAXES—POWER OF TOWNSHIP BOARD.
But under 3 How. Stat. § 1356, providing that the township board shall fix the amount to be raised as a money tax for highway purposes in case the electors "do not determine" the same, a previous submission of the question to the electors is not a prerequisite to the authority of the board to act. Distinguishing *Auditor General* v. *Railway Co.*, *ante*, 122.

12. TAXES—AUTHORITY OF BOARD OF REVIEW—INCOMPLETE ROLL.
Under section 29 of the tax law of 1893, providing that the township board of review shall add to the assessment roll the description and value of real property liable to assessment in such township, omitted from the roll, shall correct all errors in the assessment and valuation of property thereon, and shall cause to be done whatever else may be necessary to make the roll comply with the provisions of the act, the board has the power to add the values opposite the descriptions of real property on the roll, where the supervisor has failed to do so.

13. SAME—SUFFICIENCY OF RECORD.
The fact that the record of the board of review of a city fails to show that it met upon a given Monday, to which day an adjournment was taken on the previous Saturday, but shows that it did meet, and adjourn *sine die*, upon the following Tuesday, is not conclusive of the authority of the board, under the charter, to continue its sessions for as many days as might be necessary.

14. CITY TAXES—SPECIAL MEETING OF COUNCIL—NOTICE—EVIDENCE.
A city tax, voted at a special meeting of the common council at which all of the members were not present, will not be held invalid because the record of the council fails to show that due notice of the meeting was given, where the charter, if it requires proof of notice to be preserved at all, does not require it to be incorporated in the record, and it is not shown that such proof was not properly filed.

15. SCHOOL TAXES—ADJOURNMENT OF ANNUAL MEETING.
School taxes are not void because voted at an adjourned session of the annual school meeting; since, in the absence of statutory provision to the contrary, a regular meeting of a public body may adjourn to a future time.

Appeal from Gogebic; Haire, J. Submitted October 7, 1897. Decided April 5, 1898.

In the matter of the petition of the auditor general for the sale of lands delinquent for the taxes of 1894: On objections filed by Edward W. Sparrow and others. All parties appeal. Decree modified.

Charles E. Miller, Prosecuting Attorney, for petitioner.

A. B. Eldredge and *A. E. Miller*, for defendants Frederick F. Ayer and others, trustees.

M. J. Sherwood, for other defendants.

HOOKER, J. Several answers were filed by various landowners in opposition to the proceedings instituted in the circuit court of Gogebic county, under the statute, by the auditor general, for the foreclosure of tax liens and the collection of taxes for the year 1894; and the cause is brought to this court by appeal taken by all parties.

As it is conceded that the tax for county roads is invalid, there is no occasion to discuss that subject.

It is claimed that the entire county tax is invalid, for the want of a proper equalization and apportionment. The following quotation from the record will show the action taken by the board of supervisors:

"The committee on equalization submitted the following report:

"'*To the Honorable Board of Supervisors:* Your committee to whom was referred the equalization of taxes among the several cities and townships in the county of Gogebic for the year 1894 beg leave to report that the following are taxes of Gogebic county as assessed:

City of Ironwood	5171792000
City of Bessemer	1262055000
Town of Ironwood	433805000
Town of Bessemer	463119000
Town of Wakefield	512130000
Town of Marenisco	577556000
Town of Watersmeet	420480000

"'*Resolved*, that the assessment of taxes for the year 1894 for the several townships and cities of Gogebic county be equalized as follows:

City of Ironwood	5,000,000,00
City of Bessemer	1,260,000,00
Town of Ironwood	430,000,00
Town of Bessemer	460,000,00
Town of Wakefield	500,000,00
Town of Marenisco	570,000,00
Town of Watersmeet	420,000,00

"'G. L. LOOPE,
"'SAM. A. REED,
"'W. D. ELSWORTH,
"'K. S. MARKSTRUM,
"'N. B. ROSCORLO,
"'CHAS. TREZONA,
"'JOHN NELSON,
"'Committee.

"Which resolution was adopted; all the supervisors present voting therefor, by yeas and nays, as follows: * * *

"*Q.* I will ask you whether or not anywhere in any of these tables you have just read there appears a dollar sign, or anything that would indicate dollars or cents?

"*A.* No, sir.

"*Q.* Suppose you turn to the apportionment.

"*A.* Yes, sir.

"*Q.* Read it.

"Committee on apportionment report as follows:

"'*To the Honorable Board of Supervisors of Gogebic County:* Your committee on apportionment of taxes beg to report as follows:

"'The amount of State taxes to be levied is 22,422.16, to be apportioned in the several cities and townships as follows:

City of Ironwood	12,994,08
City of Bessemer	3,270,08
Town of Ironwood	1,112,00
Town of Bessemer	1,190,00
Town of Wakefield	1,294,00
Town of Marenisco	1,476,00
Town of Watersmeet	1,086,00
	22,422.16

"'Amount of county taxes to be levied is 70,000.00, to be apportioned as follows:

| | | |

based on the valuation of real estate, if the contrary does not affirmatively appear. This case differs from that in this particular: There the real estate and personal property, as assessed, appeared in separate columns in the record. Here it did not; the aggregates as assessed and equalized were shown. The law does not in terms require either, but the omission to enter one or the other would have made it impossible to ascertain the amounts added or deducted. It is as easy to ascertain these amounts where the valuations of real and personal property as assessed and as equalized are entered in the aggregate as where separately stated, and the presumption is the same.

It is contended, however, that it affirmatively appeared upon the trial, by the testimony of the chairman of the committee on equalization, that the equalization was not based upon real estate alone. If the presumption of regularity can be overthrown by oral testimony in such a case,—a question that we do not pass upon,—the testimony referred to does not, in our opinion, sustain the claim. Dr. Loope, the chairman, was called upon behalf of the State, and upon his direct examination was asked about the report of his committee. The following quotation from the record will show the nature of his examination.

"*Q.* Doctor, I call your attention to this paper marked 'Exhibit N.' Is that your handwriting?

"*A.* I believe it is; yes.

"*Q.* You know who signed that report?

"*A.* Yes.

"*Q.* What did your committee equalize?

"*Mr. Sherwood:* I object to that.

"*Court:* Overruled for the time being.

"*Q.* What did your committee equalize?

"*A.* Taxable property of the county.

"*Q.* I will ask you if there was any committee to whom was referred the equalization of taxes among the cities and townships?

"*Mr. Sherwood:* I object to that, as the record is the proper evidence.

"*A.* We have a standing committee on the county board of equalization; that is, one standing committee on the county board.

"*Q.* Now, that committee on equalization: Is its purpose to equalize the valuation of taxes? Does it equalize the valuation of different townships and wards for county purposes?

"*A.* Yes, sir.

"*Q.* Now, when you used the words in your report, 'Resolved, that the assessment of taxes for the year 1894 be equalized as follows,' you meant by that the valuations should be equalized as follows; and now I want to ask you, when that was laid before the board (that is, the report was made there), was the discussion very generally participated in?

"*A.* Yes, sir; that discussion had reference to the equalization of valuation of the different townships and wards of the county.

"*Q.* Now, I will ask you, doctor, taking the first table there, which was the valuation of the city of Ironwood, you see there is no dollar mark there,—517792000. Was that intended to be dollars?

"*A.* Yes, sir.

"*Q.* Were all these figures?

"*A.* Yes, sir; the only discussion before the board at that time upon the report was the relative valuation of the different properties in the cities.

"*Q.* Just the valuations,—the difference in valuations?

"*A.* Yes, sir.

"*Cross-examination, by Mr. Sherwood:* *Q.* Doctor, do I understand that this report was made in ink, or simply a portion of it made in ink?

"*A.* I didn't take notice to it.

"*Q.* Did you put those ciphers here with a pencil?

"*A.* I don't know who put them down.

"*Q.* You notice, doctor, that there is a row of ciphers here, indicating cents?

"*A.* I can't tell whether they were put there by the order of the committee or not. I presume, though, the committee put them there.

"*Q.* Now, doctor, you are not positive whether you made this mark with a lead pencil or not?

"*A.* No, sir; I am not.

"*Q.* Now, doctor, in making this equalization in this report, you took, as I understand, the assessment rolls of

the various townships, and equalized the total valuations of those according to your best judgment?

"*A.* Yes, sir; and made our report in accordance with them.

"*Examined by C. E. Miller: Q.* Now, doctor, around these ciphers made with the pencil there appears to be different styles of handwriting. How would you account for that?

"*A.* I don't know, unless the insertions were made by different members of the committee.

"*Q.* Doctor, the ciphers here made with the pencil are considerably smaller than those made with the pen in ink, are they not?

"*A.* They seem to be, there.

"*Q.* Have you any recollection of this yourself?

"*A.* No, sir; I have no recollection of this report, other than recognizing my own handwriting."

This is substantially his entire testimony. He was not asked to state whether the committee equalized upon a basis of the total valuation of real property, as contradistinguished from the entire aggregate of property upon the roll; and while, upon cross-examination, he answered "Yes" to the question, "Now, doctor, in making this equalization in this report, you took, as I understand, the assessment rolls of the various townships, and equalized the total valuations of those according to your best judgment?" it is not improbable that he had in mind the total of the real property. The record shows nothing to apprise him or counsel that a claim of that kind was then being made. It indicates that he was called to show that the figures referred to valuation, notwithstanding the absence of the dollar sign from the columns, and that the committee equalized valuations, and not "taxes," which is the term used in the report. Technically, the report was inaccurate in this respect, but we think that the intention to equalize valuation was manifest upon the face of the proceedings. The question arising upon the absence of the dollar sign is settled, both as to equalization and apportionment, by the case of *Muirhead* v. *Sands*, 111 Mich. 487. We are of the opinion that the circuit judge com-

mitted no error in sustaining the validity of the county tax other than that assessed for county roads.

Among the taxes questioned are those levied in the various townships. In Marenisco, two defects are pointed out by defendants' brief, viz., that the property was not definitely described, and that no tax warrant was attached to the roll. In Bessemer township, that the descriptions were defective. In Wakefield township, that the descriptions were defective; that the board of review changed valuations after its first meeting, and did not keep a record of the same, as required by section 33 of the tax law. Act No. 206, Pub. Acts 1893. In Ironwood township the descriptions are questioned, and it is said that the supervisor did not complete his roll, inasmuch as he omitted to include his estimate of the values of the respective parcels listed, and it was done by the board of review. In Watersmeet township, lands are said to have been added to the roll after the first meeting of the board of review. In the city of Ironwood, that the taxes were ordered at a special meeting of the common council; that there were changes in valuation by the board of review after the time when such changes might be lawfully made, and that the record of the board was not signed by a majority of the board; that the return of delinquent taxes was not verified; that there was no controller's warrant attached to the roll; and that the school tax was voted at an adjourned session of the annual meeting.

Under the laws of many of the States, including our own, it has been the practice to enforce the payment of delinquent taxes upon land by a sale of a portion or the whole of the land taxed; resulting usually in the sale of the delinquent lands for a small fraction of their value. So obnoxious was this that the courts of these States, with practical unanimity, have refused to sustain these titles unless the proceedings were in all respects regular. The tax laws were intricate, and the many steps required in the assessment, levy, return, advertisement, and sale in-

volved official action of so many persons, and clerical work so great in detail, that it was seldom that the tax proceedings were perfect, and it was for many years the common understanding that tax deeds were uniformly void. As this involved the loss by the tax-title purchaser of the consideration paid for the purchase, the business was attended by risks which discouraged the purchase of lands for delinquent taxes; and ultimately landowners who were nonresidents, or not possessed of personal property from which the taxes could be collected, felt safe in refusing or neglecting to pay taxes. Thousands of acres were stripped of all value, and the taxes, not being paid upon them, had to be reassessed upon the law-abiding and taxpaying portion of the community. Innumerable parcels of land were bid off by the State for want of other bidders, and ultimately had to be sold for a small fraction of the taxes originally levied, leaving large deficiencies, to be met by a new tax. Repeated but futile efforts were made by the legislature to provide a tax law which should be effective, but these efforts were invariably rendered ineffective by the inherent difficulties in the way of absolute accuracy, and the settled policy of the courts to afford every possible protection to the landowner.

The present law is radically different from those which have generally prevailed in this State. It provides for an adjudication upon the validity of the tax before a sale can be made, giving to persons assessed an opportunity to appear and contest the validity of the tax. It is, in substance, a proceeding to foreclose the lien of the State upon the land taxed, which is given by section 40 of the tax law, which provides that taxes assessed upon real property shall become a lien upon such property on the 1st day of December, which lien shall be continued until the taxes are paid. In this proceeding the State may take a decree for the whole tax, or so much thereof as appears to be valid. No good reason appears for denying the

State a decree for a legal tax merely because of some irregularity in the earlier proceedings. The fact that some proceeding has not been seasonably taken, or that some formal step has been omitted, affords no reason for allowing a property holder to escape altogether, and shift his burden upon others. It was manifestly the intention of the legislature that the court should determine the just and substantial rights of the taxpayers and the State, and to cut off technical questions by which the State and other taxpayers might be defrauded by persons who seek to avoid their just share of the public burdens. Thus, the court is given jurisdiction over all lands which are returned as delinquent, and it is not made a condition that the earlier proceedings have been regular. The language of section 60 is that "all lands which have been or may hereafter be returned * * * as delinquent * * * shall be subject to disposition, sale, and redemption *for the enforcement and collection of such tax liens;*" and care is taken to preserve the lien until payment. See sections 60, 70. Again, the curative provision of this law indicates that substance, and not form, is to be considered, and that the court is expected to sustain the tax unless it should be made to appear that the tax was illegal, or that the irregularity complained of resulted in injury to the rights of property of the contesting taxpayer. This evident intention should be given effect so far as it is possible. We will examine these alleged defects, to ascertain which, if any, of them can be said to have rendered the tax illegal, or prejudiced the property rights of the taxpayer.

It is claimed that in several of the rolls the land was not properly described. At the beginning of the roll there was a printed line, with blanks, which, when filled, made it read as follows: "Assessment roll for the township of Bessemer, in the county of Gogebic, for the year 1894." The pages were ruled, and entries made thereunder as follows:

1	2	3	4	5	6	
					Acres in Each Tract or Parcel.	
Name of Owner or Occupant.	Description.	Sec.	Town.	Range.	Acres.	100ths.
Nonresident	N. E.-N. E.	1	45	44	40	
	N. W.				40	
M., H. & O. R. R. Co.	S. W.				40	
	S. E.				40	
Nonresident	N. E.-N. W.				40	
	N. W.				40	
	S. W.				40	
M., H. & O. R. R. Co.	S. E.				40	
	N. E.-S. W.				40	
Nonresident	N. W.				40	
	S. W.				40	
	S. E.				40	
	N. E.-S. E.				40	
	N. W.				40	
	S. W.				40	
	S. E.				40	

It is contended that these are not valid descriptions, and counsel cite cases from Minnesota in support of the claim. An examination of the case of *Keith* v. *Hayden*, 26 Minn. 212, will show that it does not cite an adjudicated case, while that of *Power* v. *Bowdle*, 3 N. Dak. 107, merely follows a former decision by the same court, viz., *Power* v. *Larabee*, 2 N. Dak. 141. The opinion in *Power* v. *Larabee* cites *Keith* v. *Hayden*, *supra; Williams* v. *Central Land Co.*, 32 Minn. 440; Black, Tax Titles, § 38; and Cooley, Tax'n (2d Ed.), 404. On examination of these authorities, we find that in none of them is there a decision upon similar descriptions, except the case of *Keith* v. *Hayden*. On the contrary, description by abbreviation was early permitted by our statute (Act No. 96, Laws 1844, § 8), and sustained by this court in the case of *Sibley* v. *Smith*, 2 Mich. 486, 503. For other authorities in point on the subject of abbreviations, see 1 Blackw. Tax Titles, § 246; Black, Tax Titles, § 114; *Jordan Ditching, etc., Ass'n* v. *Wagoner*, 33 Ind. 51; *Atkins* v. *Hinman*, 2 Gilman, 451; *Paris* v. *Lewis*, 85

Ill. 597; *Buck* v. *People*, 78 Ill. 560; *State* v. *Mayor, etc., of Newark*, 36 N. J. Law, 288; *Hodgdon* v. *Burleigh*, 4 Fed. 117. If it be said that the present case is not within these authorities, inasmuch as the fractions are omitted, and in many instances portions of the abbreviations of the descriptions are not expressed, we shall still find authority in the cases cited to support their validity, when we take into consideration the entire roll, and the uniformity in the order in which the respective subdivisions appear. In discussing the question of the requisite accuracy of description, Mr. Justice COOLEY says: "A more satisfactory rule would seem to be that the designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner, or be calculated to mislead him." Cooley, Tax'n (2d Ed.), 407. See, also, *Tallman* v. *White*, 2 N. Y. 66. In 1 Blackw. Tax Titles, § 223, it is said: "The test is this: Is the description sufficient to identify the land, and give notice to the owner of its assessment, or is it so defective that it might probably mislead the owner?" And "parol evidence will be admitted to aid latent ambiguity."

In this case the columns are indicative of the section, town, and range, and the number of acres, and, in case of residents, the name of the owner. The first description contains the abbreviation: "N. E.-N. E., Sec. 1, town 45, range 44, 40 acres." Below it follow successively other descriptions under the same section, town, and range, which are not repeated. Who can doubt that this was intended to cover land on the same section? And it is just as apparent that "N. E.-N. E." means "northeast of the northeast." That it means "northeast quarter of the northeast quarter" is obvious, not alone from the number of acres, but because all of the other portions of the northeast quarter follow, and, with the first description, complete the number of acres in the quarter section. The northwest and other quarters of the section follow, the subdivisions being set down in the same order, after which section 2 is given

in the same order. It is common knowledge that these terms would be thus understood by the general public, and that this method has been pursued in describing property in this State for many years. No court would hesitate to declare such meaning in an action between private parties, and we see no reason for thinking that it could mislead any one. In *Blakeley* v. *Bestor*, 13 Ill. 713, a description was held good when two sides only of the parcel were described. This was in a tax case. *Hodgdon* v. *Burleigh*, *supra*, discusses descriptions much less certain than the descriptions before us. In *State* v. *Mayor, etc., of Newark*, *supra*, the abbreviation "H., L., and Stable" was held good, as evidently meaning "house, lot, and stable." In *Paris* v. *Lewis*, *supra*, the description, "W. ½ of N. W., sec. 15, town 37 N., range 13 E., acres 80," was held good. In *Atkins* v. *Hinman*, *supra*, the town and range were not given with each description, and the court said: "There is no just foundation for this objection. The marks which follow the section clearly refer to the township and range of the two preceding tracts. This reference makes the description complete, and places the matter beyond all dispute." Here there were no dots under the section, town, and range, but it is obvious that all of the land must have been in the same town and range; and the majority of the assessments would have been meaningless unless the descriptions be understood to refer to the quarter and section previously mentioned until a new one was given. We think these descriptions sufficiently certain.

We will next consider the effect of the absence of the warrant from the roll of the township of Marenisco. The law provides that a warrant shall be attached to the copy of the roll which is delivered to the township treasurer. It has frequently been held that without a good and valid warrant the treasurer has no authority to collect a tax, and that he is a trespasser if he seizes property for the purpose of making his tax; and tax deeds have been held invalid when a proper warrant did not accompany the

copy of the roll. This was upon the theory that it was a necessary step in the proceedings to a sale, and that it was a condition precedent to a valid sale. Under former laws, all proceedings were ministerial, but under the present law this is not so. After the failure of the executive department to collect, the enforcement of the payment of delinquent land taxes is sought through a different branch of the government, viz., the judicial branch, by proceedings conforming to its methods. The law proceeds upon the theory of the existence of a claim upon behalf of the State against the property owner for taxes which have not been paid, and cites him into court to answer a bill to enforce this claim against the property taxed. It is not a sufficient answer for him to show that the treasurer would have been a trespasser had he seized personal property, or that he had not demanded payment, or that it might have been collected had he been diligent or brought an action,— all of which, perhaps, are permitted, and possibly directed, by the law. If all of these things should be proved, the fact would remain that the tax was still due and unpaid. No good reason would seem to exist why the court should discharge the liability, instead of requiring payment. If it did, the practice would be exceptional. Everybody is presumed to expect that his property is taxed, and to know when and where the taxes are payable, and that, if not paid, they will be returned, and proceedings taken to obtain a decree requiring payment, and directing sale of the premises if payment is not made as required by the decree. There is no injury to property by such a course. The taxpayer has every opportunity to pay, and a year within which to redeem after sale. These provisions of the law are all designed to protect the landowner from accidental and unexpected losses of his property through a sale of which he was not advised, or which he had neglected to provide against; and it is no hardship to ask payment of a just debt at a late day, though the entire procedure be not strictly accurate, and in all respects conformable to law. Hence

the law requires the taxpayer to set up in his answer wherein the defect lies upon which he depends, and it must be one which the court can see is injurious to his property rights; and it is expressly provided by section 99 that these defects, to discharge the lien, must be something more than irregularities which do not prejudice property rights. The circuit court therefore properly disregarded this objection that there was no warrant, and endeavored to ascertain whether the claim of the State was a just one. See *Auditor General* v. *Hutchinson*, 113 Mich. 245. This disposes of the question raised as to Marenisco. In the same connection, we may say that the absence of the controller's warrant from the copy of the roll in the city of Ironwood is within this ruling.

The questions already discussed leave nothing to be considered in connection with the township of Bessemer, as we discover no additional point commented on in defendants' brief.

The roll for the township of Wakefield was duly certified by the board of review, but the records of the board show that on the 28th and 29th of May they passed resolutions making sweeping alterations in the roll, in the way of reductions; village and mining property being reduced 66⅔ per cent., and other property 10 per cent., upon the basis of the roll of 1893. Just how this affected the roll of 1894 does not appear, as neither roll is included in the printed record; but that it made a sweeping change is asserted by counsel, and not denied, and we therefore feel justified in so treating it. These changes might, perhaps, have been lawfully made a week earlier, when it was the duty of the board to meet; but the law, in express terms, excludes the authority of the board to make changes upon their own motion at a later date. See sections 29, 30, Act No. 206, Pub. Acts 1893, which say, referring to the Tuesday and Wednesday following the third Monday in May, that "if, for any cause, a quorum does not assemble during the days above mentioned, the roll as prepared by the supervisor shall stand as if approved by the board

of review." We are unable to determine what the defendants' properties were valued at in the original roll, or the aggregate valuation of such roll, which we should have to know were we to attempt to ascertain their just proportion of taxes upon their original assessment. It is contended that this is within the curative section 99, which says that "no tax * * * shall be held invalid * * * on account of any assessment or tax roll not having been made or proceeding had within the time required by law." We think, however, that this was clearly prejudicial, and therefore not within the terms of the section mentioned. This rendered invalid all taxes upon the roll of the township of Wakefield.

The point last mentioned is alleged to apply to the township of Watersmeet. The record is, upon its face, correct, but oral testimony was given by an agent of one or more of the parties that, previous to the last meeting of the board, this roll was completed only to the twenty-seventh page. The learned circuit judge held so much of the same valid, and the remainder invalid. This testimony was not disputed, and we do not discover a denial of the fact. We are therefore of the opinion that any assessments against these defendants appearing upon pages following page 27 of the roll were invalid, if there were any such,—a fact that we seem to have no means of determining from the printed record in the case. This will result in the exclusion of all such taxes in this township, except as to defendant Ayer, for whom Ruppe did not appear before the board of review, and who is said to have made no such objection to the tax.

It is also urged that the township, highway, and school taxes of this township are illegal, for the reason that they were voted by the township board and board of education, respectively, and that it does not appear that the electors neglected or refused to vote the same. The record of the board shows that at a meeting of the township board held June 21, 1894, the following resolution was adopted:

"*Whereas*, it appearing to this board that the electors of the township of Watersmeet, at the annual township meeting held in said township on Monday, the second day of April, 1894, failed to vote money for the several funds of said township; therefore,

"*Resolved*, that the sum of one thousand dollars be raised by tax for the contingent expenses of said township for the year 1894."

The township constituted a single school district, under Act No. 176 of the Public Acts of 1891. At a meeting of the board of education held August 20, 1894, the following resolution was adopted:

"*Whereas*, at the annual township meeting held on the second day of April, 1894, the electors hereby failed to vote the amount of tax to be raised for school purposes:

"*Resolved*, that the amount of tax for general school purposes for the ensuing year be $2,500.00."

The highway tax was levied under a resolution adopted by the township board of highway commissioners, reading as follows:

"*Whereas*, it appearing to the township board of highway commissioners of the township of Watersmeet that the electors of said township, at the annual township meeting held on the second day of April, 1894, failed to vote a highway tax in said township; therefore,

"*Resolved*, that a highway tax of one-half of one per cent. be raised on the valuation of all real and personal estate in the said township on the assessment for 1894."

The records of the township were before the court, and it was conceded upon the hearing that there is nothing in the records to show that the electors of the township ever voted any of the taxes that year, with the exception of the town-hall tax, and that they fail to show that the questions were submitted to the electors at the annual meeting.

3 How. Stat § 750, provides:

"Whenever the qualified electors of any township, at the annual township meeting, shall neglect or refuse to vote such sums of money as may be necessary to defray the ordinary township expenses, the township board of any such township is hereby authorized, at any regular

meeting, to vote such sum or sums as may be necessary for that purpose, not exceeding in any one year the sum of one thousand dollars."

Section 9, Act No. 176, Pub. Acts 1891, provides:

"At each annual township meeting held in said township, the qualified electors present shall determine the amount of money to be raised by tax for all school purposes for the ensuing year: *Provided*, that in case the electors at any annual township meeting shall neglect or refuse to determine the amount to be raised as aforesaid, then the board of education shall determine the same at any regular meeting thereof."

The record of the annual meeting must be supposed to show all questions voted upon. It appears that the raising of money for a town hall was submitted, but there is nothing indicating the submission of other questions; and it cannot be presumed that action was taken, when we have the record of the meeting, and it fails to show it. Nor can it be helped by the resolutions, inasmuch as they do not show neglect or refusal, but merely a failure, to vote the taxes, and, under both statutes quoted, the boards are permitted to act only in case of neglect or refusal.

The highway tax was raised under a different act, viz., 3 How. Stat. § 1356, which permits the board to provide for a tax if the annual meeting fails to do so. This section applies to cases where, as in this case, the township has voted a money tax for highway purposes, under sections 1354, 1355, 3 How. Stat.; such cases not being governed by section 1328, 3 How. Stat., which applies to moneys raised for roads and bridges by the highway commissioner. That section was considered in the case of *Auditor General* v. *Railway Co.*, *ante*, 122. We are therefore of the opinion that the latter tax was valid, while the township and school taxes were illegal, in this township of Watersmeet, except the town-hall tax.

The supervisor of the township of Ironwood failed to incorporate in his roll any valuation of property. This

was supplied by the board of review. It was the duty of the supervisor to place such values opposite the descriptions, but the law has provided a remedy if he should fail to do so, by providing that the board of review shall add to the roll "the names of persons, the value of personal property, and the description and value of real property liable to assessment in said township, omitted from such assessment roll; they shall correct all errors in the names of persons, in the descriptions of property upon such roll, and in the assessment and valuation of property thereon; and they shall cause to be done whatever else may be necessary to make said roll comply with the provisions of this act." Act No. 206, Pub. Acts 1893, § 29. As the roll was seasonably completed by the board, we need not consider this question further.

The validity of the tax for the city of Ironwood is attacked upon several grounds,—among them, the changes made by the board of review. The record of the board shows that it met on June 11th, and every day thereafter, up to and including Saturday, when it adjourned to Monday, June 18th. If a meeting was held that day, it is not shown by the record; but it appears that on June 19th the board met and made various changes, and adjourned *sine die*. It is claimed that the roll shows that many changes were made in valuations that are not mentioned in the record of proceedings, and it is also alleged that their certificate is bad, for the want of the signatures of a majority of the council. We have no evidence that the board did not meet on Monday, except the absence of a record for that day; and the absence of such record is not conclusive of their authority to continue their sessions for so many days as were necessary under the charter (section 2, chap. 13, Act No. 235, Local Acts 1893). It does not appear that any of these defendants sought or were denied a hearing before such board, or that the board took any action not authorized by law. The informality in the certificate, if there be any, is within the curative provisions of the tax law. Section 99, Act No. 206, Pub. Acts

1893. See *Auditor General* v. *Hutchinson*, 113 Mich. 245.

The city taxes were voted at a special meeting. It is conceded that the taxes were ordered in due form, but it is contended that they are void for the reason that the record of the council does not show that the members were duly notified of the call for the meeting, inasmuch as it fails to show that all members were present. If, under the charter (Act No. 235, Local Acts 1893, chap. 9, § 1), it is necessary that proof be made of the summoning of members of the council, there is no intimation that it must appear upon the record of the proceedings; and we cannot presume that proof is not on file, or, if it were shown to be not on file, that it was not properly filed. See Act No. 206, Pub. Acts 1893, § 99. We are cited to several Michigan cases supposed to be at variance with this rule, but they are not. In *Township Board of Beaver Creek* v. *Hastings*, 52 Mich. 528, there was an application for *mandamus* to compel the clerk to record the proceedings of a meeting of a township board at which it was not shown that the same had been duly called and members notified. It was denied. But it is not in any sense authority for the proposition that proof of a valid call and notice must appear upon the record of the meeting, if held, or that a presumption of regularity does not arise upon the record of a special meeting. In *Harding* v. *Bader*, 75 Mich. 321, it was held that the records of a township must show that all members were notified or present, to make action taken at a special meeting to raise money valid. This was based upon 1 Dill. Mun. Corp. §§ 262, 263, 286. This case was followed in the case of *Auditor General* v. *McArthur*, 87 Mich. 457. But neither of these authorities limits the proof to the journal of the board, and, in the absence of proof that they were filed, the presumption, under section 99 of the tax law, renders the action *prima facie* valid. The case of *Newaygo Co. Manfg. Co.* v. *Echtinaw*, 81 Mich. 416, recognized the presumption of regularity by presuming that the two justices present were

those whose terms of office would soonest expire; and in the case of *Boyce* v. *Auditor General*, 90 Mich. 324, it was said that the law does not require entry of such proof, and implied that it will not be presumed that proof of notice does not exist. We think the proceedings of the council are *prima facie* valid.

The school taxes are conceded to have been voted at an adjourned session of the annual meeting, held to hear the report of an auditing committee, and for other business. Contestants' brief says that they claim that the purpose of adjournment was not to vote taxes; that the laws covering school districts provide for a date for the annual meeting, at which taxes shall be voted; that there is no provision of law for adjournment of the annual meeting; that the adjournment in this case was taken without authority; and that there was no authority to vote any taxes at such meeting. This statement of claims is unsupported. The only authority cited is 1 Dill. Mun. Corp. § 286, and notes, which we find does not support the contention; but the next section (287) says:

"A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation."

We have always understood that the annual school meeting is a regular, not a special, meeting. It is fixed by law, and requires no call or notice.

We think that the verification of the delinquent list applied to the whole list, though included in two books, and, were it otherwise, the alleged defect worked no injury to the defendants; and the same is true of the failure of a majority of the board of review to sign the certificate to the roll, if they did not do so.

Recapitulation: The county and State taxes are all valid, except in the township of Wakefield, and all lands listed after page 27 in the roll for Watersmeet township. County-road taxes are all invalid. The township taxes in

the townships of Marenisco, Bessemer, and Ironwood are valid. All taxes in Wakefield are illegal. In Watersmeet township, the township and school taxes, except town-hall tax, are illegal, and the highway tax is legal. Our understanding is that, upon behalf of defendant Ayer, only the township, highway, and school taxes in the township of Watersmeet are questioned. The decree of the circuit court will be modified as indicated herein, and, upon the settlement of the decree in this court, the amounts due from the several defendants will be determined, if practicable, from the record, and the rights of defendant Ayer in relation to taxes other than those mentioned will be settled, if the foregoing statement in relation thereto is inaccurate. Defendants will recover costs of this court, and complainant will recover costs of the circuit court.

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

THOMAS *v.* WALKER TOWNSHIP BOARD.

116 597
123 291

1. DRAINS — ASSESSMENT FOR BENEFITS — APPEAL TO TOWNSHIP BOARD.

   The duty of the township board, under chapter 5 of the drain law of 1885 (3 How. Stat. § 1740*e*2 *et seq.*), upon the appeal of a landowner assessed for benefits, is confined to the correction of any error or inequality in the assessment made by the commissioner upon the lands benefited; it having no authority to pass upon the validity of the drain proceedings, or to review the action of the commissioner in fixing the percentage of the cost to be borne by the township at large.

2. SAME—PARTIES.

   Therefore, where a drain is established by the joint action of the commissioners of two counties, and the owner of lands assessed for benefits appeals to the township board of the township in which his lands so assessed are situated, the

drain commissioner of the other county is not a necessary party to the appeal.

3. SAME—ASSESSMENT DISTRICT—REVIEW.

The authority of the township board to correct any "error or inequality" in the assessment does not extend to the changing of the boundaries of the assessment district by excluding lands which the commissioner has determined to be benefited by the drain.

4. SAME—REVERSAL IN SUPREME COURT—PROCEDURE.

Where a township board, upon the appeal of a landowner assessed for drain benefits, attempted, in excess of its authority, to exclude certain of the lands as not assessable, and failed otherwise to pass upon the errors and inequalities alleged, it was directed by the Supreme Court, upon the reversal of a judgment of the circuit court sustaining its action, to reconvene and review the assessment in accordance with the statute.

Error to Kent; Grove, J. Submitted January 26, 1898. Decided April 19, 1898.

Certiorari by John M. Thomas, drain commissioner of Kent county, to review the decision of the township board of the township of Walker upon an appeal from an assessment for drain benefits as made by the commissioner. From a judgment sustaining the action of the board, petitioner brings error. Reversed.

Application was made to the county drain commissioner of Ottawa county in 1896 to construct a drain commencing and ending entirely in Ottawa county. That commissioner, finding that the said drain affected lands lying in Kent as well as in Ottawa county, called a meeting of the two commissioners of the counties. The meeting was held, survey made, and the drain ordered. A special drain assessment district was established, and the cost of the improvement was computed, and apportioned between the two counties. Sixty per cent. was apportioned to Ottawa county, and 40 per cent. to Kent county. The

drain commissioner of Kent thereafter apportioned to the township of Walker at large one-half of the 40 per cent., and the remaining half to lands liable to be assessed for benefits by reason of the improvement. The commissioner thereupon made out a special assessment roll, containing a description of the lands to be assessed, with the required certificates. An appeal was taken from these proceedings to the township board of the township of Walker. The board met and made the following report:

"This is to certify that, pursuant to notice duly given, we, the undersigned, constituting the township board of the township of Walker, in said county, for the purposes hereof, did on the 12th day of October, A. D. 1896, meet at the residence of E. P. Tucker, in said township, to consider the matter of appeal taken by [the parties, naming them] from the assessment and apportionment of the per cent. of benefits assessed for the construction of a certain drain in the township of Tallmadge, Ottawa county, known and designated as the Friar and Kimble drain, as made by J. M. Thomas, the county drain commissioner of said county of Kent; that, at the time and place aforesaid, we proceeded to view the grounds, and to review the said assessment and apportionment made by the said drain commissioner, and to hear the proofs and allegations of all parties in respect to the matter of said appeal; that, in our judgment, there is manifest error and inequality in said apportionment, owing to the fact that the natural flow of water is in an opposite direction in the case of the lands described and marked 'Not assessable' in the annexed schedule, and we hereby order such lands to be stricken from the special assessment roll. As to the balance of the lands described in said annexed schedule and in said special assessment, as well as the township at large, we find that, while the natural flow of water is towards said described drain, the said lands are all high and naturally well drained, and are in no wise benefited by the construction of said drain, and are not legally assessable therefor; and we hereby protest against the assessment of such lands or of the township at large for the purpose of said construction."

Here are inserted the descriptions marked "Not assessable."

"The above-described lands that are not assessable the natural flow of water is in an opposite direction, while those that are assessable appear to incline in the direction of said drain."

This action of the board was removed to the circuit court of the county of Kent upon a writ of *certiorari*, and was sustained. It is brought to this court upon a writ of error.

W. D. Fuller, for appellant.

Wolcott & Ward, for appellee.

GRANT, C. J. (*after stating the facts*). We find only one case in this court involving the power and jurisdiction of the township board upon appeals from the action of the commissioner under the statute of 1885. *Gillett* v. *McLaughlin*, 69 Mich. 547. It was there held that the board had no power to change the per cent. of the drain assessment to be borne by the township after the commissioner had fixed it. The law governing these assessments, and providing for appeals therefrom, is found in chapter 5 of the drain law. 3 How. Stat. § 1740e2 *et seq.* Section 1 authorizes the commissioner to apportion the per cent. of the cost of construction of a drain to any township traversed thereby, by reason of the benefit to the public health, convenience, or welfare, or as a means of improving any highway. He must assess the cost of such drain, over and above the per cent. assessed against such township, to lands benefited thereby.

"Such assessment of per cent. for benefits shall thereupon be subject to review and correction, and may be appealed from in the manner hereinafter provided: *Provided*, that * * * when the lands to be assessed therefor are situated in more than one township, the commissioner shall first determine and apportion, among such several townships, the per cent. * * * which each township and the lands therein situated is to bear. From this determination there shall be no appeal."

Section 2 provides that the owner of any lands assessed

a per cent. for benefits may appeal to the township board of the township in which his lands so assessed are situated. Section 3 provides for the notice to be given of the meeting of the board, and that "at such hearing the board shall have the right to review all assessments." It then provides that the proceedings in establishing any drain shall be subject to review upon *certiorari*, notice of which shall be served on the commissioner within 10 days after his determination in establishing the drain, and that—

"If no *certiorari* be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity."

Section 5 provides that the board shall proceed—

"To view the grounds, and to review the assessments made by the commissioner, and to hear the proofs and allegations of all parties in respect to the matter of such appeals, and if, in their judgment, there be manifest error or inequality in such assessments, they may order such changes to be made as they may deem just and equitable."

1. It is clear from these provisions that the township board is not clothed with authority to determine the validity of the proceedings taken by the commissioner of Kent county, or the joint action of the commissioners of the two counties, or to change the per cent. assessed upon the township at large. Its power is confined exclusively to the correction of any "error or inequality" in the assessment made by the commissioner upon lands benefited. Any person or township desiring to contest the validity of the action of the commissioner, or of the two commissioners, in laying out and establishing the drain, must resort to the courts, and not to the township board. It follows that the commissioner of Ottawa county was not a necessary party.

2. There is no difficulty in determining what is meant by the term "inequality." The township board may de-

termine that the benefits assessed upon some lands are too high, and upon others too low, and may exercise their judgment to equalize the assessment. A question of some difficulty arises as to what is included within the term "error." The commissioner might make an error in the amount, so that the total assessments would be more or less than the total amount apportioned to the lands. This would be error which the board could correct. But does the statute contemplate that the board may change the assessment district as fixed by the commissioner, and exclude any lands which, in its judgment, are not benefited? Does the term "error" mean that the commissioner erred in his judgment as to the lands which are and those which are not benefited? The logical result of this holding would be that the board might determine that none of the lands were benefited, and thus defeat the construction of the drain. In this case the assessment district contained about 712 acres, as fixed by the commissioner. Of this about two-thirds was directly held by the board to be nonassessable, and though the board seems, in the closing sentence of the report, to hold that the others are assessable, it said in a previous part of the report that they were not legally assessable. The members of the board seemed to recognize that they had no power to set aside the assessment upon the township at large, and contented themselves with a protest against it. The board is evidently not clothed with power to enlarge the assessment district. It is only by implication that it can be held to possess the power to restrict the district. It is clearly not clothed with power to wipe the district out entirely, and thus defeat the action of the commissioner. If the drain be legally established,—and, so far as this case is concerned, it must be so held,—the result would be the total failure to raise 20 per cent. of the cost. We are therefore of the opinion that the board had no power to change the boundaries of this district, and to exclude lands which the commissioner had determined were benefited. It may correct the inequalities, and

place as little upon such lands as it chooses. In this respect its power is supreme, and from its action there is no appeal.

Those who appeal to this board are entitled to have the board pass upon such errors or inequalities. This it has not done, and it would be manifestly unjust to have the assessment made by the commissioner stand, and thus deprive the appellant of the benefit of his appeal. It follows that the judgment must be reversed, and the township board directed to meet and review the assessments in accordance with this opinion.

The other Justices concurred.

SCHULZ v. BROHL

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DEEDS—CONSTRUCTION.

Under a deed to two persons, "to them and the survivor of them, parties of the second part," the grantees take each a moiety for life, with remainder to the survivor in fee, although the grant, in terms, is "to the parties of the second part, and to their heirs and assigns."

Appeal from Wayne; McMahon, J., presiding. Submitted February 1, 1898. Decided April 19, 1898.

Bill by Christine Schulz, by Charles Schulz, her guardian, against Joseph Brohl, to quiet title. From a decree dismissing the bill on demurrer, complainant appeals. Reversed.

William E. Henze, for complainant.

Franz C. Kuhn (*Edward A. Barnes* and *U. Grant Race*, of counsel), for defendant.

MONTGOMERY, J. The bill in this case was filed to quiet title. April 17, 1884, a deed was made by Caroline Schulz, the main provisions of which were as follows:

"This indenture, made this seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-four, between Caroline Schulz, of Detroit, Michigan, party of the first part, and Peter Brohl and Christine Schulz, of Grosse Pointe, Wayne county, Michigan, to them and the survivor of them, parties of the second part, *Witnesseth:*

"That the said party of the first part, for and in consideration of the sum of eleven hundred dollars ($1,100), to her in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, does by these presents grant, bargain, sell, remise, release, alien, and confirm unto the said parties of the second part, and their heirs and assigns, forever, all that certain piece or parcel of land situate and being in the city of Detroit, county of Wayne, and State of Michigan, known and described as follows, to wit: Lot nineteen (19) in block sixteen (16) of the Witherell farm, being on the north side of Watson street,—subject, however to a certain mortgage for seven hundred dollars ($700), dated January 4, 1882, made by August Schulz and Caroline Schulz, of Detroit, aforesaid, to James Dewey, of the same place, and recorded in the register of deeds' office for said county, in Liber 161 of Mortgages, on page 330; and also to all unpaid taxes and assessments upon said premises.

"Together with, all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining: To have and to hold the said premises, as above described, with the appurtenances, unto the said parties of the second part, and to their heirs and assigns, forever. And the said Caroline Schulz, party of the first part, for herself and her heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said parties of the second part, their heirs and assigns, that at the time of the ensealing and delivery of these presents she is well seised of the above-granted premises in fee simple; that they are free from all incumbrances whatever; and that she will, and her heirs, executors, and administrators shall, warrant and defend the same against all lawful claims whatsoever, excepting said mortgage, which the parties of the second part assume and agree to pay."

January 2, 1897, Peter Brohl, by quitclaim deed, conveyed the premises to Joseph Brohl, reserving a life estate. Peter Brohl died February 1, 1897. Complainant claims a sole ownership since the death of Peter Brohl, but defendant, Joseph Brohl, claims that the deed from Caroline Schulz created a tenancy in common in complainant and Peter Brohl, and that a moiety passed to defendant by the quitclaim from Peter Brohl. The case turns, therefore, on the construction of the deed from Caroline Schulz. What estate did it convey? If we confine ourselves to the granting clause, the defendant's contention is found to be fully sustained. But, referring to the premises, it is clear that the conveyance is made to Peter Brohl and Christine Schulz and to the survivor of them. It is contended that as these words are not contained in the granting clause, and that as the grant is to the parties of the second part and *their* heirs, the granting clause should control, in preference to the premises. In a doubtful case, this is the rule; but we are of the opinion that, on the whole deed, the intention is not doubtful. It is no stretch to read the word "parties" in the deed, wherever it occurs, with the additional designation contained in the premises. If we do this, the only possible ambiguity arises out of the fact that the plural was used, with reference to heirs, by the scrivener. We think the plain intent should not be defeated by this slip. The fact that the plural is often used when the singular is intended is recognized, and therefore it is provided that, in construing *statutes*, words importing the plural number may be applied and limited to the singular. 1 How. Stat. § 2, subd. 2. The purpose in construing deeds is to ascertain the intent of the parties as manifested by the instrument. *Moran* v. *Lezotte*, 54 Mich. 83; *Munro* v. *Meech*, 94 Mich. 596. This intent was, as we construe this deed, to convey a moiety to each of these parties for life, with remainder to the survivor in fee. Neither grantee could convey the estate so as to cut off the remainder. *Ewing's Heirs* v. *Savary*, 3 Bibb, 235; 1 Washb. Real Prop. *413.

The decree will be reversed, and case remanded for further proceedings.

The other Justices concurred.

WEIST *v.* MORLOCK.

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APPEAL—REVIEW ON FINDINGS—ASSIGNMENTS OF ERROR.

Where a case is tried before the court without a jury, and no exceptions are taken to the findings of fact and law by the court, the only question that can be raised upon appeal is whether the findings support the judgment; and that question is not open for consideration unless it is made the basis of an assignment of error.

Error to Berrien; Coolidge, J. Submitted April 5, 1898. Decided April 19, 1898.

Trover by Sophia Weist, administratrix of the estate of Mary Breidinger, deceased, against Frank Morlock. From a judgment for plaintiff, defendant brings error. Affirmed.

James O'Hara and *Cassius M. Van Riper*, for appellant.

Edward Bacon and *George W. Bridgman*, for appellee.

GRANT, C. J. This case involves $300, and was tried before the court without a jury. The court made written findings of facts and law, to none of which were any exceptions taken. Several errors are assigned upon both. Under the repeated decisions of this court, the only question open for decision is whether the findings support the judgment. Upon this point there is no allegation of error,

and it is not argued in the brief. It is not, therefore, open for consideration. *Cook* v. *Burnett*, 83 Mich. 251. We have, however, examined the findings sufficiently to hold that they support the judgment.

Judgment affirmed.

The other Justices concurred.

MILLER v. HAHN.

1. ASSUMPSIT—GENERAL ISSUE—EVIDENCE.
   In *assumpsit* against an officer to recover moneys paid on an execution issued upon a void judgment, the execution is admissible in evidence under a plea of the general issue.

2. PUBLIC OFFICERS—EXECUTION—VOID JUDGMENT—DAMAGES.
   An execution valid on its face protects a public officer against an action for damages resulting from its enforcement, even though the judgment on which it is based is invalid, and the debtor threatens to make him trouble if he enforces it.

3. SAME—FEES.
   An officer who enforces an execution valid on its face is not liable in *assumpsit* for fees collected under the writ, even though the judgment on which it was issued is invalid.

Error to Macomb; Eldredge, J. Submitted April 5, 1898. Decided April 19, 1898.

Assumpsit by William H. Miller against August R. Hahn to recover moneys paid to defendant, as deputy sheriff, to satisfy an execution issued upon a void judgment. From a judgment for defendant, plaintiff brings error. Affirmed.

Byron R. Erskine, for appellant.

Crocker & Knight (*T. M. Crocker* and *James G. Tucker*, of counsel), for appellee.

MONTGOMERY, J. The questions presented in this case arise upon exceptions to findings of law by the circuit judge. The defendant is a deputy sheriff. On the 6th of March, 1895, an execution regular in form was issued by a justice of the peace, and placed in defendant's hands. The execution commanded him to make the amount of the recited judgment, with costs and costs of the execution, out of the property of William Miller (the plaintiff in the present action). Defendant, under this writ, made a levy, and seized three horses belonging to plaintiff. Plaintiff thereupon paid to defendant the amount of the execution and costs, which the officer turned over to the magistrate, retaining his own fees, amounting to $2. This action was afterwards brought to recover in *assumpsit* the money thus paid to defendant. The judgment on which this execution issued was void. The defendant prevailed at the circuit, and plaintiff brings error.

Three contentions are made:

(1) That the defendant could not give the execution in evidence under the general issue.

(2) That the officer cannot justify under his execution alone, but must, in addition, show a valid judgment.

(3) That, in any event, the plaintiff is entitled to recover the amount retained by the officer as fees.

1. The defense was admissible under the plea of the general issue. In trespass for taking property, it is true, the defendant must give notice of justification when he relies upon a writ; but this is because the plaintiff's case is made by showing a taking *prima facie* wrongful. In *assumpsit*, however, before the plaintiff entitles himself to recover, he must show that the money which was paid was paid under such circumstances that the law will raise a promise to repay. The general issue raises this question. *Wilson* v. *Wagar*, 26 Mich. 452; *Berringer* v. *Lake Superior Iron Co.*, 41 Mich. 305. The plaintiff knew, when the payment was made, that the defendant was proceeding under the writ in his hands. He made payment of the money to him, relying on his supposed right to

recover money paid under such circumstances. The writ no longer remains in defendant's hands. If the declaration had been special, it would have been good pleading for plaintiff to set out the circumstances under which the money was paid, and particularly what constituted the alleged duress. He not having done so, but having declared generally, the defendant was entitled to give the facts in evidence under the general issue.

2. This action cannot be maintained. The rule is elementary that a writ valid on its face protects a public officer against an action for damages resulting from its enforcement, even though the judgment on which the writ is based be invalid. So far as we know, this rule is universal. *Ortman* v. *Greenman*, 4 Mich. 291; 1 Freem. Executions, § 101; Cooley, Torts, 459; Mech. Pub. Off. § 768. Nor was the defendant bound to suspend action because the execution debtor threatened to make him trouble. *Foster* v. *Wiley*, 27 Mich. 244 (15 Am. Rep. 185). The cases relied upon by the plaintiff were cases in which the right to the property was involved, and in which the officer was an indifferent and nominal party.

3. We see no reason for holding that the officer should be held liable for the fees recovered on the execution. The collection of these fees was an act directly within the command of his writ.

Judgment affirmed, with costs.

The other Justices concurred.

GILBERT *v.* MICHIGAN CENTRAL RAILROAD CO.

TRIAL — HOSTILE WITNESS — LEADING QUESTIONS — CONDUCT OF COUNSEL.

The court may in its discretion permit counsel, in the examination of a hostile witness called by him, to put leading questions with reference to his testimony upon a previous occasion, and to state the grounds upon which he relies as justifying such course; care being taken to check promptly any apparent effort to make the statement the means of bringing inadmissible matter to the attention of the jury.

Error to Bay; Maxwell, J. Submitted April 5, 1898. Decided April 19, 1898.

Case by Frederick L. Gilbert and Isabella I. Webster against the Michigan Central Railroad Company for negligently setting fire to plaintiffs' land. From a judgment for plaintiffs, defendant brings error. Affirmed.

E. A. Cooley, for appellant.

T. E. Webster (*John E. Simonson*, of counsel), for appellees.

HOOKER, J. In the circuit court the plaintiffs recovered a verdict and judgment in an action brought to recover damages for an injury to land alleged to have been suffered through the negligent setting of fire by the defendant's section men. The defendant has removed the cause to this court by writ of error.

The plaintiffs called as a witness the section foreman who had in charge that portion of the defendant's railroad upon which it is claimed that the fire which caused the injury was set, and he gave testimony concerning the burning of rubbish under his direction about the time that plaintiffs' property was burned. He was examined at length by

counsel for the defendant, as well as by counsel for the plaintiffs, in relation to the setting of fires, and testified that he saw the fire which did the injury when it started, a short distance from defendant's right of way, at a time after the extinguishment of all fires set by the defendant's employés. On redirect examination the following occurred:

"I cannot say what time of day it was I set the fire on the 22d of July,—whether it was forenoon or afternoon. There were no ties burned at that time.

"*Q.* Let me call your attention to your testimony before in relation to the burning of ties. Did you not testify that there might have been one or two piles of ties that burned? (Objected to as incompetent, immaterial, and he cannot cross-examine his own witness. Objection overruled, and exception duly taken.)

"*A.* I couldn't say whether there were any piles of ties burned along the Rudel land and the Hirschmann land. I might have said it.

"*Q.* Are you still in the employ of the defendant in this case? (Objected to as incompetent and immaterial. Objection overruled, and exception taken.)

"*A.* Yes, sir. At the time we burned our grass and rubbish, any fire we saw out there we dug out. At that time no fire got outside the right of way. We dug out any fire that we saw running through the fence or up to the fence."

One Frank was called as a witness for the plaintiffs. He testified that upon July 28th he saw the section men set fire to some cocks of hay, and that on the 31st of July he saw the muck burning, and that no one was looking after it. He also testified to the action of the fire of August 2d, when the injury was done to the plaintiffs' property. In the course of the direct examination of this witness the following dialogue occurred:

"*Q.* State whether or not you were where you could see the right of way. (Objected to as leading. Objection overruled, and exception duly taken.)

"*A.* Yes, sir; I was in plain view of the right of way.

"*Q.* Whom did you see, if any one, in the employ of the railroad company, looking after the fire that was burning

on the right of way, or that had been set by them in the right of way, between the 28th of July and the 2d day of August? (Objected to, that there is no evidence that there was any fire burning at that time set by the railroad men.)

"*The Court:* If he did, he can state it. On the former trial, the foreman, Brown, testified that they whipped it out and went away.

"*Mr. Webster:* Mr. Brown's evidence is a little different on this trial from what it was on the other. Now he says he did not set any fire.

"*Mr Cooley:* I object to the statement of counsel, and ask that it be stricken out.

"*The Court:* The jury will be instructed not to consider it.

"*Mr Cooley:* Instructions don't do much good afterwards.

"*The Court:* It will have to be. The question is leading.

"*Mr. Cooley:* I take exception to the refusal of the court to strike the remark of counsel out."

The witness Brown being recalled, upon his examination by counsel for the plaintiffs the following occurred:

"*Q.* I understand you to have testified yesterday that you set no fires opposite the Rudel land or the Hirschmann land. Is that true?

"*A.* I burned the grass that was along there.

"*Q.* In 1894 you did burn the stuff that was along the Rudel land?

"*A.* I did. About the 22d or 23d of July, as near as I can remember, I set fire on the right of way opposite the Rudel land. I commenced at the south end of the section about the 21st or 22d, and kept burning it, and it took about three days to burn it. The section extends about five miles.

"*Q.* Do you remember when this big fire was that broke out and spread over the land?

"*Mr. Cooley:* That has been gone through with. What is the object of this?

"*Mr. Van Kleeck:* In the other trial his testimony was somewhat different as to the setting of the fire along the Rudel land, and seeing the fire cross the Rudel land onto the Hirschmann land.

"*Mr. Cooley:* This is their witness, and they have no right to cross-examine, and it is neither fair nor proper for counsel to refer here to what occurred in some other trial, because they would not be permitted to show it, and I take exception to counsel making any such statement in the presence of the jury.

"*Mr. Van Kleeck:* If this witness has not testified as he did two or three weeks ago, and as we expected he would, and if we have been surprised by that, and if he is a witness that is opposed to us, which is true, we have a right to pursue his examination by leading questions, by calling his attention to what was said before and the testimony given on the former trial.

"*Mr. Cooley:* I take exception to the remarks.

"*Mr. Webster:* It was necessary for us to call him, and we called him to show that he had the authority from the railroad company to set those fires, and that it was his duty to set them, and we called him for that purpose and no other. He is a witness in the employ of the Michigan Central Railroad Company, and was at that time, and the only one we could rely on to prove the authority. In his former testimony he claimed he set the fires. In his testimony yesterday—

"*Mr. Cooley:* I take exception.

"*Mr. Webster:* He said he did not set the fires along there. This morning he says he did set the fires. That was the object of re-examining him.

"*Mr. Cooley:* I take exception to the remarks of counsel."

One Michael Summerfield was called to prove the value of, and injury to, the land, and it is alleged that he did not show himself competent to testify.

We are of the opinion that there is nothing in the foregoing questions that would justify a reversal of the judgment. It was competent for the plaintiffs to call Brown as a witness, and it was within the discretion of the court to permit his recollection to be refreshed; and, within proper bounds, counsel might state the grounds upon which they relied as justification for the questions to which opposing counsel objected. Care should be used in such statements, and the circuit judge should promptly check any apparent effort to make them the opportunity

for the assertion of matters which are inadmissible. We must, however, depend upon the circuit judges to correct the less important matters of this kind, which we must assume that they will do, where brought to their attention by proper request.

A question is raised over the introduction of evidence of injury to a road which was wholly or in part upon the plaintiffs' premises; but, as the record shows that no damages were awarded for this, it is unnecessary to consider it.

The judgment is affirmed.

The other Justices concurred.

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McKILLOP *v.* BOARD OF SUPERVISORS OF CHEBOYGAN CO.

1. BOARDS OF SUPERVISORS—PAYMENT OF CLAIM—MANDAMUS.

Mandamus is the proper remedy to compel a board of supervisors to pay the bill of a health officer, duly allowed and certified by the township board of health, for services rendered during an epidemic by direction of such township board.

2. SAME — SUPPRESSION OF EPIDEMIC — PHYSICIAN'S SERVICES — CONTRACT OF TOWNSHIP BOARD OF HEALTH.

A board of supervisors has no authority to disallow a portion of a physician's charges, as allowed and certified by the board of health of a township, for services rendered under the direction of the latter board in time of epidemic, upon the ground that some of the persons to whom the services were rendered were financially able to pay for them.

Certiorari to Cheboygan; Adams, J. Submitted April 5, 1898. Decided April 19, 1898.

Mandamus by Archibald J. McKillop to compel the board of supervisors of Cheboygan county to allow a claim for services as health officer during an epidemic

of diphtheria. From an order denying the writ, relator brings *certiorari*. Reversed.

Shepherd & Reilley, for relator.

H. W. Harpster and *S. B. Roe*, for respondent.

Moore, J. In 1894 an epidemic of diphtheria prevailed in the township of Nunda, Cheboygan county. There were so many cases that the schools were closed, and prompt action became necessary. The relator is a practicing physician. An arrangement was made with him by the board of health of the township that he should take charge of the patients as physician and nurse, and bury the dead, if any; that supplies should be furnished through him; that he should quarantine the houses where there were cases of the disease, and take all necessary steps to check and control the disease. There were between 30 and 40 cases, and a number of deaths. The relator carried out the instructions of the board, and gave nearly all his time to the work. In December, 1894, he presented a bill for his services, to the board of health, for $647, which was allowed and certified. Later he presented a bill for $179.25, which bill was also allowed and certified. These bills were afterwards presented to respondent. The first one was allowed at $500, and the second one at $100. The relator then filed a petition in the circuit court for a writ of *mandamus* to compel the respondent to pay all his bills as allowed by the township board of health. An answer was filed, and a trial had before a jury. Questions of fact were submitted to the jury, which, with their answers, were as follows:

"1. Was relator a regular practicing physician, duly qualified to practice under the laws of the State of Michigan?

"*Answer.* Yes.

"2. Did relator perform the services for which he presented his bill of account?

"*Answer.* Yes.

"3. In auditing relator's bill, did the board of health of the township of Nunda fraudulently combine with relator to allow same?

"*Answer.* No.

"4. Was relator a member of the board of health of the township of Nunda, and did he take part in auditing his own bills?

"*Answer.* No.

"5. In auditing relator's bill, did the board of health of the township of Nunda carefully consider same, and allow same at what they considered his services worth, and as a charge against the county of Cheboygan?

"*Answer.* Yes.

"6. Did relator protest against the allowance of his bills in part by the board of supervisors?

"*Answer.* Yes.

"7. Were the services rendered by the relator in the treatment of persons affected with a contagious disease and residing within the county of Cheboygan?

"*Answer.* Yes."

The answer stated that the portions of the bills not allowed were not allowed because some of the persons treated were able themselves to pay for treatment. As no issue was framed on this statement, the circuit judge held that it must be deemed to be true. The judge regarded the verdict of the jury as advisory simply, and denied the writ for two reasons: *First*, because *mandamus* was not the proper remedy; *second*, because services rendered to patients able to pay would not be a charge against the county,—basing his decision upon *Farnsworth* v. *Supervisors of Kalkaska Co.*, 56 Mich. 640.

As to the first reason, as early as the case of *People, ex rel. Bristow*, v. *Supervisors of Macomb Co.*, 3 Mich. 475, it was decided in this court that *mandamus* was the proper remedy in these cases, and from that time until now *mandamus* has been regarded as the proper remedy. *Farnsworth* v. *Supervisors of Kalkaska Co.*, *supra; Elliott* v. *Supervisors of Kalkaska Co.*, 58 Mich. 452 (55 Am. Rep. 706); *Safford* v. *Detroit Board*

of Health, 110 Mich. 81; *Village of St. Johns* v *Supervisors of Clinton Co.*, 111 Mich. 609.

As to the second reason assigned for not issuing the writ· In *Farnsworth* v. *Supervisors of Kalkaska Co.*, *supra*, part of the claim disallowed by the board of supervisors was for services rendered without any direction of the board. The other claim disallowed was for services rendered by a physician who was a member of the township board of health. There is language used in this opinion that tends to support the view taken by the trial judge of this case. But we think the later case of *Elliott* v. *Supervisors of Kalkaska Co.*, *supra*, should control. In the last-named case the relator's claim was for services as nurse in a pest-house, at four dollars a day. The supervisors allowed two dollars, and claimed that some of the patients were able to pay for their own necessities, and that the charge was exorbitant. In disposing of the case, Justice CAMPBELL used this language:

"Relator, Elliott, was employed to act as a nurse there, and it in no way concerned him what was the pecuniary standing of its inmates. The board of health have the power and responsibility of providing such a house and nurses to attend it. It was held in *Rae* v. *Mayor, etc., of Flint*, 51 Mich. 526, that the public is primarily responsible for such expenditures, and that it would be contrary to public policy to endanger the public health by making it impracticable to employ help who would be sure of their pay. The exigency of a pestilence will not wait for the convenience of parties, and measures must be prompt and effectual. The board of health must have power to make necessary contracts, and this involves all their terms. This was decided in the early case of *People, ex rel. Bristow*, v. *Supervisors of Macomb Co.*, 3 Mich, 475. There was nothing in Elliott's claim which was open to inquiry before the supervisors, and they should have allowed it as presented. There is no possible issue left open. * * * It is very much to be regretted that respondents have been so ill advised as to attempt to avoid the payment of these claims. The statutes designed to protect the community from infection are of the utmost importance, and persons cannot be compelled to risk their

lives to take charge of patients, unless they choose to do so. Suitable and competent persons cannot be procured without fair remuneration. It would be dangerous in the extreme if such matters could be left open to the caprice of any public body, after the immediate danger is ended, where notions of thrift may interfere with those of humanity The law has not left these matters open to any such risk, and it is the duty of courts to see that it is not disregarded."

In this case the record shows that the emergency was very great. The relator testified that in rendering the service he relied upon the promise made to him by the board of health that he should be paid what his services were reasonably worth, and would not have rendered the service if he had supposed he must look to the patients for his pay. His case comes directly within the reasoning employed in *Elliott* v. *Supervisors of Kalkaska Co.*, *supra*. If, in emergencies of this kind, it is understood that the agreements made by the boards of health cannot be enforced, the statutes designed to protect the community in these times, requiring prompt action of the board of health, will be rendered nugatory.

The writ will issue as prayed.

The other Justices concurred.

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WEIDMAN v. SYMES.

1. PROMISSORY NOTES—EVIDENCE.
   In an action on a note, defendant was permitted to cross-examine plaintiff as to his knowledge of a co-maker's insolvency, and the conveyance of some of his property to plaintiff. There was no pretense that the property was conveyed for the purpose of paying the note. *Held*, prejudicial error.

2. SAME—COMPARISON OF HANDWRITING.
   In an action on a note, defendant claimed that the instrument had been altered, without his consent, by filling in a space which he had left blank. *Held*, that it was error to permit him to put in evidence other notes written by him, for the purpose of having the jury compare the handwriting.

Error to Shiawassee; Smith, J. Submitted April 6, 1898. Decided April 19, 1898.

Assumpsit by William Weidman against George B. Symes upon a promissory note. From a judgment for defendant, plaintiff brings error. Reversed.

Selden S Miner, for appellant.

Watson & Chapman, for appellee.

MOORE, J. Plaintiff sued defendant upon a promissory note, given in 1890, signed by John McBride and the defendant. Defendant, by way of defense, claimed that he signed the note as an accommodation maker, and had been released because plaintiff had, several times after the note became due, extended the time of payment without the consent of defendant. It was also claimed that after Mr. Symes signed the note it had been changed by writing in the words "ten (10) per cent.," without the knowledge or consent of the defendant. On the trial the plaintiff testified that he obtained the note from Mr. Mc-

Bride, and that since it was delivered to him it had not been changed or altered. Mr. McBride testified that he saw Mr Symes sign the note, and that there was no change made in the note up to the time when he delivered it to plaintiff. The defendant gave testimony tending to show there had been a change made in the note by writing in the words "ten (10) per cent." This was a disputed fact, and it was an important fact. The circuit judge charged the jury, among other things:

"It is undisputed in this case, and claimed by the defendant in the case, and the evidence tends to show, that when the note went from his hands there was no rate of interest provided for in the note, but that the blank space in the note, where the figures '10' and the words 'ten per cent.' were written, was blank at the time. That is the claim of the defendant, and there is no dispute about it."

This was error. The question was one for the jury, and not for the court. *Perrott* v. *Shearer*, 17 Mich. 48; *Blackwood* v. *Brown*, 32 Mich. 104; *Conely* v. *McDonald*, 40 Mich. 150; *Hart Manfg. Co.* v. *Mann's Boudoir Car Co.*, 65 Mich. 564; *Davis* v. *Gerber*, 69 Mich. 246; *People* v. *Gastro*, 75 Mich. 127; *Wessels* v. *Beeman*, 87 Mich. 481; *Prentis* v. *Bates*, 93 Mich. 234 (17 L. R. A. 494).

On the cross-examination of the plaintiff, counsel for defendant was allowed to examine him in detail about what he knew about McBride becoming insolvent long after the note was given, and about McBride having made a conveyance of some of his property to the plaintiff. There was no pretense that the property conveyed was for the purpose of paying this note, or applying upon its payment. The purpose of the testimony was to prejudice the jury against the plaintiff, and it doubtless had that effect, and should not have been allowed.

The defendant was allowed to introduce in evidence a number of notes written by him subsequent to the time when the note in controversy was written, for the purpose of being submitted to the jury, for them to compare with

the handwriting in the note. This was error. *Vinton* v. *Peck*, 14 Mich. 287; *First Nat. Bank of Houghton* v. *Robert*, 41 Mich. 709.

Counsel for defendant, in his argument to the jury, made use of language in relation to the business of the plaintiff that was unwarranted.

Other errors were committed in the trial, but as they are not discussed in appellant's brief, and are not likely to occur on a new trial, further reference will not be made to them.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

HUELLMANTEL *v.* VINTON.

1. CHATTEL MORTGAGES — AFTER-ACQUIRED PROPERTY — SALES BY MORTGAGOR.

   A mortgage of a stock of goods is not void as against the creditors of the mortgagor because it covers after-acquired goods, and permits the mortgagor to sell in the usual course of trade, and apply the proceeds to his own use. Reaffirming *Louden* v. *Vinton*, 108 Mich. 313.

2. SAME—TROVER BY SECOND MORTGAGEE—LIMIT OF RECOVERY.

   The holder of a second mortgage upon chattels may maintain trover against one who has wrongfully converted them, without paying or tendering the amount of a judgment theretofore recovered against the defendant for the conversion of the interest of the prior mortgagee, and may recover in the action such portion of the value of the property converted, up to the amount of his claim, as remains after satisfying the former judgment.

Error to Grand Traverse; Corbett, J. Submitted April 6, 1898. Decided April 19, 1898.

Trover by Julius Huellmantel against Medad Vinton. From a judgment for plaintiff, defendant brings error. Affirmed.

Dodge & Covell, for appellant.

W. H. Foster, for appellee.

HOOKER, J. This cause is before us a second time, our disposal of the same on the first hearing being reported in 112 Mich. 47, where the principal facts are stated. Upon a second trial the plaintiff recovered a judgment for $305.35, and the defendant has appealed.

The first question presented grows out of the claim of counsel that the plaintiff's mortgage was a "legal fraud." It is admitted that this question was passed upon in the case of *Louden* v. *Vinton*, 108 Mich. 313, which was a similar action to this, growing out of the same transaction, brought by an earlier mortgagee Being satisfied with the ruling in that case, we think it unnecessary to discuss the question here.

Several assignments of error are discussed in the briefs. One Foster, a witness for the plaintiff, was cross-examined in relation to his motive in taking a third mortgage upon the property, exception being taken to redirect examination permitted upon the same subject. We find no error in this.

We think it unnecessary to discuss the question raised in relation to the admission of the appraisal, or the denial of the motion to strike out the testimony, or the charge of the court in relation thereto.

The court instructed the jury that:

"Now, gentlemen of the jury, the first thing for you to consider, and for the court to consider now, is the value of this stock of hardware in question. Mrs. Louden having had a first mortgage on this stock of goods, and having obtained a judgment against the sheriff, and that judgment having been paid, if the stock of goods did not exceed in value the amount of her judgment, then there is

nothing left here for Mr. Huellmantel, the plaintiff, on his mortgage, and your verdict should be for the defendant. Now, gentlemen, if this stock of goods did not exceed the amount of the Louden judgment, which Buhl Sons & Co. paid, $3,184.65, there is nothing further for you to consider, and your verdict should be for the defendant of no cause of action."

This was proper instruction, unless, as counsel contend, the judgment in favor of Clara Louden was a complete answer to the plaintiff's claim, inasmuch as he had not paid such judgment nor tendered payment. There were three successive mortgages upon this property. The owner of the first, Mrs. Louden, recovered from the defendant, who converted the entire property, the amount of her lien. If that did not equal the value of the property,—and the jury evidently found that it did not,—the second mortgagee might recover a portion or the whole of the unappropriated value upon his claim. All of the property came to the possession of the defendant, who sold it, and appropriated the proceeds. Each person having an interest in the property wrongfully converted had a right of action for the conversion, which was separate and distinct from the rights of others, except as the right of the second was dependent upon the sufficiency of the property to pay the claim of the prior mortgagee and leave a surplus.

The question in relation to the village lot deeded to the plaintiff was decided on the former hearing. There was testimony justifying the court in his submission of that matter to the jury.

The judgment is affirmed.

The other Justices concurred.

116 624
126 19

PHELPS *v.* ABBOTT.[1]

ACTIONS—OPEN ACCOUNT—SEPARATE SUITS—COSTS.

Separate suits may be brought by a creditor upon the claims embraced in an open account, subject, under 2 How. Stat. § 6876, to the penalty of loss of costs in subsequent suits where the whole of the claim upon such an account is not included in one action.

Error to Washtenaw; Kinne, J. Submitted April 6, 1898. Decided April 19, 1898.

Assumpsit by Caliphurnia B. Phelps and others against Charles S. Abbott for goods sold and delivered. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

Lehman Bros., for appellant.

Bowen, Douglas & Whiting, for appellees.

LONG, J. Plaintiffs had an account for goods, wares, and merchandise against defendant, which had been running for several months, amounting to $489.88. On January 9, 1896, plaintiffs caused two summonses to issue against defendant. To each summons was attached a verified statement of a portion of the account. On the adjourned day of the first case, February 5th, they took judgment for $228.30 damages and $7.80 costs of suit. This included the general account from January 1, 1894, to and including the month of December, 1894. On February 6th the second trial came on. There had been served with this summons a verified statement of the account from January 11, 1895, to and including December, 1895. The defendant appeared in this cause, and

[1] Rehearing denied June 28, 1898.

pleaded the former suit and judgment in bar, under a claim that the second suit was for a part of the same general account for which judgment was rendered February 5, 1896, and that the cause of action, if any, accrued before the bringing of the first suit wherein judgment was rendered. Judgment was rendered by the justice in this second suit for $261.58 damages and $7.85 costs. The cause was appealed to the circuit court, where the judgment was affirmed. Defendant brings error.

The defendant requested the court to charge, substantially, that plaintiffs could not recover, which request was refused. It is the claim of the defendant that a debt due upon a continuous account of book entries, made in the ordinary course of dealing. is entire, and cannot be split up into separate and distinct demands, so as to form the basis of several suits; that an open account containing many items, all of which are due, constitutes but one claim, and one right of action. It appeared in the case that the plaintiffs, before these suits were brought, had brought suit upon the whole claim in Detroit, but that it had never been put in judgment, and that such suit was discontinued before the present suits were brought. The defendant contends that the whole account was there treated as one cause of action, and that, therefore, it cannot be split up, and that the first suit before the justice is a bar to the present suit.

We think that none of these contentions can be sustained, and that the court below very properly directed verdict in favor of plaintiffs. There was no question but that defendant was indebted to the plaintiffs for the amount covered by the two suits. The question here raised was passed upon in *Stickel* v. *Steel*, 41 Mich. 350, adversely to the claim now made by the defendant. It is true that in that case the bills of goods, which were bought on the same day, were bought on different terms of payment, but the account for each bill became due before the suit was brought on the first bill. It was said:

"The two bills might have been embraced in one action,

but, as the aggregate amount exceeded the jurisdiction of a justice of the peace, we probably have in this fact an explanation of the two suits. We think the plaintiffs had a legal right to bring the two suits. The justice refused to give costs in the second suit, and the course taken has been favorable to the debtor, instead of being oppressive. He has been sued in an inexpensive court."

This doctrine was reaffirmed in *Reid, Murdoch & Co.* v. *Ferris*, 112 Mich. 693. The penalty fixed by the statute for not including the whole claim on open account in one suit is loss of costs in the second suit. 2 How. Stat. § 6876.

The judgment must be affirmed.

The other Justices concurred.

CONLIN *v.* LAMONT IRON CO.

LABOR LIENS—JUDGMENT—SURPLUSAGE.

A judgment giving a lien on real as well as on personal property in an action for work and labor, in which the summons and declaration claimed a lien on the personal property only, under 1 How. Stat. § 4063, will be treated as surplusage, so far as the lien on the real property is concerned, and the validity of the judgment as to the lien on the personal property will not be affected thereby.

Error to Iron: Stone, J. Submitted April 6, 1898. Decided April 19, 1898.

Assumpsit by Thomas Conlin against the Lamont Iron Company for work and labor. From a judgment for plaintiff, defendant brings error. Affirmed.

Sherman T. Handy, for appellant.

M. H. Moriarty (*R. C. Flannigan*, of counsel), for appellee.

GRANT, C. J. Plaintiff recovered a judgment in a suit at law against the defendant for $429 for work and labor. In both the summons and declaration he claimed a lien on the personal property of defendant under 1 How. Stat. § 4063. In entering the judgment plaintiff was given a lien on the real as well as the personal property. Defendant seeks to reverse this judgment because it declares a lien on the real estate. Its counsel insists that such lien can only be enforced by a bill or petition in chancery under 2 How. Stat. § 8382. If this were so, the mere taking of a judgment would not be a proceeding to enforce the lien. When he attempts to enforce his lien by proceedings at law, it will be in time for defendant to raise the question. If there is no way to enforce the lien by proceedings at law, the recital is harmless.

But this case may be disposed of by holding that this recital in the judgment is surplusage. Obviously it does not affect the validity of the judgment or the lien upon the personal property. No such lien is claimed in the declaration or summons, and no such issue was presented by the pleadings. It does not appear that this matter was called to the attention of the trial court. It is an error which the court would undoubtedly have corrected on motion. Counsel for plaintiff assert in their brief that they offered to consent to an amendment striking out this recital. If this was so, defendant should have complied with the offer.

Judgment affirmed.

The other Justices concurred.

116 628
119 490

HAMMOND *v.* PLACE.

1. MUNICIPAL CORPORATIONS—BONDS—REMEDIES—ESTOPPEL.
   An objection that the owner of municipal bonds has no right to put his claim thereon into judgment, but is limited to *mandamus* to compel an assessment to pay them as they become due, cannot be urged for the first time in a proceeding to enforce the judgment.

2. SAME—RIGHTS OF ACTION.
   But the objection is without force; since the right of the owner to sue upon these bonds exists, notwithstanding an amount sufficient to pay them has been included in prior assessments, and has failed of collection or been misappropriated.

3. SAME—CONTRACTS—POVERTY AS DEFENSE.
   Poverty is no more a defense to the enforcement of a just demand against a municipal corporation than it is where the defendant is a private corporation or an individual.

4. SAME—TAXATION.
   The validity of a contract of a municipal corporation necessarily involves the right to raise by taxation the amount for which it thereby becomes obligated.

5. SAME—LIMIT OF TAXING POWER—JUDGMENTS—MANDAMUS.
   Under 3 How. Stat. § 8218, providing that judgments rendered against a municipality shall be assessed upon its taxable property, and the amount thereof added to the other municipal taxes, *mandamus* will lie to compel the levy of an assessment to pay a judgment against a city, even though the rate of taxation will thereby be increased beyond the limit established by the charter.

6. SAME—STATUTES—AMENDMENTS TO CHARTER—CONSTRUCTION.
   Act No. 354, Local Acts 1897, amendatory of the charter of the city of North Muskegon, providing that, when the city shall be unable to meet the payment of any judgment or decree by reason of the limitation of its power of taxation, it

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[1] The decision in this case ruled the companion cases of *Commercial & Savings Bank of St. Clair* v. *Place* and *Boston & New York Air Line Railroad Co.* v. *Place*, in which orders granting *mandamus* were also affirmed.

shall be lawful for the council to issue bonds to pay the same, which shall not be disposed of at less than par value, is permissive merely, and does not impair the judgment creditor's right, under the general statute, to have his demand collected by assessment against the taxable property.

7. SAME—CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS.

It is beyond the power of the legislature, under the Constitution, so to limit the taxing power of a municipality as to preclude it from raising an amount necessary to satisfy its pre-existing legal obligations.

Certiorari to Muskegon; Russell, J. Submitted April 6, 1898. Decided April 19, 1898.

Mandamus by Henry B. Hammond and others to compel Charles S. Place, assessor of the city of North Muskegon, to assess against the taxable property of the city the amount of a judgment recovered by relators. From an order granting the writ, respondent brings *certiorari*. Affirmed.

June 11, 1896, the relators recovered a judgment against the city of North Muskegon for $1,393.60. They then applied to the respondent, the assessor, to place the amount of this judgment upon the tax roll for collection. He refused. They thereupon presented a petition to the circuit court for the county of Muskegon for a writ of *mandamus* to compel him to assess said amount. The petition does not set forth what was the basis of the judgment. The answer admits all the allegations of the petition, except that it denies that the petitioners have no other legal remedy. It further sets forth that the bonded indebtedness of the city is $35,000; that its assessed valuation is $33,000; that the officers of the city have from year to year spread upon the assessment rolls such amount as was deemed sufficient to pay the interest and bonds as they became due; that there is now due over $25,000 in delinquent taxes; that the assessment of this judgment will place taxation above the rate allowed by the charter,

viz., 3 per cent. The court granted the writ, and the respondent brings *certiorari*.

H. L. Delano, for relators.

Philip W Niskern, City Attorney (*George S. Lovelace*, of counsel), for respondent.

GRANT, C. J. (*after stating the facts*). 1. No claim is made that these bonds were not valid when issued. Counsel insist that the sole remedy possessed by the persons holding them was by *mandamus* to compel an assessment as they became due. If this were a defense, it should have been raised in that suit. The position, however, is untenable. Even if an amount sufficient to pay them had been included in prior assessments, and had failed of collection, or had been collected and misappropriated, this would not bar the right of the holders to sue upon their bonds. *Ralls County Court* v. *U. S.*, 105 U. S. 733.

2. Is it a good defense that the result of this assessment will increase taxation beyond the rate allowed by the charter? The charter of the respondent has been several times amended and revised. It has always contained a limit to the rate of taxation. The charter of 1895, at present in force, limits the amount that may be raised by general taxation "for the purpose of defraying the general expenses and liabilities of the corporation, and for all purposes for which the several general sums hereinbefore mentioned are constituted," to 3 per cent. on the assessed valuation. Act No. 466, Local Acts 1895, chap. 10, § 4. The general sums before mentioned are the contingent fund, the sinking fund, to pay the bonded indebtedness of the city and interest thereon, the fire-department fund, water fund, highway fund, poor fund, and police fund.

The validity of these bonds is conceded. When they were issued, does not appear. It is fair to presume that they were issued when the city was prosperous, and had prospects of permanent prosperity. It depended largely

upon its sawmills and perhaps other manufactories. They have removed to a very large extent, and property has depreciated. Poverty, however, is no more a defense against just debts in a municipal corporation than in any other corporation or an individual. The validity of a contract made by a municipal corporation necessarily involves the right to raise by taxation the amount which it has agreed to pay "The right to contract must be limited by the right to tax, and if, in the given case, no tax can be lawfully levied to pay the debt, the contract is void for want of authority to make it." *Citizens', etc., Loan Ass'n* v. *City of Topeka*, 20 Wall. 655. The contract in this case being conceded to be valid, it follows that the only method by which it can be paid, viz., by taxation, is open to the payee. Taxation is the sole method provided by law for the payment of such debts. Execution cannot issue against the municipality. The proceeding by the writ of *mandamus* to compel payment of the judgment, or of the bonds without a judgment, is in the nature of an execution, and the only remedy open to the creditor. Creditors of a municipal corporation are, of course, chargeable with notice that any limitation to taxation controls, and cannot be exceeded. It is therefore held that, where the power to provide for the payment of bonds is limited to an annual special tax of one-twentieth of 1 per cent. by the statute itself authorizing the issue of the bonds, a levy of taxes beyond that amount cannot be authorized. *State, ex rel. Watkins*, v. *Macon County Court*, 68 Mo. 29; *U. S.* v. *County of Macon*, 99 U. S. 582. So the constitutional limitations as to rate of taxation must control. *Grand Island, etc., R. Co.* v. *Baker*, (Wyo.) 45 Pac. 494; *City of Sherman* v. *Smith*, 12 Tex. Civ. App. 580. Our Constitution imposes upon municipalities no limitation to taxation, but leaves that power in the legislature. So, also, where the law provided that "the aggregate of all taxes levied or ordered by any corporation shall not exceed 16 mills," it was held that the assessor would not be compelled by the writ

of *mandamus* to enforce a tax levied in excess of that amount. *State, ex rel. City of Cincinnati*, v. *Humphreys*, 25 Ohio St. 520; *City of East St. Louis* v. *Board of Trustees*, 6 Ill. App. 130. Our own court holds the same doctrine. *Ironwood Waterworks Co.* v. *City of Ironwood*, 99 Mich. 454.

None of these cases, however, involve the enforcement of the payment of bonds valid when issued, and merged in judgments. The contention means this: That the municipality may avoid its legal obligations by the reduction of its valuation, and making its running expenses equal to the limit of taxation. This is practical repudiation. Whether the valuation of the property of this city at $33,000 was reached by the same methods as were severely condemned by this court, speaking through Justice COOLEY, in *Wattles* v. *City of Lapeer*, 40 Mich. 624, we do not know, since there is no explanation in the record. Whether, however, this singular result would follow from a strict construction of the limitation clause in its charter, we need not determine. Possibly in contemplation of such results, a special statute was enacted, providing for the assessment of judgments rendered against municipalities. 3 How. Stat. § 8218. This statute provides that judgments rendered against municipalities shall be assessed by the assessing officers upon its taxable property, and the amount thereof added to the other municipal taxes. It was enforced in *Shippy* v. *Mason*, 90 Mich. 45. It clearly provides for the payment of judgments, exclusive of the limitations to taxation established by municipal charters.

It is, however, seriously urged that the above act is repealed, so far as the city of North Muskegon is concerned, by an amendment to its charter passed in 1897. It was there provided that, when the city shall be unable to meet the payment of any judgment or decree by reason of the limitation of its power of taxation, it shall be lawful for the council to issue bonds to pay the same, which shall not be disposed of at less than par value. Act No.

354, Local Acts 1897, chap. 11, § 9. Under the state of facts set up in the answer of the respondent, the issue of bonds to meet this and the other judgments against the city would be useless. They could not be sold at any price. This amendment, however, does not attempt to repeal the general statute, but only makes it lawful for the common council to meet the payment in another way. The general statute remains in full force. If the legislature had passed an act designed to aid the municipality in avoiding its legal obligations, courts would not hesitate to declare it inoperative and void, as impairing the obligation of contracts. Mr. Justice COOLEY thus forcibly states the doctrine:

"It is possible, however, that the State itself may so far sympathize with a debtor municipality as to be disposed to aid it in its obstructive methods to prevent collection; and it may seek to do this by so limiting the municipal power to tax that it shall be impossible for it to pay its debts by taxes raised within the legal limit. Where such obstruction has been attempted, however, it has been judicially determined that the limitation of the power to tax under such circumstances was an impairment of the obligation of contracts, and therefore inoperative. The argument, shortly stated, is that the State, in conferring upon its municipalities the power to contract debts and to levy taxes for their satisfaction, impliedly contracts with those who become creditors in reliance upon the power, that such power shall not, while their demands remain unpaid, be so limited, impaired, or hampered as to preclude the municipality providing for and satisfying such demands according to their terms. Any subsequent legislation, therefore, which could have such injurious effect upon the interests of creditors, and deprive them of the resource of taxation, which they had a constitutional right to rely on, will be treated as inoperative and void, and a levy of taxes may be compelled, as it might have been if no such legislation had been attempted." Cooley, Tax'n (2d Ed.), 76.

It follows that the judgment of the court below was correct, and it is affirmed.

The other Justices concurred.

LOTH *v.* LOTH

EQUITY PRACTICE—BILL OF REVIEW—AFFIDAVITS—ADMISSIBILITY.

On the hearing of a petition for leave to file a bill of review, affidavits may be received denying the averments of the petition.

Appeal from Marquette; Stone, J. Submitted April 7, 1898. Decided April 19, 1898.

Bill by Katherine Loth against Alvina L. Loth to foreclose a mortgage. Decree for complainant. Defendant appeals from the denial of her petition for leave to file a bill of review. Affirmed.

F. H. Peters, for appellant.

Hayden & Young, for complainant.

MOORE, J. June 3, 1896, complainant filed a bill for the purpose of foreclosing a mortgage given by defendant. June 12th the subpœna was served personally upon the defendant. She appeared by her solicitor, who was served with a copy of the bill of complaint, July 8, 1896. No answer was filed, and in December defendant's default was taken. In March, 1897, a decree was entered for complainant. In June, 1897, the property was advertised for sale. Before the sale occurred, defendant filed a petition for leave to file a bill of review, and the sale was postponed until in September. Upon the hearing of the petition of defendant, complainant was allowed to file affidavits denying the allegations of the petition. Upon the hearing the judge denied the petition. If the affidavits were to be considered at all, they were a complete refutation to the statements contained in the petition, and it was properly denied.

It is claimed the judge erred in receiving these affidavits, and that he was bound to accept the petition as true, and that the petition contained sufficient to entitle defendant to file a bill of review. The solicitor has not called our attention to any authority in support of his contention. In *Day* v. *Cole*, 65 Mich. 154, an answer was filed to the petition, and it was said by the court: "We ought not to grant the prayer of this petition without we have some reason to believe that the charges and facts therein alleged can be sustained by competent proof." We understand the rule to be well settled that, on the hearing of such a petition, affidavits may be admitted to explain the nature of the evidence. Jenn. Ch. Prac. 372; Puterb. Mich. Ch. (3d Ed.) 238; 2 Barb. Ch. Prac. (2d Ed.) 424. We think the trial judge, in the exercise of his discretion, very properly denied the petition.

The decree is affirmed, with costs.

The other Justices concurred.

SOGGE *v.* SCHWARTZ.

BILL OF PARTICULARS—AMENDMENT.

A bill of particulars stated that in October, 1892, on a full settlement of partnership dealings, it was found that defendant owed plaintiff $1,000, which he agreed to pay. The evidence showed that, while there was a partial settlement in October, there was no full settlement until November, and that the amount actually due was $528.50. It appeared that the settlement was made with defendant personally, and that the books and papers of the partnership had been all the time in his custody. *Held*, that the bill of particulars did not surprise or mislead defendant so as to prevent an amendment at the trial to correspond with the proofs.

Error to Leelanaw; Corbett, J. Submitted April 7, 1898. Decided April 19, 1898.

Assumpsit by Lars R. Sogge against Jacob Schwartz upon an account stated. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Pratt & Davis, for appellant.

C. L. Dayton and *Patchin & Crotser*, for appellee.

MOORE, J. Plaintiff sued defendant, and declared on all the common counts in *assumpsit*. The bill of particulars was as follows:

"October, 1892. To amount found due upon a statement of account between the above-named plaintiff and the above-named defendant on settlement of the partnership dealings between the said plaintiff and the defendant and William C. Nelson, which amount, upon full settlement of said partnership account, was agreed to be paid by said defendant to said plaintiff, $1,000."

Testimony was given showing that plaintiff and defendant and one Nelson were partners; that defendant had one-half interest, plaintiff one-fourth, and Mr. Nelson one-fourth interest in the partnership. Testimony was then offered tending to show that a partial settlement of the partnership affairs was made in October, 1892, and that there was a full settlement in November. Objection was made to any testimony showing a settlement in November under the bill of particulars. This objection was overruled, but no exception was taken. It was shown that under this settlement there was due Mr. Sogge and Mr. Nelson from Mr. Schwartz $1,057. Defendant's attorney then entered upon a full cross-examination of the witness in relation to the partnership dealings. Testimony was taken which fills 20 pages of the printed record, when, for the first time, any objection was made to the testimony upon the ground that the amount proven upon the settlement differed from the amount stated in the bill

of particulars. Counsel for defendant at this point moved to strike out the testimony for that and other reasons. Counsel stated that he claimed that, as a bill of particulars had been furnished of an account stated, plaintiff could not vary from the amount stated in the bill of particulars one cent more or one cent less. The court then overruled the motion, and said that the question might be raised when the testimony for plaintiff was all in.

Other testimony was taken, going fully into the details of the partnership and of the settlement. The testimony of the plaintiff was to the effect that, in a settlement made between plaintiff and defendant and Mr. Nelson, there was found to be due upon a settlement commenced in October, 1892, and completed in November, $1,057 from defendant to Mr. Nelson and Mr. Sogge, one-half of which was to be paid to each of them by Mr. Schwartz. When plaintiff rested his case, the defendant renewed his motion to strike out the testimony of the plaintiff, and that the judge direct a verdict for the defendant, for several reasons, one of which was because the testimony did not tend to prove the claim set forth in the bill of particulars. The judge stated that he thought the objection to the variance between the proofs and pleadings was well taken, but suggested that the bill of particulars could be amended. An exception was taken to the ruling of the court, and the plaintiff asked to amend the bill of particulars so as to state the amount due the plaintiff to be $528.50, instead of $1,000. Defendant objected to this, unless the case was continued for the term, with costs to be taxed. The counsel for plaintiff said that he did not press his motion to amend upon the terms required by the defendant, and that he did not see how defendant was misled as to the amount claimed to be due, as he had come in with his papers and cross-examined the witnesses fully, and asked for a ruling of the court upon the motion to strike out the testimony and direct a verdict for defendant. The court replied:

"I think the rule is as I have stated it, that on an account stated the correct amount ought to be stated, and it remains with the defendant whether this matter will be closed up. If the objection is insisted upon, I think it is well taken."

Defendant insisted upon his objection, and the court directed a verdict in favor of defendant.

The sole question involved is, Was the bill of particulars sufficient? The record shows that the alleged settlement was made with defendant personally, and that, from then until the trial, the books and papers of the partnership were in his custody. In *Davis* v. *Freeman*, 10 Mich. 188, it is said:

"The office of a bill of particulars is to inform the opposite party of the cause or causes of action the party giving it intends to rely on at the trial, not specifically set out in the declaration, or notice accompanying the general issue."

In *Wright* v. *Dickinson*, 67 Mich. 580, the court said:

"A bill of particulars, in practice, is considered in some respects as an amplification of the declaration, but it is considered sufficient if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise. *Brown* v. *Williams*, 4 Wend. 360."

In *Freehling* v. *Ketchum*, 39 Mich. 299, it was said:

"The purpose of the rules in allowing bills of particulars to be demanded is to enable defendants to avoid surprise, and not to enable them to make vexatious requirements."

See, also, *Collins* v. *Beecher*, 45 Mich. 436.

In *Hamilton* v. *Ingham Circuit Judge*, 84 Mich. 393, it is said:

"In mentioning dates, it is not necessary that the exact date shall be given, but it may be stated as 'on or about a certain day,' and in that case the plaintiff is not restricted to proof of that special day. The question to be determined at the trial in each case is whether the proof is so variant from the date alleged as to mislead the opposite party."

In 1 Green, Prac. 512, it is said:

"But as the object of this strictness in a bill of particulars is that the defendant may know what will be attempted to be proved against him at the trial, and may prepare his evidence accordingly, a mistake in a particular not calculated to deceive or mislead him will not be regarded as material."

Testing the bill of particulars by these statements, can it be said that the defendant was misled? The bill of particulars is for an amount found due in October, 1892, upon a statement of account between the plaintiff and defendant on settlement of the partnership dealings between the plaintiff and defendant and William C. Nelson, which amount, upon full settlement of said partnership account, was agreed to be paid by said defendant to said plaintiff, $1,000. The proof was that a settlement of account was commenced in October and completed in November, when there was found due from the defendant to the plaintiff, upon a statement of account on settlement of the partnership dealings between the parties to this suit and Mr. Nelson, which amount, upon full settlement of said partnership account, was agreed to be paid by said defendant to said plaintiff, the sum of $528.50. We think it too technical to say that defendant was misled. The same settlement was referred to in the proofs that was referred to in the bill of particulars. The only difference was that in the bill of particulars the amount stated to be due the plaintiff from the defendant was $1,000, while the proofs showed that there was due but $528.50.

We think the court erred in his disposition of the case. Judgment is reversed, and new trial ordered.

The other Justices concurred.

RUMNEY *v.* DETROIT & MONTANA CATTLE CO.

CORPORATIONS—RECEIVERS—RIGHTS OF MINORITY STOCKHOLDERS.

A receiver should not be appointed for a corporation on the application of one comparatively small stockholder, on the ground that another stockholder has obtained full management of the corporation, and that there has been no meeting of the directors, and that no reports of the condition of the company have been filed, and that such other stockholder has declared dividends only when threatened with proceedings for a receiver, and has then withheld the applicant's share of the dividend, where no other stockholders are dissatisfied with the management, and it does not appear that the corporation or the managing stockholder is insolvent, or that the latter has converted any of the corporate property to his own use.

Appeal from Wayne; Lillibridge, J. Submitted April 7, 1898. Decided April 19, 1898.

Bill by John G. Rumney against the Detroit & Montana Cattle Company and its stockholders for the appointment of a receiver. From a decree for complainant, defendants appeal. Reversed.

Russel & Campbell, for complainant.

Elliott G. Stevenson, for defendants.

HOOKER, J. The complainant, John G. Rumney, is a stockholder of the Detroit & Montana Cattle Company, which is a Michigan corporation. He owns 521 out of 4,000 shares of a capital of $100,000. He is also a member of the Rumney Land & Cattle Company, which has or had contract relations with the Detroit & Montana Cattle Company, and has pending litigation concerning them. Charles F. Hammond is a stockholder, as representative of his father's estate, in the Detroit & Montana

Cattle Company. Complainant's bill states that he has control of a majority of the stock. The business of the Detroit & Montana Cattle Company consists of the raising of cattle in Montana, where it has had large herds for several years, and still has a considerable number, in charge of the Rumney Land & Cattle Company, which is under contract obligations to care for and market the same. Each company claims that the other is its debtor. The bill of complaint is filed against Hammond and the corporation, to enjoin Hammond, whom it alleges to be in absolute and full control of its affairs, from disposing of any property or money in his hands belonging to the Detroit & Montana Cattle Company, to procure the appointment of a receiver of the assets of said company, to obtain an accounting by said Hammond, to compel the turning over to the complainant of his shares of stock, now in the custody of said company, and held by it as security for the performance of the contract made by the Rumney Land & Cattle Company, and to wind up the concern and distribute its assets. The application for a receiver *pendente lite* was heard upon the bill, and answer in the nature of a cross-bill, which also prays accounting between the parties, and upon affidavits permitted to be filed at the hearing, and an order was made for the appointment of such receiver. The defendants have appealed. It seems to be conceded that the application is here upon its merits.

The bill charges Hammond with fraudulently procuring himself to be given absolute and full management, by resolution of the board of directors, against the consent and protest of the complainant, for the purpose of winding up the affairs of the concern, and with preventing the stockholders from managing its affairs. It alleges that no meetings of the directors have been held, no reports of the condition of the company filed as required by law, and that such condition has not been made known to the stockholders. It is alleged, upon information and belief, that no books of the transaction of the business and affairs of

the corporation have been kept since said Hammond has managed its affairs, except a private memorandum kept by Hammond, which is inaccessible to stockholders and officers, and that he has declined and refused to give true and accurate statements of such matters to the president and other officers of the corporation. It is also alleged that defendant Hammond has declared dividends only when threatened with proceedings for a receiver, and that he has withheld from the complainant his share in said dividends when declared. It avers, on information and belief, that such dividends were withheld from other stockholders, and that Hammond has large sums which he refuses to divide, and is in the habit of loaning for his own profit.

It is a significant fact that this bill is filed by one comparatively small stockholder, and there is no showing (unless it is to be inferred from the affidavit of one Hart, the president) that other stockholders are dissatisfied with the management. There is no allegation of insolvency, and it is not disputed that the complainant, or the Rumney Land & Cattle Company, for whose acts he is claimed to be responsible, is in control of most, if not all, of the property of the corporation, aside from money, and it is claimed that until such cattle are put in condition for market, and sold in the ordinary course of business, its affairs cannot be profitably closed. It is not charged that Hammond is irresponsible, or that any of the property of the concern has been converted by him to his own use, except the unsubstantiated statement that he loans its money. On the other hand, it is obvious that the dispute over the unsettled claims between the two companies is the mainspring of this litigation. We are of the opinion that it is not shown that the interests of the great majority of the stockholders would be subserved by closing up the affairs of this corporation at this juncture, especially if, as alleged in the answer, it has a large claim against Rumney. The mutual claims of these companies can be settled by a direct proceeding for the purpose. We discover no necessity for

a receiver, unless it be to wind up the affairs of the corporation, and we do not see why that cannot be done by the corporation itself, if a majority think it advisable.

The order is reversed, with costs.

The other Justices concurred.

BROCKETT v. SAGENDORPH.

LIMITATION OF ACTIONS — INDORSEMENT ON NOTE — AUTHORITY — EVIDENCE.

Plaintiff, who held defendant's note, wrote him that he would like to indorse upon the note, as a payment, the price of a cloak which plaintiff's daughter had purchased upon defendant's credit, with his consent. Defendant replied: "The cloak is not paid for yet; still, I shall try and take care of it." Plaintiff thereupon made the indorsement, and afterwards wrote defendant, advising him of the fact, to which letter defendant made no reply. *Held*, to support a finding that the indorsement was authorized, so as to arrest the running of the statute of limitations.

Error to Jackson; Peck, J. Submitted April 7, 1898. Decided April 19, 1898.

Assumpsit by Lucius B. Brockett against Daniel P. Sagendorph upon a promissory note. From a judgment for plaintiff, defendant brings error. Affirmed.

D. P. & W. K. Sagendorph (*Richard Price*, of counsel), for appellant.

Williams & Lockton, for appellee.

LONG, J. This action was brought upon a promissory note of $285, dated December 31, 1884, due in three months. It bore the following indorsements:

"Paid January 1, 1886, $38.00.
"Paid January 5, 1886, $1.00.
"Paid June 11, 1886, $15.55.
"Paid November 29, 1889, $25.34.
"Paid November 29, 1894, $35.00."

The plea was the general issue, with notice of the statute of limitations and set-off. The only question in the case is whether the indorsement of November 29, 1894, was authorized by the defendant, and the note thus taken out of the operation of the statute. The suit was commenced February 4, 1897. But two witnesses—the plaintiff and his daughter—were sworn in the case. Letters passing between the parties were also introduced by plaintiff. At the close of plaintiff's case, the defendant asked the court to direct the verdict in his favor. This was refused, and the question was submitted to the jury, who found a verdict in favor of plaintiff for the amount claimed.

It appears that the parties are brothers-in-law. The plaintiff lived in Battle Creek, and the defendant at Jackson. They had not seen each other since 1889. In October, 1894, the plaintiff's daughter visited defendant at Jackson, and, while there, asked the defendant for $50, saying that her father told her to get the money from him, and he would settle for it. Defendant did not have the money, but sent her to a store, where she purchased a coat, and he arranged for the payment with the storekeeper, and it was charged to him. She was directed by the plaintiff to get the money from defendant to purchase the coat. On November 22d plaintiff wrote defendant as follows:

"Anna spoke to me soon after her return from Jackson about the money she had from you, and I meant to have written, but did not find the time when I remembered it. * * * I would like to indorse the money Anna got on your note, if convenient for you; and, if you could help me still further, it would be a great favor. Please send more if you can. * * *"

Defendant answered this letter on November 27, 1894, as follows:

"I am in receipt of your letter of the 22d inst. Anna's cloak is not paid for yet; still, I shall try and take care of it. * * *"

After this letter was received, the plaintiff indorsed upon the note the amount paid for the coat as of November 29, 1894; and he testified that he took the defendant's letter as giving him the authority to do so. It also appears that in March, 1893, plaintiff had written defendant, asking payment of the note. He also wrote defendant in February, 1896, that it must be paid, but heard nothing from him after the letter of November 27, 1894. The plaintiff testified that he wrote defendant after this last indorsement was made, telling him the amount due and the indorsements that had been made, including this indorsement of $35.

We think the court very properly left the question involved to the determination of the jury. They had the right to take into consideration all the circumstances surrounding the case, as well as the letters passing between the parties; and they were told by the court that, if they found from the circumstances, the testimony, and the letters that the defendant did not authorize this indorsement, the plaintiff could not recover.

It is contended, further, that the court was in error in stating to the jury that if the plaintiff notified defendant of the indorsement of November 29, 1894, they might take that fact into consideration, with other circumstances, in determining whether the defendant authorized the indorsement. The claim is that this charge was not warranted by the evidence. We think it was warranted by the record, and that the charge was properly given. The plaintiff's attention having been called to this indorsement, he testified that he "made the indorsement, and afterwards wrote to him in reference to it, telling the amount due, and showing the payments." He was asked: "Including the indorsement of $35?" Answer: "All indorsements."

We find no error in the case, and the judgment must be affirmed.

The other Justices concurred.

SHELDEN *v.* FREEMAN.

MORTGAGES — EXECUTION — CERTIFICATE OF ACKNOWLEDGMENT — PRESUMPTION.

A certificate of acknowledgment of a mortgage, in proper form, raises a presumption of the execution of the paper as stated therein.

Appeal from Saginaw; Wilber, J. Submitted April 8, 1898. Decided April 19, 1898.

Bill by Allan Shelden against Caroline M. Freeman and others to foreclose a mortgage. From a decree for complainant, defendant Freeman appeals. Affirmed.

Hanchett & Hanchett, for complainant.

Trask & Smith (*C. H. Gage*, of counsel), for appellant.

MOORE, J. Complainant filed a bill to foreclose a mortgage. The bill was taken as confessed by all of the defendants except Caroline M. Freeman, who claimed that her signature to the mortgage was a forgery. A decree of foreclosure was granted as prayed, from which decree Mrs. Freeman has appealed.

The only question involved is the question of fact whether Mrs. Freeman executed the mortgage or not. The original mortgage, duly recorded, was offered in evidence. It purported to contain the acknowledgment of Mrs. Freeman, made before a justice of the peace. Such a certificate of acknowledgment raises a presumption of the execution of the paper as stated therein. That presumption has not been overcome by satisfactory evidence in this case. *Saginaw Building & Loan Ass'n* v. *Tennant*, 111 Mich. 515, and cases therein cited.

The decree is affirmed, with costs.

The other Justices concurred.

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McCORMICK HARVESTING MACHINE CO. *v.* CUSACK.

1. SALE — STATUTE OF FRAUDS — PART DELIVERY — SEPARATE TRANSACTION.

   Where an agent for a harvesting machine company, to induce a customer to order a binder, agreed to "put in on the deal," without extra charge, a corn sheller belonging to him, and of which the company had no knowledge, and the order as signed made no mention of the sheller, its delivery by the agent did not operate as a part delivery, sufficient to take the agreement for the purchase of the binder out of the statute of frauds.

2. SAME—ASSUMPSIT FOR PURCHASE PRICE — PASSING TITLE — DELIVERY.

   Assumpsit will not lie for the price of a machine purchased under a written order directing that it be consigned for the purchaser to the care of a local agent of the seller, to be paid for in approved notes on delivery, where the purchaser refuses to execute the notes as agreed, and the property is not turned over to him; there being no such delivery as to pass the title.

Error to Kent; Grove, J. Submitted April 8, 1898. Decided April 19, 1898.

Assumpsit by the McCormick Harvesting Machine Company against George M. Cusack for the purchase price of a binder. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Wolcott & Ward, for appellant.

Maher & Salsbury, for appellee.

MOORE, J. The plaintiff sued the defendant, in an action of *assumpsit*, to recover the price of a binder. The circuit judge directed a verdict for defendant. Plaintiff appeals.

The testimony on the part of the plaintiff was substantially as follows: Mr. Grutsch, a traveling salesman for plaintiff, visited defendant, and urged him to sign an order for a harvesting machine. The witness said:

"I had my order drawn up, ready, trying to have him sign the order, and sell him the machine; showed him the contract, and everything; and he broke out of the binder conversation, and wanted to know if we handled corn shellers; and I told him we did not, but that I had a second-hand corn sheller, that I had in business when I was in the feed business, that I would sell him cheap. He wanted to know what the price would be. I told him three dollars; and he finally said, 'If you will put in the corn sheller on this deal, we will call it a deal.' I told him we would do it; and it was getting dark and late, and I says, 'We will throw in the corn sheller, and make the deal.' I handed him the order, and he signed it, and I gave him a copy of the order, and we went home."

The order signed was as follows:

"McCormick Harvesting Machine Company's Order Blank.

"Give each purchaser a duplicate of this order. Delivered on cars in Chicago.

"McCormick Harvesting Machine Company will ship for the undersigned, any time before the coming harvest, one of their latest improved 6-ft. cut binder, carrier, and trucks, consigned to the care of Edw. Stoddard, at Grand Rapids; the undersigned agreeing on delivery of the machine to pay the McCormick Harvesting Machine Company $125, in the following manner: To execute approved notes for the sum of $30, payable on the 1st day of November, 1897; $40 payable on the 1st day of November, 1898; $40 payable on the 1st day of November, 1899; $15 allowed on one old Wood binder,—with interest thereon at the rate of 6 per cent. per annum from date, July 1st, 1898, next, until due, and 8 per cent. thereafter until paid, and agree to make settlement as above stated upon delivery of machine. The machine to be warranted as per the following warranty, without addition or erasure, a copy of which I have this day received: The machine is warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate

notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine by the undersigned.

"Dated the 11th day of January, 1897.

"GEORGE M. CUSACK."

The corn sheller was afterwards delivered to defendant. It was a corn sheller owned by Mr. Grutsch, and not by the plaintiff, and at this time was at Grand Rapids. The witness says that the price of the corn sheller was afterwards passed to his credit, and that he got the money for it. The order given by defendant was not sent to Chicago.

Mr. Stoddard was sworn as a witness, and testified that the first time he ever saw defendant was about the 1st of June, when he came into the office at Grand Rapids, and said that he wanted to countermand his order for a binder. "I said to him, we could not do it; that we had already received his machine, and had it there for him any time." Afterwards this witness received a written countermand of the order from defendant, which had first been mailed to the plaintiff at Chicago, which was forwarded by it to Mr. Stoddard. It was dated June 12, 1897. The witness said the machine was still at his place at the time of the trial; that defendant had never been to get it, and had never signified his willingness to take it. The testimony of this witness was that the machine was shipped from Chicago with 13 or 15 others; that they were not put together when shipped; that, after the machines arrived in Grand Rapids, they were set up, and one of them was set apart in one corner of the room; that it was not labeled with the name of the purchaser, and there was nothing to distinguish it from any other machine; that it was not placed on board the cars in Chicago, consigned to Mr. Cusack. June 12, 1897, defendant sent a three-dollar postal order to Mr. Grutsch, in a letter; say-

ing it was in full payment for the corn sheller, and that he had countermanded the order for the binder. Before defendant saw Mr. Stoddard, he notified Mr. Grutsch, as early as in April or May, that he had countermanded his order, and should not take the machine. June 18th, Mr. Grutsch visited defendant, with notes drawn to comply with those described in the order, and requested him to sign them. This he refused to do. At this time the postal order for $3 was returned to defendant by Mr. Grutsch, and defendant produced it upon the trial.

It was the claim of defendant that, when the order was given, he was told by Mr. Grutsch that he could countermand the order any time before harvest, by simply seeing Mr. Stoddard, in Grand Rapids, and telling him he did not want the machine. He also claimed that Mr. Grutsch told him it would help him very much about sales in that neighborhood if he would sign the order, and that, if he would sign it, Mr. Grutsch would give him the corn sheller, and that he relied upon these statements when he gave the order. He testified that he notified Mr. Grutsch the fore part of April, and Mr. Stoddard a week or two later, that he did not want the machine, and would not take it, and that later he saw Mr. Stoddard again, and told him the same thing, and on the 12th of June sent a written countermand to Chicago. He denied that at the time he saw Mr. Stoddard he was told the machine was on hand. There is nothing in the record to show that, before Mr. Cusack undertook to countermand his order, he had any knowledge that any machine had been consigned for him to Mr. Stoddard, at Grand Rapids; nor is there anything in the record to show that any machine was ever pointed out to him as the machine which was intended for him, or that he ever saw any machine which he was told was intended for him, or that he was ever requested to make a selection of those shipped from Chicago, one of which, it is said, was intended for him.

After the testimony was all in, Judge Grove concluded that the question involved was one of law. He concluded

that the agreement in relation to the corn sheller was a distinct transaction from the order for a sale of the machine, and found that there was no delivery of part of the goods mentioned in the order, so as to take the transaction out of the statute of frauds. His further reasons for directing the verdict are stated by him as follows:

"I do not believe that it was the intention of these parties that there should be any delivery of the machine into the actual possession and control of the defendant until he complied with his part of the agreement, by giving approved notes; and that he refused to do. It is a part of the order that the defendant agrees on delivery of the machine to pay by giving those three notes. Now, he could not take the machine, against the consent of Mr. Stoddard, acting for the plaintiff, without giving those notes. I do not think there was a delivery.' But, whether the title had passed under the contract by its acceptance, it was accepted, in my judgment, by the shipment to Mr. Stoddard, at Grand Rapids. If the order had been forwarded to Chicago, and this machine, pursuant to that order, had been sent just as the car load was sent,—directed to Mr. Stoddard as consignee,—it might be said that there was a delivery; it might be said that the defendant himself designated the manner and place of delivery, as well as the time, and that he made Mr. Stoddard his agent to receive it here at Grand Rapids. Still, he could not have got the property unless he completed his part of the agreement by giving approved notes. I understand it to be a general rule that where the title has not passed, and there is a performance—a full performance—on the part of the vendor, and a readiness to deliver and pass the title, and a refusal on the part of the vendee to carry out his part of the contract, an action may be maintained against the vendee for damages on account of the breach of the contract. That is not this form of action. This is an action for the price. If the title had passed; if this were a case where the property had gone into the possession and control of the defendant, and he refused to give the notes,—that is, he refused to give security (I take it, by the term 'approved notes,' some security was mentioned),—if he refused to give it, that an action for the price might have been presently maintained, notwithstanding the rule that where goods are sold on credit, and there is a refusal on the part of the vendee to accept, the plaintiff cannot sue

(the vendor cannot sue) for the price until the credit expires, but must sue the defendant for the breach. And I think it was held (it is in Michigan, at least) that where there is an agreement for credit, and there is to be security given by the vendee, and he refuses to give the security, an action may be maintained for the price payable at once. I am inclined to hold in this case that it was the intention of the parties that the title to this machine should pass on delivery to the defendant, at Grand Rapids, on his paying for it in the manner provided by the contract,—by executing approved notes,—and that an action for the price, under all the circumstances of this case, cannot be maintained. That will be your verdict, gentlemen of the jury, —verdict for the defendant, of no cause of action."

It is urged by the appellant that the court erred in holding that the delivery of the corn sheller was not a delivery of part of the goods, and sufficient to take the case out of the statute of frauds. The corn sheller did not belong to the plaintiff. At the time of the alleged contract there is nothing to indicate that the plaintiff knew that this particular corn sheller was in existence. No mention was made of it in the order. So far as it was concerned, it was a transaction, not between the plaintiff and defendant, but between Mr. Grutsch and defendant. The court did not err in so holding.

Speaking for myself, I think there was no acceptance of this order. It is not shown by the evidence that the plaintiff ever shipped for Mr. Cusack, consigned to the care of Edward Stoddard, a binder, as requested in the order. The most that can be said of the transaction is that a quantity of machines were shipped to Mr. Stoddard, one of which he set apart for defendant. Mr. Stoddard testified that the company was never directed to ship a machine to Mr. Cusack, in his care. It, however, is not necessary to pass upon that feature of the case, as we are all agreed that the circuit judge was right in holding that there had been no such delivery of the machine as to vest title in the defendant. It will be observed that plaintiff, when the order was given, did not agree to fill the order. It was not bound to do so, and, if it had failed to send the machine, defendant would have been remediless. The

order provides that upon the delivery of the machine the notes shall be given. No machine had been consigned to defendant. None had been pointed out to him as his. If he had wanted to insist upon having a machine, and for any reason Mr. Stoddard had refused to deliver him one, how could he have obtained a machine by bringing replevin? Or, if he had insisted upon having the machine which Mr. Stoddard says was there, could not Mr. Stoddard have refused to deliver it to him until he had given approved notes? We do not think there had been such a delivery that title passed to defendant, and, before plaintiff could maintain *assumpsit* for the price of the machine, the title must vest in the vendee. *Ganson* v. *Madigan*, 13 Wis. 67. See *Yockey* v. *Norn*, 101 Mich. 193 (26 L. R. A. 145). Before the delivery of the goods will be sufficient to take the contract out of the statute of frauds, where such an order as this one is given, some of the goods must be received and accepted by the vendee or his agent. In 8 Am. & Eng. Enc. Law, at page 730, it is said:

"To the existence of actual receipt by the buyer, it is essential that there should be a relinquishment by the seller of his vendor's lien, coupled with a taking of the goods, in whole or in part, by the buyer, or an agent with his authority, with the intention of maintaining a possession adverse to the seller."

Before defendant had any notice that the goods had been shipped from Chicago, he notified plaintiff's agent that he would not receive them. On the 12th of June he notified plaintiff, in writing, that he would not receive them; and it was not until six days later that plaintiff indicated to him that it would not insist upon approved notes before it would deliver the machine, or gave any intimation that it relinquished its lien as vendor. The defendant all the time has declined to take any possession of the machine, and it cannot be said that he has taken any possession adverse to the seller.

Judgment is affirmed.

The other Justices concurred.

PEOPLE, *ex rel.* RYAN, *v.* VAN ANDEN.

1. MUNICIPAL OFFICERS — TENURE — CONSTRUCTION OF CHARTER.
Act No. 374, Local Acts 1897, revising the charter of Grand Rapids, provides (title 2, § 6) for the appointment of a building inspector on the first Monday in May after the passage of the act, and each year thereafter, who shall hold his office for one year. Title 12, § 33, provides that all the officers of the city, in office at the passage of the act, who were appointed for a longer period than till the first Monday in May thereafter, shall continue in office until the term for which they were appointed expires by limitation, "except as herein otherwise provided." *Held*, that the office of building inspector was within the exception.

2. SAME — PRESIDENT OF COUNCIL — APPOINTMENTS IN MAYOR'S ABSENCE.
Where a charter provides for nominations to city offices by the mayor, subject to the confirmation of the common council, and confers upon the president of the council the right to discharge the municipal duties of the mayor during the latter's absence, a nomination to office by the president of the council, made and confirmed during the mayor's absence from the State, is valid.

Case made from Kent; Adsit, J. Submitted April 8, 1898. Decided April 19, 1898.

Quo warranto proceedings by the people, on the relation of William J. Ryan, against Charles H. Van Anden, to try the title to the office of inspector of buildings of the city of Grand Rapids. Relator had judgment, and respondent assigns error. Affirmed.

Charles W. McGill, for appellant.

Taylor & Eddy, for appellee.

HOOKER, J. An information in the nature of a *quo*

warranto was filed in the circuit court to try the respondent's title to the office of inspector of buildings in the city of Grand Rapids. The record shows that on June 15, 1896, the mayor of Grand Rapids "nominated and appointed" the respondent to the office of inspector of buildings for the term ending the first Monday in May, 1898, subject to confirmation by the council, which was duly made. This was under a provision of the city charter which made the term of said office the period of two years. In the winter of 1897 the charter was amended (Act No. 374, Local Acts 1897), and it is claimed that the term was reduced to one year, and that it had the effect to terminate respondent's right to the office on May 1, 1897. The provisions supposed to affect the question are the following:

"The mayor shall, on the first Monday of May after the passage of this act, or within a reasonable time thereafter, and on the first Monday in May of every succeeding year, or within a reasonable time thereafter, nominate a building inspector, who shall hold his office for one year, and until his successor is appointed and qualified. * * * All such nominations shall be subject to confirmation by a majority vote of all the aldermen-elect of the common council." Title 2, § 6.

"All the officers of the city who may be in office at the passage of this act shall continue to exercise the duties of their respective offices until the first Monday in May thereafter, and until their successors shall have been elected or appointed and duly qualified: *Provided*, they shall not have been elected or appointed for a longer period, but, if they were elected or appointed for a longer period, they shall continue to exercise the duties of their respective offices until the term for which they were elected or appointed shall expire by limitation, except as herein otherwise provided." Title 12, § 33.

This revision of the charter was given immediate effect. On May 3, 1897, the mayor nominated the respondent as inspector of buildings for the period of one year after that date, and until a successor should he nominated, confirmed, and qualified. The council refused to confirm this nomina-

tion, and again, on June 1st, the respondent was nominated, but failed of confirmation. Subsequently, and while the mayor was absent from the State, the president of the council, while acting mayor, nominated the relator, and his nomination was confirmed by the council at a regular meeting. On the same evening, after the council adjourned, the president of the council filed his approval of said confirmation.

The questions raised by counsel are: *First.* Did the revision of the charter change the term of office of the respondent? *Second.* If so, had the president of the council the authority to nominate the relator? The power of the legislature to shorten respondent's term of office is not questioned, and it is conceded that section 6, tit. 2, hereinbefore quoted, would have that effect but for the provision of section 33, tit. 12, which is said to continue him in office until the expiration of the time for which he was appointed; and it is urged that this provision would be meaningless unless given that effect. It is doubtless true that this language is meaningless unless it has the effect to relieve one or more of the officers of the city from the provisions of section 6; but, on the other hand, the words "except as herein otherwise provided" are meaningless unless they render the preceding words of said section 33 inapplicable to one or more officers whose terms would thereby be preserved. Section 33 is a saving clause as to some offices, and would be as to all but for the words "except as herein otherwise provided." Counsel for the relator call attention to certain officers whose terms were within the saving clause, and we think the respondent's office was clearly within the exception, as section 6 plainly requires that his successor should be appointed in May, 1897.

Section 2, tit. 3, of the revised charter, provides:

"The common council shall, on the first Monday in May in each year, or within ten days thereafter, elect by ballot one of their number, who shall be known as president of the council, and who shall possess the same powers

and perform and discharge the municipal duties of the mayor, during the absence, inability, death, resignation, or removal of the mayor."

We are of the opinion that this confers upon the president all of the power and authority of the mayor during the period of his absence from the State. In this case the mayor was absent from the State for upwards of two weeks, and had announced an intention to be absent three weeks. He did not, in fact, return until after the confirmation and approval. Whether or not the approval of the confirmation was necessary we need not discuss, because, if necessary, it was seasonably announced.

The judgment is affirmed.

The other Justices concurred.

KIRKPATRICK *v* BESSALO.

116 657
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1. PAYMENT—NEGOTIABLE PAPER.
   The taking of an acceptance for the price of goods sold does not, in the absence of special agreement, amount to a payment of the debt.

2. CORPORATIONS—LIABILITY OF STOCKHOLDERS FOR GOODS SOLD.
   1 How. Stat. § 3940, making each of the stockholders and directors of an incorporated co-operative association individually liable for goods sold the corporation "to the amount of his capital stock therein, and no more," imposes a liability equal to and over and above the full-paid value of the stock held.

Error to Houghton; Haire, J., presiding. Submitted April 8, 1898. Decided April 19, 1898.

Proceedings by Allen Kirkpatrick against Frank Bessalo under 1 How. Stat. § 4886 *et seq.*, to enforce the in

dividual liability of defendant for goods sold to a corporation in which he was a stockholder. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

A. T. Streeter, for appellant.

Dunstan & Hanchette, for appellee.

LONG, J. The Mechanics & Miners' Co-operative Association is a corporation organized under chapter 116, 1 How. Stat., and in 1895 was doing business at Red Jacket, this State. The capital was divided into shares of the par value of $10 each. The defendant was a stockholder, owning two shares. The largest amount of stock held by any one stockholder was four shares. Section 6 of the organic act (1 How. Stat. § 3940) provides:

"Stockholders and directors shall be severally and jointly liable for all debts for labor performed for said corporation; and for all goods, wares, and merchandise sold and delivered to any such association, each of the stockholders or directors thereof shall be held liable to the amount of his capital stock therein, and no more."

Sections 4886 and 4887, 1 How. Stat., provide the manner of enforcing such liability. The plaintiff is a wholesale commission merchant, and sold and delivered goods to the association in 1894 and 1895. On June 21st he stopped selling goods to the association, and took for the balance of his account, which included goods sold and delivered from May 13th to June 14th, two acceptances, each for one-half of the amount then due, together with 8 per cent. interest, one payable in August, and one in September, of that year. Neither of these acceptances being paid, plaintiff commenced two suits in justice's court in January, 1896, against the association; and on February 7th judgments were taken for the amount of the acceptances in each case, with interest from June 21, 1895, to the time of the trials. Transcripts of these judgments were taken to the circuit court. Executions issued thereon

out of the circuit court, which were returned unsatisfied. Thereupon proceedings were taken to enforce the claims under the above statute against the stockholders. The cause was tried as against this defendant before a jury, and the court directed verdict in favor of plaintiff. Defendant brings error.

Counsel for defendant contends that there was evidence to go to the jury on several questions of fact. We find no conflict of evidence in the case. The plaintiff showed that he sold goods to the association; and it was conceded by counsel for defendant that the goods were sold to the amount of these acceptances. It was shown that these acceptances were never paid, and that the suits were brought and the judgments were obtained for the identical goods that were sold between May 13 and June 21, 1895. It is contended that the question whether the acceptances were received as payment was one of fact, and that the evidence was conflicting upon that question. There was, however, no conflict of evidence in this regard. The plaintiff testified that no talk was had that the acceptances should be treated as payment, and this was not contradicted. In *Kirkpatrick* v. *Mehalitch*, 113 Mich. 631, the same contention was made, and it was held, not only that the judgments rendered before the justice were for goods, wares, and merchandise, within the meaning of this statute, but that the taking of the acceptances did not extend the time of payment, and did not release the stockholder. That case grew out of the same judgments before the justice, and was a proceeding to enforce the payment against Mehalitch as a stockholder.

But counsel now contends that the manner of dealing between the parties must be considered as bearing upon these questions. It appears that John Phillips was the manager and purchasing agent of the association between the 1st day of January, 1895, and the following July. He was absent for a time; and E. C. McLean, the bookkeeper, acted in his stead during that time, and made the purchase of the goods in controversy. The board of

directors knew of these purchases. The matter of the sale of the goods and the giving of the acceptances was talked over by the board of directors. The board knew they were time acceptances. The goods sold to the association up to January 10, 1895, were sold on a cash basis, each invoice being settled for separately as soon as the goods were received by the association. Beginning with February, 1895, settlements were made monthly for goods sold during the month prior to the pay-day on which settlement was made. The arrangement was that the account should run from pay-day to pay-day, and, when the account had thus run a month, an acceptance was to be given for it, running from 30 to 90 days. It is claimed that it was a question for the jury to determine whether the arrangement so claimed to have been made was ever made. We find nothing in the record in any wise contradicting this claim. The fact is not in dispute that on June 21, 1895, the plaintiff stopped selling goods to the association, and that acceptances were made for the amount then remaining unpaid. That this was known to the directors is not in dispute; and it is not shown by the record that these acceptances were taken as payment. The suits upon which the judgments before the justice were rendered were brought for the goods, wares, and merchandise sold.

There is but one other question raised which we deem necessary to discuss. Counsel for defendant asked the court to charge the jury: "A stockholder can be held liable to the amount of his capital stock in the association, and no more. Therefore, if you find from the evidence that the defendant had fully paid his stock, he has no other liability, and you should find for him." This was refused. The defendant held two shares, and the court directed the jury to find for the plaintiff the sum of $20. The claim is, therefore, that, this stock having been fully paid, no further liability attached. This statute (section 6 of chapter 116) as to the liability of stockholders cannot have the interpretation contended for. The statute means that each stockholder shall be liable, after execution re-

turned unsatisfied against the association, for goods, wares, and merchandise purchased, to the amount of the capital stock held by him, and no more. Under this statute, the stockholders and directors are jointly and severally liable for all debts for labor performed for the corporation; while for debts for goods, etc., they are each liable only to the amount of the capital stock held by each. This has no reference to the moneys arising from the capital stock paid in, only as fixing the extent of the liability. The moneys paid for the stock become a portion of the corporate property, and it would be absurd to say that it was these very moneys for which each stockholder might be liable after execution returned unsatisfied against the corporation. What the statute means is that each stockholder shall be liable for goods, etc., over and above the stock held, to an amount equal thereto. This principle was settled in *Pettibone* v. *McGraw*, 6 Mich. 440, and the same reasoning applies to the present case.

We find no error in the record. The judgment must be affirmed.

The other Justices concurred.

KIRKPATRICK *v.* COSTO.

CORPORATIONS—LIABILITY OF STOCKHOLDERS.
Case ruled by *Kirkpatrick* v. *Bessalo, ante,* 657.

Case made from Houghton; Haire, J., presiding. Submitted April 8, 1898. Decided April 19, 1898.

Proceedings by Allen Kirkpatrick against Joseph Costo under 1 How. Stat. § 4886 *et seq.*, to enforce the individual liability of defendant for goods sold to a corporation in which he was a stockholder. Plaintiff had judgment, and defendant assigns error. Affirmed.

A. T. Streeter, for appellant.

Dunstan & Hanchette, for appellee.

LONG, J. This case was heard with that of *Kirkpatrick* v. *Bessalo, ante,* 657. The questions there discussed and decided are applicable to the present. The question of the extent of the liability of a stockholder in the association is more fully argued in the present case, but, as we have examined the briefs in the present case in connection with the *Bessalo Case*, we shall not discuss the question here. The present case was heard before the court without a jury, and a judgment found against the defendant for $10; he holding one share of stock. The case grows out of the same judgments as in the *Bessalo Case.* We find no error in the record, and the judgment is affirmed.

The other Justices concurred.

HOUGH v. AUDITOR GENERAL.

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TAXES—SALE OF LAND—VACATION.

A sale of land for State and county taxes will be set aside at the instance of a mortgagee thereof, on payment by him of the amount of such taxes, with interest and charges, where he attempted to pay to the city treasurer, within the time prescribed by law, all taxes standing against the land, and failed to pay the State and county taxes because he was misled by that officer into a belief that the amount paid by him included all of the taxes; and this even though the roll containing the State and county taxes had not yet been received by the treasurer.

Appeal from Ingham; Person, J. Submitted April 6, 1898. Decided April 19, 1898.

Petition by Carrie Mansfield Hough against the auditor general and G. Burton Harris to set aside a tax sale. From a decree for petitioner, defendant Harris appeals. Affirmed.

Moore & Goff (*Edward Cahill*, of counsel), for petitioner.

Jason E. Nichols, for appellant.

LONG, J. This is a proceeding upon a petition filed to set aside a decree of the circuit court, in chancery, of Ingham county, rendered in a tax proceeding, so far as it affects the lands of petitioner, and to decree a release of record of all claims of defendant Harris under a deed made to him by the auditor general.

The lands are situate in the First ward of the city of Lansing. In 1886 D. W. Van Auken was the owner, and that year gave a mortgage thereon to Betsey Mansfield. This mortgage was foreclosed, and sale made February

11, 1893, to Betsey Mansfield. She came into possession of the property in February, 1894, and died February 10, 1895, leaving a last will, and the parcel in controversy was deeded to petitioner. The assessment roll and tax roll of the First ward of the city of Lansing for the year 1892 showed that the land was assessed to the owner at $3,700. The warrant to the tax roll was dated December 1, 1892. No tax was assessed upon the property for that year to the mortgagee. Mr. William A. Moore, of Detroit, the agent and attorney for Betsey Mansfield, after he had advertised the Van Auken mortgage for foreclosure, wrote to E. R. Merrifield, at Lansing, in the latter part of 1892, requesting him to ascertain if there were any taxes unpaid on the Van Auken property; that he wished to pay them, and include them in the sale. Mr. Merrifield being sick, his son went to the city treasurer's office, and made inquiry as to the amount of the taxes, on December 1st. He wrote Mr. Moore on that day, as follows: "The city treasurer has just informed me that the taxes on the Van Auken property must be paid by Saturday, December 3d. The amount of the same is $70.20. Perhaps you had better send me a check, and I will pay them, and send receipt to you." The check was sent the next day, and on that day, December 2, 1892, Mr. Merrifield went to the city treasurer, and paid the taxes, and received a receipt therefor. This was for the taxes for the year 1892. On December 5, 1892, Mr. Moore also received a receipt from the county treasurer for the taxes for the year 1891. When Mr. Merrifield paid the taxes for the year 1892, on December 2d, the city treasurer did not say anything as to there being any other taxes due at that time.

It appears that all taxes in the city of Lansing, except the State and county taxes, are paid upon a roll made during the month of July. These had not been paid, and it was this part only that the city treasurer included in his statement to Mr. Merrifield as due and unpaid. The State and county taxes were not included in the statement. Under the city charter, the assessor is required to deliver

the tax roll, with his warrant attached, to the city treasurer, at the time prescribed by law for the delivery of the township rolls to the township treasurer; and that time is fixed by the general law as "on or before the 1st day of December." It appears, however, that, at the time Mr. Merrifield paid these taxes for the year 1892, the tax roll had not been placed in the hands of the city treasurer, and the treasurer knew that the State and county taxes for that year were not included in the statement; yet he said nothing to Merrifield about those taxes, though he knew he should have had the roll on the day before. Mr. Merrifield testified that when he went to the city treasurer's office, on December 2d, he stated to the treasurer that he wanted to pay the taxes on the Van Auken property. The lands were returned for the State and county taxes for 1892, and sold, and bid in by defendant Harris, and in 1896 a deed given therefor to him by the auditor general. Upon the discovery of the fact that the lands had been deeded, Mr. Moore offered to pay to Mr. Harris the sum of $100 for a release of his claim, which was refused.

On the hearing in the court below, the court decreed that the sale be set aside, on condition that petitioner pay the unpaid taxes for 1892, with interest and charges to date of decree. The court below, in a written opinion, found that Mr. Moore in good faith intended and attempted to pay all taxes standing against the land on December 1, 1892, and that he was deceived and misled by the statement of the city treasurer as to the State and county taxes. We think this conclusion is supported by the facts and circumstances shown by this record. Under such facts the mortgagee did all that was required of her. The case comes within the ruling of this court in *Hand* v. *Auditor General*, 112 Mich. 597. See, also, *Forrest* v. *Henry*, 33 Minn. 434.

The decree below must be affirmed, with costs in favor of petitioner.

The other Justices concurred.

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VISSCHER *v.* OTTAWA CIRCUIT JUDGE.

TAXES — SALE OF DELINQUENT LANDS — NOTICE — PUBLICATION IN FOREIGN LANGUAGE.

Act No. 162, Pub. Acts 1895, providing for the publication of the petition and order of hearing in proceedings for the sale of lands delinquent for taxes, contemplates a publication in English, in a newspaper printed in the English language; and anything less than that is insufficient to confer jurisdiction upon the court.

Mandamus by Arend Visscher, prosecuting attorney of Ottawa county, to compel Philip Padgham, circuit judge of said county, to vacate an order dismissing the petition of the auditor general for the sale of lands delinquent for the taxes of 1895. Submitted April 19, 1898. Writ denied April 20, 1898.

Arend Visscher, in pro. per.

Charles E. Soule, for respondent.

PER CURIAM. The auditor general filed his petition in the circuit court for the county of Ottawa, in chancery, for the sale of lands delinquent for taxes for the year 1895. The same came on to be heard upon objections filed by certain landowners, and the court entered an order dismissing the petition, and denying the decree prayed for. The prosecuting attorney for the county applies for the writ of *mandamus* to compel the circuit judge to vacate this order, and grant the decree. Upon denying the petition, the learned circuit judge filed a written opinion, of which the following are the material portions:

"The respondents further objected to any decree or sale of any lands for taxes in the tax record before the court, for the reason that the court has no jurisdiction to render any decree for the sale of lands for taxes as contained in the said tax record. The main reason relied upon to show

that this court obtained no jurisdiction to decree sale of any of these lands in said tax record is that the auditor general's petition, and the order of the court thereon made, were not published as required by law, the same having been in De Grondwet, a newspaper published in the Holland language, and not in the English language. It is contended that the law contemplates publications of this nature in the English language only.

"The requirement of the tax law, being section 66, Act No. 206, Pub. Acts 1893, as amended, is as follows: 'The auditor general shall cause a copy of said order and a copy of said petition to be published at least once in each week for four successive weeks next prior to the time fixed for the hearing thereof, in some newspaper published and circulating in the county where such petition is filed, to be selected by the auditor general. Said order and petition shall both be published in the same newspaper, the order immediately preceding the petition. * * * The cost of such publication shall be paid by the State on the warrant of the auditor general, not exceeding forty cents for each parcel of land advertised. * * * The auditor general shall not pay for any such publication until satisfied that it has been made according to law. The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon, and of the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest, and charges thereon.'

"By the law of this State, all legal proceedings must be in the English language.' 2 How. Stat. § 7251.

"It will be noticed that the tax law (section 66, above quoted from) requires the auditor general to select the newspaper in which such publication is had. By referring to the files in the case, I find the following certificate: 'I hereby certify that on the 1st day of September, 1897, I designated De Grondwet, published at Holland, Michigan, in the county of Ottawa, a newspaper published and circulating in said county of Ottawa, as the newspaper in which the "order and petition" in the above-entitled cause are to be published, together with the descriptions of the lands assessed in said year or years (which said lands are delinquent for the taxes of said year or years), and that

such designation was accepted by the publisher of the said De Grondwet on the 3d day of September, 1897.

"'ROSCOE D. DIX, Auditor General.

"'Dated at Lansing, this 15th day of September, 1897.'

"This was the only paper in which this publication was had in Ottawa county. The affidavit of the publisher on file shows this, and it is conceded by the prosecuting attorney, who appears for the State, that De Grondwet is published entirely in the Holland language, except this petition and order, and the lands therein described. It is urged with much force by the objectors to these proceedings that a notice published in this newspaper, circulating as it does among the Holland people, would not be read by the English-speaking people to the extent it would otherwise be if printed in an English newspaper. Many of the Holland people could not read it, and many English-speaking people would not see it, because not in an English paper. The real object of the publication being to acquaint the people of the proceedings about to be taken, and the great mass of our people speaking and reading only the English language, the object of the law is defeated by its publication in a Holland newspaper. If the publication of these tax sales had been printed in the Holland language, then the Holland readers, at least, would have been apprised of the proceedings proposed to be taken; but the publication *in English* in a Holland paper prevented the Hollander from reading it, and, the newspaper itself being in the *Holland tongue*, prevented it being read by the English-speaking people, as they might not take the paper. The question is not new in this State. It has been before our Supreme Court in two cases at least, where the question has been ruled against such a publication, and it was held substantially that such publication was not in conformity to the statutes of the State. *Schaale* v. *Wasey*, 70 Mich. 414; *Auditor General* v. *Hutchinson*, 113 Mich. 245. I think these cases dispose of this case, and that this court gets no jurisdiction to render a decree for the sale of delinquent tax lands for the May sales of 1898.

"This question might be disposed of by simply sustaining the objections made by these two objectors in this matter, and by letting the balance of the descriptions be sold, where no specific objections have been filed; but I think that, in justice to the people of Ottawa county, the whole list should be set aside, for, if the sales should be

made, and purchasers should pay their money for different parcels, such sales would convey no title to the lands, and the result would be that each purchaser would eventually demand his money back from the State, which would be paid to him, with interest at the rate of 8 per cent. per annum from the time of the sale. All this would be charged back to the county by the auditor general, to cover the portion originally assessed for county and township taxes and the interest thereon. The sale would then have to be again gone through with, and this extra and unnecessary expense saddled onto the county. The auditor general can make another petition, and have it properly published, and these taxes collected as the law requires.

"The original petition filed in this case will be dismissed, without prejudice, the order vacated, and a decree will be denied."

We think the decision of the circuit judge upon the facts found by him was correct, and the writ will be denied.

HOLTON v. HOLTON.[1]

1. DIVORCE—COLLUSION—EVIDENCE IN FORMER SUIT.
   It being the duty of courts to see that no divorce is obtained by collusion between the parties, the circuit judge may, in a suit in which defendant fails to appear, order in evidence, and consider, the pleadings and proofs in a former suit between the same parties, in which a decree was denied.

2. APPEAL—RECORD—OMITTED EVIDENCE.
   Affidavits claimed to have been introduced in the trial court cannot be considered on appeal where they are not made a part of the record.

[1] Rehearing denied September 20, 1898.

Appeal from Gratiot; Daboll, J. Submitted April 5, 1898. Decided May 6, 1898.

Bill by Thomas Holton against Mary Holton for a divorce. From a decree dismissing the bill, complainant appeals. Affirmed.

Newel Smith, for complainant.

Edwin H. Lyon, for defendant.

GRANT, C. J. Complainant filed a bill for divorce, on the ground of desertion. Defendant did not appear, and an order *pro confesso* was entered. Proofs were taken in open court, and consisted of the testimony of complainant and one Arnold, a neighbor. Complainant testified that they were married December 3, 1894; that they lived together seven or eight weeks, when she left him; that she had never returned to live with him; that she left of her own accord; that, immediately after, he requested her to return, and she refused. Arnold testified that he knew about the time she left; that she had never been back to his knowledge; and that he did not know any of the circumstances surrounding her leaving, or why she left. After defendant left her husband (but when does not appear), she filed a bill for divorce against him, charging extreme cruelty. He answered, and claimed the benefit of a cross-bill. Proofs were taken, and both bills dismissed. The presiding judge, Daboll, heard and decided that case. He ordered in evidence, and considered, the pleadings and proofs in that case in deciding this one, and dismissed the bill. Complainant appeals.

1. It is insisted that the court had no right to order in evidence, and to take into consideration, the records in the other case. We think that the court was justified in so doing. The public are interested in divorce proceedings. It is the duty of courts to see that there is no collusion between the parties, and to refuse a divorce when satisfied that there is. It is within the power of the court,

on its own motion, to order other witnesses than those produced by the parties to be subpœnaed and examined, in order that it may ascertain the truth or falsity of the charges upon which a divorce is asked. Complainant had not the absolute right to have his case submitted on such testimony as he saw fit to introduce. Complainant had carefully avoided any reference to the circumstances under which his wife left him. He had fixed the time of her desertion to commence on the occasion when she had charged him with extreme cruelty, for which she claimed the right to a divorce in the former suit. In that suit both testified, and their testimony is in the present record. They had a quarrel, in which he assaulted her, and struck her with such force as to break her arm. The judge evidently found that there was blame on the part of both, for he granted a divorce to neither. From the testimony of both parties given upon that hearing, we think the court was correct in holding that she was not guilty of desertion.

2. Complaint is made that, while all the records of the former suit were introduced, the court below, in making up the record for this court, did not put in all the testimony, but left out certain affidavits alleged in the brief to have been made at the time of the trial of the former case. Counsel has furnished copies of these affidavits. They appear to be *ex parte*, are not certified to be copies of originals, and there is nothing to indicate that they were introduced or received in evidence in the former case, or that complainant sought to have them, or any more of the testimony, inserted in the record. If the judge refused to insert material testimony, complainant should have taken the proper steps to have it inserted in the settlement of the case. We cannot consider them, as they are not a part of the record.

Decree affirmed, with costs.

The other Justices concurred.

SEVENTH-DAY ADVENTIST PUBLISHING ASSOCIATION *v.* BOARD OF STATE AUDITORS.

STATE PRINTING—AWARD OF CONTRACT—LOWEST BIDDER.

The board of state auditors, in determining who is the lowest responsible bidder for the state printing, may take into consideration the fact that the doing of the work away from the capital would entail additional expense to the State.

Mandamus by the Seventh-Day Adventist Publishing Association to compel the board of state auditors to award to relator the contract for the state printing. Submitted April 5, 1898. Writ denied May 6, 1898.

O. S. Clark (*Jesse Arthur*, of counsel), for relator.

Fred A. Maynard, Attorney General (*Cahill & Ostrander*, of counsel), for respondent.

HOOKER, J. The relator is owner of an extensive printing and binding establishment at Battle Creek. It has petitioned this court for a *mandamus* to compel the board of state auditors to execute a contract for the state printing with the relator, upon the claim that in a recent competition it was the lowest responsible bidder for such work, and was found to be such by the respondent. These claims are denied by the answer, which alleges that relator was not the lowest responsible bidder, and that the board so decided. The answer admits that the bid of relator for the work was $3,759.43 less in amount than that of the Robert Smith Printing Company, its competitor, but that relator's bid contemplated that the work would be done in Battle Creek, while that of the Robert Smith Printing Company was made with the expectation that the same should be done in Lansing; and the respondent alleges that, if the work should be done in Battle Creek, it would not only be attended with inconvenience and delay, but

also with expenses to the State in the way of transportation, establishing a warehouse for paper at Battle Creek, and providing a custodian of the same, proof-reading by different persons, representing each of the several departments, etc., which would increase the cost of printing to the State more than the difference between the bids. We must take this answer to be true, as no issue has been made upon it; and, if we do, we must find that the relator was not the lowest bidder. We cannot assent to the proposition that the contract should be awarded to the bidder who makes the lowest price per thousand ems and per token, regardless of the place where the work is to be done, and the expenses attending upon the transportation to and from another city, and the other expenses alleged to be incident to work done at a distance from the capital.

It is argued that the board had no right to assume that relator did not intend to do such work at Lansing. The notice and proposal are not in the record, but the petition describes in detail the facilities of the relator at Battle Creek, and its letter contained in the brief states the plan to be to have as much of the work as is necessary done at Lansing, from which the inference is natural that all was not expected to be done there. This letter, however, does not seem to be within the record.

Counsel contend that the law contemplates that the work shall be done at the capital, and that the board may properly disregard any bid which involves the taking of the work elsewhere; but we find it unnecessary to pass upon this question.

The writ is denied.

The other Justices concurred.

JORDAN *v.* NEWTON.

RAILROAD-AID NOTE—CONSIDERATION—CONDITION PRECEDENT.

A promissory note reciting that it is given in consideration of the construction of a certain railroad, and the completion and operation of the same by a specified date, makes the provision as to time a condition precedent to liability on the note, a nonperformance of which renders the note void.

Appeal from Berrien; Coolidge, J. Submitted April 5, 1898. Decided May 6, 1898.

Bill by Francis Jordan, trustee, against John C. Newton and others, as assignees of certain railroad-aid notes executed by Abel W. Wells and others, impleaded in the suit, to determine as to the ownership of the notes. Complainant died pending decree, and Orville O. Jordan, his executor, was substituted as complainant in his stead. From a decree declaring the notes invalid, defendant assignees appeal. Affirmed.

N. A. Hamilton, for complainant.

Edward Bacon (*Cahill & Ostrander*, of counsel), for appealing defendants.

Lawrence C. Fyfe, for other defendants.

MOORE, J. The circuit judge filed a written opinion in this case, which so clearly states the questions involved that I quote as much from it as is necessary to an understanding of the case:

"The bill of complaint was filed by Francis Jordan in his lifetime as a bill of interpleader, setting forth that on September 8, 1888, there was deposited with him, as a trustee and in escrow, a package of 84 notes executed by different parties, and made payable to the treasurer of the Indiana & Lake Michigan Railway; that said notes were identical with each other in the time and

conditions expressed, except the words expressing the amounts payable; and that such notes were executed shortly before such deposit. A specimen copy of such notes reads as follows:

"'ST. JOSEPH, BERRIEN COUNTY, MICH., ——, 1888.

"'In consideration of the construction of a standard-gauge railroad by the Indiana & Lake Michigan Railway Company from South Bend, Indiana, to St. Joseph, Michigan, and making said St. Joseph the terminus of said Indiana & Lake Michigan Railway, and the completion and operation of said railroad by November 1, 1889, I promise to pay to the treasurer of said road, or bearer, the sum of ——, in 30 days after said road is constructed as aforesaid; this contract to be held by the president of the Union Banking Company until the construction of said road as above. ————.'

"The bill further alleges that the said Francis Jordan delivered to John Higman, at the time of said deposit of said notes, a receipt, which reads as follows:

"'ST. JOSEPH, MICH., September 8, 1888.

"'I have received this day from Fred Carlisle, per committee, consisting of Dr. L. I. McLin, Warren Ballengee, and John Higman, Jr., the following railroad notes, said notes payable to Ind. & Lake Mich. R. R. Company upon completion of said road as per contract.'

"Here follows list of names with amounts opposite. At the end of the list of names is the following:

"'ST. JOSEPH, MICH., September 8, 1888.

"'I hereby certify that I have received this day from the parties above named, in trust for the parties interested, exclusively at their own risk.

"'UNION BANKING CO.'

"The bill further alleges that in November, 1889, a large portion of the signers of said notes demanded of the complainant the surrender to them of said notes, on the ground that certain conditions precedent therein contained had not been performed by the Indiana & Lake Michigan Railway, and that the consideration thereof had failed; that he refused to deliver them to such signers; that subsequently Milton Wood, John C. Newton, Daniel H. Newton, and John W. Welch demanded of him, the complainant, the surrender of such notes to them, claiming to be the assignees of said Indiana & Lake Michigan

Railway, and that they were legally entitled to the possession of said notes; that complainant refused to deliver said notes, or any of them, to the parties so demanding; that subsequently said Wood, John C. Newton, Daniel H. Newton, and Welch instituted an action of trover against him in the circuit court for the county of Berrien, claiming damages for the conversion of said notes, which action is still pending; that he asks the intervention of a court of equity to determine what parties are entitled to the possession of said notes; that the various parties may be called upon to defend their respective claims, and complainant be released from further expense and trouble of litigation in the matter. All the parties interested, together with the Indiana & Lake Michigan Railway, are made parties to the bill, and all have appeared and answered except said railway, and the case has been heard in open court on pleadings and proofs. The defendants Wood and others, who claim to be the assignees of said railway, in their answer claim that the conditions of the notes have been substantially complied with, and that the signers of the notes, for various reasons, are estopped in a court of equity from asserting a failure of consideration, or that the conditions expressed in the notes have not been complied with. The signers of the notes, in answering, claim that the conditions set forth in the notes were conditions precedent; that they were never complied with; and that the consideration has wholly failed."

The circuit judge then made further findings of fact, which, because of our view of the law, it is unnecessary to state. Among other things, he found:

"By the condition of the notes, the road was to be constructed and in operation by November 1, 1889. It was not constructed until December 19, 1889. No train passed over that road until that date, and it is not contended by anybody that the road was actually constructed till that date. It was not in operation till August, 1890. No trains ran over it, except a few construction trains, and a few trains conveying officers of the road for purposes of inspection, till that date. No business of transportation which could be of any utility to the citizens of St. Joseph was done till August, 1890."

This finding was fully justified by the record. The circuit judge held that the completion and operation of the

road by November 1, 1889, was a condition precedent, and made a decree adjudging the notes in controversy null and void, and directing their surrender to the makers, and granted costs to the complainant, and to the defendants who are appellees here.

A great many questions were argued before the circuit judge, and were passed upon by him, and they are very ably argued here by eminent counsel. A reading of the notes indicates to our minds very clearly that, when they were given, it was expected that, before the makers should become liable, the road must not only be constructed, but it must be completed and in operation by November 1, 1889. It is now urged that time is not of the essence of the contract; that what the makers of the notes wanted was the road, and time is immaterial; and as the road is now built, and more than 30 days have elapsed, they are now liable. It is also said that equity does not deem time to be of the essence of the contract. In relation to the last statement, it may be said that, while this is a suit in equity, the complainant has no interest in the result, except to have it decided to whom he shall deliver the notes. The controversy is between the makers of the notes and those who seek to enforce the payment. The real question is, Can they be collected at law? In a discussion of this case, it must not be forgotten that there is no promise on the part of the railroad company that it will construct the road at all. It also ought not to be overlooked that, when the road is constructed, it continues to be the property of the railroad, and no part of it becomes the property of the makers of the aid notes. They had a right to put into these notes such conditions precedent as they desired; and, where they have made the condition clear and unambiguous, before they can be held liable upon the notes the condition precedent must be performed.

If the road, by the terms of this agreement, is not to be completed and in operation by November 1, 1889, no time is fixed for its completion and operation. It is incredible that the makers of these notes intended to be-

come liable for their payment, without having some time fixed when the road should be completed. They fixed a time in the notes. This time was a condition precedent, and, before the makers of the notes can be held liable, it must be shown that the conditions have been performed. *Brown* v. *Dibble's Estate*, 65 Mich. 520; *Sickels* v. *Anderson*, 63 Mich. 421; *Port Huron, etc., R. Co.* v. *Richards*, 90 Mich. 577; *Thornton* v. *Railroad Co.*, 84 Ala. 109 (5 Am. St. Rep. 337); *Slater* v. *Emerson*, 19 How. 224; *Jones* v. *U. S.*, 96 U. S. 24; *Lowber* v. *Bangs*, 2 Wall. 728; *Johnson* v. *Lyon*, 75 Mich. 477; *Loud* v. *Pomona, etc., Water Co.*, 153 U. S. 564. The following, in addition to the cases cited above, are cases in this State involving litigation in relation to notes given in contemplation of the construction of railroads: *Michigan, etc., R. Co.* v. *Bacon*, 33 Mich. 466; *Tower* v. *Railroad Co.*, 34 Mich. 328; *Stowell* v. *Stowell*, 45 Mich. 364; *Pontiac, etc., R. Co.* v. *King*, 68 Mich. 111; *Gardner* v. *Walsh*, 95 Mich. 505; *Gardner* v. *Burch*, 101 Mich. 261. In none of them is it held that the makers of the notes are liable where the conditions are unperformed which the makers of the notes have in unambiguous language incorporated in them.

The decree is affirmed. The complainant and appellee defendants will recover costs, including but one solicitor's fee, from the appellant defendants.

The other Justices concurred.

FINLEY v. WIDNER.[1]

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131 617
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APPEAL—DENIAL OF NEW TRIAL—REVIEW.

To present a case for review under Act No. 134, Pub. Acts 1893, empowering the Supreme Court to review orders overruling motions for new trial, a statement of the reasons given by the circuit judge for his ruling must be incorporated in the bill of exceptions.

Error to Alpena; Kelley, J. Submitted April 5, 1898. Decided May 6, 1898.

Case by William Finley against John A. Widner for slander. From a judgment for plaintiff, defendant brings error. Affirmed.

Dafoe & Gustin, for appellant.

J. D. Turnbull, for appellee.

LONG, J. This case was in this court at the January term, 1897, and the judgment reversed, and cause remanded for another trial. 112 Mich. 230. The cause has again been tried, resulting in verdict and judgment in favor of plaintiff for $450. Defendant brings error. It is an action of slander, brought upon certain words spoken by defendant of and concerning the plaintiff. The facts are stated in the former opinion, and the cause has been tried in accordance with the rules laid down in that opinion.

After the trial and entry of judgment, the defendant moved for a new trial. This was refused, and we think there is nothing in the record calling for discussion except this motion. We have carefully examined the other questions, and find no error. It is unnecessary to set out the

[1] Rehearing denied June 28, 1898.

grounds for a new trial, or what the affidavits upon which the motion is based purport to show, as we find, upon an examination of the record, that the court below gave no reasons for the denial of the motion. Act No. 134, Pub. Acts 1893, gives this court power to review orders overruling motions for new trial. Under the act these proceedings are to be incorporated into the bill of exceptions, "including the reasons given by the trial judge in refusing to grant said new trial. 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." Here no reasons were given by the circuit judge, and consequently no exceptions could be taken. There is, therefore, nothing in the record relating to the motion for new trial for this court to review. This construction was given to this statute in *McRae* v. *Garth Lumber Co.*, 102 Mich. 488, and has since been followed.

The judgment must be affirmed.

The other Justices concurred.

MERO *v.* BUTTON.

JUSTICES OF THE PEACE—CERTIORARI—AFFIDAVIT OF ACCOUNT—PARTNERSHIP—EVIDENCE.

Where an affidavit of account, which stated that between specified days plaintiff worked for defendants in their mine under an agreement with them through their foreman, was received in justice's court without objection, and was treated by the justice as evidence upon which to base a finding that defendants were copartners, the finding was properly sustained on *certiorari*.

Error to Gogebic; Haire, J. Submitted April 5, 1898. Decided May 6, 1898.

Assumpsit by Clarence Mero against Charles F. Button and Otto Olson, impleaded with James George, upon an account for work and labor. Plaintiff had judgment in justice's court, which was affirmed in the circuit on *certiorari*. Defendants bring error. Affirmed.

Button & Norris, for appellants.

Buck & Waples, for appellee.

LONG, J. Plaintiff brought suit in justice's court against defendants by summons, with verified copy of the account upon which suit was brought attached. Upon the trial in justice's court, the affidavit to the account was admitted in evidence without objection. The justice rendered judgment in favor of plaintiff, and the two defendants removed the cause to the circuit court by *certiorari*, where the judgment of the justice was affirmed. The only question now raised upon this record is whether the affidavit sufficiently sets forth the partnership of the defendants.

The defendants Button and Olson were both personally served with copy of summons and affidavit stating the account. Defendant George was not served. He has not appealed. The affidavit to the account states that "on and between the 1st day of February, 1895, and the 21st day of March, 1895, he [affiant] worked for Otto Olson, Charles F. Button, and James George, of Bessemer, Michigan, in their mine at Dodgeville, Wisconsin, * * * under an agreement with them through their foreman; * * * that he rendered a statement to them showing the number of days' work," etc. This was some evidence of a partnership; and, the justice having taken it as such, the finding on *certiorari* cannot be reversed. No question of jurisdiction is involved. The case is governed by *Locke* v. *Farley*, 41 Mich. 405; *Forbes Lithograph Manfg. Co.* v. *Winter*, 107 Mich. 116.

The judgment below is affirmed.

The other Justices concurred.

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LORIMER *v.* WAYNE CIRCUIT JUDGE.

PROBATE COURTS—NON-APPEALABLE ORDERS—STATUTES.

An order of the probate court under 3 How. Stat. § 5992*a et seq.*, determining who are the heirs, minor heirs, or legal representatives of a decedent, which order, under section 5992*c*, is only *prima facie* evidence of the facts found therein, is not appealable under the general statute (2 How. Stat. § 6779) providing for appeals from probate court "in all cases not otherwise provided for."

Mandamus by Emily Lorimer to compel William L. Carpenter, circuit judge of Wayne county, to allow relator a jury trial of issues sought to be raised by an appeal from an order of the probate court. Submitted April 5, 1898. Writ denied May 6, 1898.

Flowers, May & Moloney, for relator.

Edwin F. Conely and *Orla B. Taylor*, for respondent.

LONG, J. Relator filed a petition in the probate court, stating that she was the widow of Thomas Lorimer, deceased; that said Lorimer died intestate and without issue; that at the time of his death he was the owner of certain lands in Wayne county. The petition set up the names of the claimed heirs, and asked an order under 3 How. Stat. § 5992*a et seq.*, determining who were the legal heirs. On the hearing the probate court found that the petitioner was not the widow or heir at law of the deceased, and had no interest in the lands, etc. He thereupon denied the petition. An appeal was taken by the relator to the Wayne circuit court. The cause was there noticed for a jury trial before Judge Carpenter. Upon the calling of the cause, counsel for the administrator of the estate objected to the impaneling of a jury. This objection was sustained. Relator now asks a *mandamus* to compel the

circuit court to set aside that order, and proceed to the trial before a jury. A return has been made to the order to show cause. Two contentions are made by counsel for the administrator: (1) That the order made by the probate court, adjudging that the relator was not the widow of Thomas Lorimer, deceased, is not appealable; (2) that the case is not one for the determination of a jury.

Section 3 of the act under which the proceedings were brought (3 How. Stat. § 5992*c*) provides that the probate court may, upon such application,—

"Hear proofs, taken by commission or by witnesses produced in open court, of the facts set forth in said petition, and shall thereupon, if the evidence be sufficient, find and adjudge who are, or were, the heirs, minor heirs, or legal representatives of the deceased, and entitled by the laws of this State to inherit the real estate of the deceased; * * * which finding and adjudication shall be entered on the journal of said court, and which entry, or a duly-certified copy thereof, shall be *prima facie* evidence of the facts therein found."

The statute does not authorize an appeal from this finding. The general rule is that where a special and extraordinary jurisdiction, not following the common law, is created by statute, no appeal can be taken therefrom, unless expressly provided for in the statute. *Cross* v. *People*, 8 Mich. 113; *Smith* v. *Superintendents of Poor*, 34 Mich. 58; *Auditor General* v. *Pullman Palace-Car Co.*, Id. 59. But counsel for relator contend that the appeal is authorized by 2 How. Stat. § 6779, which provides that, "in all cases not otherwise provided for, any person aggrieved by any order, sentence, decree, or denial of a judge of probate may appeal therefrom to the circuit court," etc. The act under which the proceedings were instituted does not purport to make the proceedings of the probate court conclusive upon anybody. They are not binding even upon the relator. The petitioner, or other person interested, if not satisfied with the findings, might, in any judicial proceeding, resort to original evidence, and wholly ignore the action of the probate court. The

proceeding simply makes evidence, and any common-law jury could overturn it in any other proceeding. In *Miller* v. *Davis*, 106 Mich. 302, this statute was before this court, and it was said:

"It is remedial in its character, takes away no vested rights, and is, like a statute establishing a rule of evidence, or one designed to perpetuate testimony, unobjectionable because in a sense retroactive."

The legislature evidently intended that the proceedings under this statute should be summary, and hence provided no appeal.

The order not being appealable, the other question need not be discussed.

The writ must be denied.

The other Justices concurred.

HAMILTON *v.* ARNOLD.

1. TRIAL—REQUESTS TO CHARGE—DISPUTED FACTS.
   A party who, by his requests to charge, has treated certain questions of fact as disputed, cannot complain because the court treats them in the same way in its general instructions.

2. ASSAULT AND BATTERY—INSTRUCTIONS.
   An instruction, in an action for assault and battery, that, if plaintiff was removing defendant's property "with no manifestation of force, then defendant would not be excusable in using force, or legally allowed to do so," is harmless error, where it was elsewhere clearly charged that he might use sufficient force to reclaim the property, or to prevent its removal, and where the evidence tends to show the use of excessive force.

Error to Calhoun; Smith, J. Submitted April 6, 1898. Decided May 6, 1898.

Case by Paulina Hamilton against Adam C. Arnold for assault and battery. There was a judgment against defendant, from which M. V. Barker, his administrator, brings error. Affirmed.

Herbert E. Winsor, for appellant.

Williams & Lockton, for appellee.

MONTGOMERY, J. This action was for an assault and battery alleged to have been committed on the plaintiff, and was prosecuted to judgment against Adam C. Arnold in his lifetime. His administrator has procured a bill of exceptions to be settled, and brings error.

A preliminary question arises over a challenge made to the array of jurors. We need not discuss this question at length, as the ruling of the circuit judge is fully sustained by previous rulings of this court. *People* v. *Coffman*, 59 Mich. 7; *People* v. *Coughlin*, 67 Mich. 470.

The facts of the case developed at the trial were these: Plaintiff and her husband resided on lot 88, block 4, Battle Creek. The defendant was the owner of the adjoining lot 87. The exact location of the line was disputed. On the disputed land there were three plum trees. The plaintiff and her son were, on the day of the alleged assault, gathering plums from one of these trees. The defendant, accompanied by a deputy sheriff, came on the scene, and, as plaintiff's testimony tends to show, found plaintiff with a pan partially filled with plums, standing on a portion of the lot occupied by herself and husband, and outside the disputed territory, and seized hold of her. Plaintiff also claimed that the defendant had given her permission to gather the plums.

The defendant's counsel assigns numerous errors on the charge. It is first contended that the court was in error in submitting to the jury the question whether the plum tree stood on the lot occupied by the Hamiltons, and also in submitting to the jury the question whether deceased gave plaintiff permission to pick plums

from the tree. Without reciting the testimony at length, it will suffice to say that there was some testimony to support each of the claims made by the plaintiff in that regard. Furthermore, the requests preferred by the defendant at the trial treated both of these questions as disputed questions of fact. One of these requests was as follows:

"If the fruit which the plaintiff was attempting to gather and remove was upon lands owned or controlled by the defendant, then she had no lawful right upon the lands, or to the possession of the fruit, without permission of defendant; and without such permission she was a trespasser."

This instruction was given in substance, and the circuit judge very properly stated the converse of the proposition, leaving to the jury the determination of the facts which the defendant's counsel assumed to be in dispute.

Complaint is made of a portion of the instruction reading as follows:

"If you should find that Mrs. Hamilton had no right to the plums whatever, yet in picking and taking them away she was doing so by no manifestation of force, then the defendant would not be excusable in using force, or allowed legally to do so."

It is said that this instruction was erroneous for the reason that, even though the plaintiff was inactive, the defendant had the right to use force sufficient to reclaim his property. This is, in the abstract, correct, and, if we were satisfied that the jury could have been misled by this instruction, we should feel constrained to reverse the case, as we cannot affirm its technical accuracy; but a review of the full charge, when taken in connection with the proofs in the case, convinces us that the jury could not have been misled. The plaintiff's testimony tended to show that the defendant came up to her, and seized hold of her with considerable force, and that this was the first attempt to reclaim the property. The court, in view of this testimony, doubtless intended to convey the idea to

the jury that the defendant was not justified in using unnecessary force, and, in view of the very full instructions given in other portions of the charge, we think the jury must have so understood it. These instructions were as follows:

"If the plaintiff was removing the plums belonging to the defendant without lawful right, then the defendant would be justified in attempting to take them from her, and could use sufficient force to compel the plaintiff to give them up.

"If the plums, which are the property in question in this case, belonged to the defendant, and the plaintiff was attempting to remove them without consent or lawful authority from the defendant, and they belonged or were under the control of defendant, he had a right to prevent her from so doing. * * * But in the case suggested—that is, should you find that the plaintiff had no legal right to the plums, and that the defendant was seeking to retake only what belonged to him—he would only have had a right to use sufficient force to overcome the force used by Mrs. Hamilton in taking away the plums. Defendant would have no right to use more force than was reasonably necessary, under all the circumstances, to retake them; and, should you find that he did use more force than was reasonably necessary, he would be liable for such damages as were occasioned by such excessive use of force."

A criticism is also made of a portion of the charge reading:

"If Mrs. Hamilton had no right to the plums, Mr. Arnold would have no right to use more force than was reasonably necessary to retake his property; in other words, he would have no right to commit an assault and battery upon her."

This criticism is answered by supplying the succeeding sentence omitted in the criticism of counsel, viz.:

"That is, to go beyond the necessary force of retaking his property."

A criticism is made of the charge of the court on the question of damages, and it is said the court erred in permitting the jury to award added damages for injury to

the feelings in case malice should be found, for the reason that there was no evidence of malice. It is evident that defendant's counsel considered this a proper question for the jury, as he preferred the following request: "The defendant cannot be charged with malice unless it has been shown by evidence that he was intending to injure plaintiff at the time he took hold of her arm and tried to recover his property." We may add that there was evidence from which we think the jury might have been justified in inferring malice, and that the charge of the court upon this subject was carefully guarded.

We discover no prejudicial error. The judgment will be affirmed.

The other Justices concurred.

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GRAND RAPIDS NATIONAL BANK *v.* KRITZER.

1. SUMMARY PROCEEDINGS—JURISDICTION OF JUSTICE.
   The fact that there is no circuit court commissioner residing in the township in which summary proceedings to recover the possession of land are instituted before a justice under 2 How. Stat. § 8296, conferring jurisdiction upon a justice under such circumstances, need not be set up in the complaint.

2. EXECUTION SALE—RETURN OF SHERIFF—POSTING OF NOTICES.
   A sheriff's deed on execution sale is not invalid because his return fails to show that notices of sale were duly posted.

3. SAME—VALIDITY—SUMMARY PROCEEDINGS.
   The validity of a sale of land on execution is properly triable in summary proceedings by the purchaser to recover the possession of the premises sold.

Error to Newaygo; Edwards, J. Submitted April 6, 1898. Decided May 6, 1898.

Summary proceedings before a justice of the peace by the Grand Rapids National Bank against Magdalena Kritzer and others to recover the possession of land. Complainant prevailed before the justice, and defendants appealed to the circuit court. From a judgment there for defendants on verdict directed by the court, complainant brings error. Reversed.

L. G. Rutherford and *Joseph Renihan*, for appellant.

George Luton and *A. G. Day*, for appellees.

MONTGOMERY, J. The complainant instituted before a justice of the peace summary proceedings to recover possession of land claimed by the complainant under a sheriff's deed made on sale of the same on execution in a suit by complainant against the Kritzer Milling Company. Complainant recovered judgment before the justice, and defendants appealed to the circuit. At the trial the circuit judge directed a verdict for the defendants on the ground that the title to land came in question, and complainant brings error. Three questions are argued in this court. It is insisted by the defense—

(1) That the justice acquired no jurisdiction, for the reason that the complaint failed to allege that there was no commissioner residing in the township in which suit was instituted.

(2) That the sheriff's deed is invalid for the reason that no evidence appears in the clerk's office that notice of sale was duly posted.

(3) That, in any event, the title to land came in question, and the court had no power to try the issue.

1. The statute (2 How. Stat. § 8296) does not require the complaint to set up the fact that no commissioner resides in the township. If the *fact* be so, the justice is given jurisdiction. The question is analogous to that arising on a short summons, which is authorized only in case of nonresidence of one of the parties. In such case it is held that the summons need not recite the fact, and that if the defendant contends that the summons is not

proper, because of the fact that both parties are resident, he should make the fact appear. *Allen* v. *Mills*, 26 Mich. 123; *Stoll* v. *Padley*, 98 Mich. 14.

2. The counsel for defendants rely upon *Perrien* v. *Fetters*, 35 Mich. 233, and *New York Baptist Union* v. *Atwell*, 95 Mich. 240, to sustain the contention that the proof of publication of notice of sale should be made a matter of record. The sales under consideration in these cases were chancery sales, which are required to be confirmed by the court; and the question involved in *Perrien* v. *Fetters* was what should be made to appear to the court to justify a confirmation. I confess to grave doubts as to whether the sufficiency of the officer's return can be questioned collaterally after confirmation, as seems to be implied in *New York Baptist Union* v. *Atwell;* but, however that may be, it is settled that under our statute it is not the sheriff's return of an execution sale that settles the question of the purchaser's title, but the sheriff's certificate and deed. *Spafford* v. *Beach*, 2 Doug. (Mich.) 150; *Cook* v. *Knowles*, 38 Mich. 322. The statute governing sales of land on execution provides:

"The omission of any officer to give the notice of sale required in this chapter, or the taking down or defacing of any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of such omission, taking down, or defacing." 2 How. Stat. § 6114.

By section 6112, provision is made for recovery, by any person injured by the default of the officer in posting notice, of any damages sustained, together with a penalty of $500. There is no provision in chapter 232, 2 How. Stat., which governs in sales of real estate on execution, requiring a return of the officer to the court of proof of publishing or posting notices. In this case the only evidence of any dereliction of the sheriff is the absence of a record, which no law requires. The presumption from the certificate and deed cannot be thus overcome. *Wood* v. *Morehouse*, 45 N. Y. 368; and see the case of *President*,

etc., of Natchez v. *Minor*, 10 Smedes & M. 246, where the distinction between such a statute as ours and that of Massachusetts, which requires a record of proof of service, is noted.

3. Did the title to land come in question, so as to oust the court of jurisdiction? The statute expressly gives the remedy sought in this case against one holding over after a sale of real estate on execution after the time limited by law. In this case it appears that the defendants deeded these lands to the Kritzer Milling Company, and continued thereafter to occupy them, and that there was no contract between the grantee and themselves relating to the occupancy. This transaction constituted them, at most, tenants by sufferance, and thus established privity between the parties. *Stevens* v. *Hulin*, 53 Mich. 93. No other title whatever was shown, or attempted to be shown, in defendants. It is true, one of the defendants testified that another defendant claimed title. It does not cost much effort to do this, and it certainly amounts to no more than a plea of title, which in *Butler* v. *Bertrand*, 97 Mich. 59, was held not to oust the court of jurisdiction. The only attempt to try title was that made to impeach the proceedings by which complainant acquired title under the sheriff's deed. The question of the validity of this title was properly triable in this proceeding. As was pertinently said by my Brother HOOKER in *Gage* v. *Sanborn*, 106 Mich., at page 279, "If these questions cannot be tried by the commissioner, the statute is farcical, as jurisdiction would always be lost as soon as a plausible claim of invalidity of the sale was made."

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

SCHMOLTZ *v.* SCHMOLTZ.

1. WRITTEN CONTRACTS—RATIFICATION—ESTOPPEL.
   One cannot ratify a written agreement, and at the same time assert a different parol one.

2. HUSBAND AND WIFE—CONTRACT OF SEPARATION—FRAUD—CONTINGENT INTERESTS—JURISDICTION OF LAW COURT.
   Since a wife has not a present subsistent, but only a contingent, interest in personal property owned by her husband, misrepresentation by him as to the value of such personalty, whereby she is induced to execute a contract of separation upon terms which, but for the misrepresentation, she would not have agreed to, will not entitle her to sue at law to recover her damages.

3. FRAUD—SUFFICIENCY OF ALLEGATIONS.
   An allegation that one defendant told plaintiff that the other defendant deemed certain land to be worth a specified amount, which was in fact worth more than that, is insufficient to support a charge of fraudulent misrepresentation as to the value of the land.

Error to Ionia; Davis, J. Submitted April 7, 1898. Decided May 6, 1898.

Case by Jennie B. Schmoltz against Frank E. Schmoltz and Jacob Schmoltz for deceit and conspiracy to defraud. From a judgment for defendants on demurrer to the declaration, plaintiff brings error. Affirmed.

Plaintiff and defendant Frank E. Schmoltz are husband and wife. They were married in 1888. They have one child, about eight years old. They lived together as husband and wife until January 2, 1897, when they separated. Two days after, they made an agreement of settlement. The agreement recited that unhappy differences had arisen between them; that they had determined to live separate and apart; that they had ceased to cohabit as husband and wife, but had lived in the same house until January

2, 1897; that in consideration of $800 paid to her by her husband, and certain personal property to be retained and owned by her as if she were a single woman, she agreed to join him in the deed of a house and lot in the city of Ionia to defendant Jacob, the father of defendant Frank. She further agreed to release him from any claim for her support and maintenance during her life, and all right of dower, and all claim or interest in any personal property that he might then own or might thereafter accumulate. He further agreed to pay $52 a year towards the support and maintenance of their child until she should be 14 years old. This agreement was carried out. This suit is based upon fraud and deceit on the part of defendant Frank in securing this settlement. The alleged deceit consists in misrepresentations as to the amount of property owned by him, and as to the value of the lot conveyed to defendant Jacob. The declaration also alleges conspiracy between the defendants to cheat and defraud the plaintiff out of her just rights. The declaration contains three long counts. They are substantially the same, and it is unnecessary to further state the cause of action. The case is before us on a judgment sustaining a demurrer to the declaration.

A. A. Ellis, for appellant.

McGarry & Nichols, for appellees.

GRANT, C. J. (*after stating the facts*). Counsel for the plaintiff states his position as follows:

"The action in this case is not brought upon the contract, but is upon the theory that the contract is valid, and the action is for the fraud committed in making the contract, and inducing the plaintiff to release without receiving the compensation, and in causing her to execute a written release that did not express the true consideration between the parties."

In other words, she affirms the contract, retains all the benefits which she has obtained from it, and asserts that

she would not have made it had she not been misinformed by her husband as to the amount of his property, and now seeks to have a jury or court give her an additional amount. Her declaration asserts that the parol agreement was that she should have one-half of his property, but such is not the written agreement. She ratifies that, and cannot be heard to assert a different one. If it did not contain the actual agreement of the parties, her appropriate remedy is in equity, to set it aside or to reform it. The only theory, therefore, before us, is that he misrepresented to her the amount of his personal property; that she would not have made the contract had she been fully informed, and is therefore entitled to damages for such misrepresentation.

What interest has she in the personal property? Only that which comes from the marital relation. The title was in him, not in her. She has no salable interest. He could sell and convey it without her consent. The household goods were divided between them, he taking certain specified articles, and she taking the rest. There is no way to determine what her interest in the property is. She had no present subsistent interest to be damaged. A court of law cannot determine whether the separation was due to his or her fault, with a view to determining how much she ought to have. That subject belongs exclusively to a court of chancery. They have concluded to separate, and, by the agreement of separation, have fixed their rights. She relinquished her right to support, and he to her services and society. Both recognized the duty to support the child, and agreed how much he should contribute towards it, and that she should contribute the rest. Under like circumstances, this court said:

"The consideration for the conveyance embraced matters incapable of any accurate estimate in money, and the consideration named by the parties must therefore be taken and deemed to be the valuation placed upon it by themselves." *Randall* v. *Randall*, 37 Mich. 563, 574.

What shall be the measure of damages if she be entitled

to recover? Shall it be such alimony as the jury may think she is entitled to have if they find she is not at fault? Shall it be one-third or one-half of his property, or what she would be entitled to upon his death? Alimony rests entirely in the judgment of a court of equity, and depends upon the condition and situation of the parties,—the necessities and property of the wife, and the conduct and abilities of the husband. It thus appears that plaintiff had no valid subsistent rights or interests in her husband's property, but only contingent ones, and such cannot be made the subject of a suit at law for damages. The court correctly held that the declaration set forth no damages which she was entitled to recover in a suit at law. *Hutchins* v. *Hutchins*, 7 Hill, 104; *Adler* v. *Fenton*, 24 How. 407.

There is no allegation in the declaration that defendant Jacob made any representation whatever to her, either as to the value of the lot or as to the amount of the personal property, or that he said anything to her to induce her to make the agreement. The sole allegation in regard to Jacob is that Frank said to plaintiff that defendant Jacob deemed the lot to be worth $1,600, while she alleges it to be worth $2,000. This is not a sufficient allegation upon which to base a charge of fraud or conspiracy or misrepresentation of the value of the land.

The judgment is affirmed.

The other Justices concurred.

SWEENEY *v.* LUSTFIELD.

1. PLEADING—OBJECTIONS TO DECLARATION—DEMURRER.
   An objection that the declaration, in an action against a surety upon an undertaking for a stay of execution on a justice's judgment, counts upon a common-law, instead of a statutory, obligation, must be taken by demurrer.

2. STAY BOND—RIGHTS OF SURETY—SUBROGATION.
   A surety upon an undertaking given under 2 How. Stat. § 6963, to stay execution, is not entitled to the protection of sections 6977, 6978, relating to the right of a surety to have the property of the principal first resorted to to satisfy an execution, as section 6953 provides that execution may issue against both principal and surety upon such an undertaking, with the same effect as if the judgment had been rendered against both upon a joint liability, and section 6971 amply protects the surety by subrogating him, after satisfaction of the judgment, to all the rights which the judgment creditor had.

Error to Iron; Stone, J. Submitted April 7, 1898. Decided May 6, 1898.

Assumpsit by Edward Sweeney against Adolph Lustfield upon a bond to stay execution on a justice's judgment. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

Julius J. Patek (*Button & Norris* and *R. C. Flannigan*, of counsel), for appellant.

Cook & Pelham, for appellee.

MONTGOMERY, J. Plaintiff, on the 21st of March, 1893, recovered a judgment against the Deer River Lumber Company (composed of Benjamin F. Davenport and Fred Esau, copartners) for $188.71 and costs. The defendant, on the 27th of March, 1893, entered into an undertaking,

as surety, for the stay of execution on said judgment, which is set out at length in *Lustfield* v. *Ball*, 103 Mich. 17. The present action is brought on that undertaking. In *Lustfield* v. *Ball*, *supra*, we held that the undertaking was in compliance with section 6963, 2 How. Stat. It is now contended that the declaration counts on this undertaking as a common-law obligation, and not as a statutory stay. The declaration, however, sets out all the facts leading up to the giving of the undertaking, and sets that instrument out in full. The declaration was not demurred to, and was not subject to this objection on the trial. *Grand Rapids, etc., R. Co.* v. *Southwick*, 30 Mich. 444; *Fuller* v. *City of Jackson*, 82 Mich. 480; *Hayes* v. *City of West Bay City*, 91 Mich. 418.

The only other question raised relates to a ruling on the trial which was made the basis for a motion for a new trial after verdict. The opinion of the learned circuit judge given on this motion states the question and conclusions in accordance with our views, and we adopt it as our own. It is as follows:

"The single question presented by this motion for a new trial is whether or not the circuit judge erred upon the trial in refusing the offer by defendant of proof by witness Benjamin F. Davenport that at the time the execution was issued upon the judgment in the case of Edward Sweeney against the Deer River Lumber Company, and while the same was in the hands of the sheriff, and before a levy thereof was made upon the goods of the defendant in this suit, he, the said Davenport, was possessed of sufficient property, free from incumbrance and subject to execution, from which the entire amount of the said execution could have been made, and that he offered to turn the same out to the sheriff and to said Sweeney, for the purpose of levy and sale on said execution. It is contended by defendant's counsel that this offer of proof by Davenport on behalf of the Deer River Lumber Company discharged and satisfied the execution, in so far as Lustfield was concerned; and he cites and relies upon sections 6977, 6978, 2 How. Stat. Do these sections apply to a case of stay of execution? Section 6953, Id., provides that 'in all cases where security shall have been given for

the stay of execution, as hereinafter provided, if the debt or damages, with interest and costs, shall not be paid within the time limited by law therefor, execution shall be issued by the justice, on application of the judgment creditor, his agent or attorney, against both principal and surety, with the same effect as if the judgment had been rendered against both such principal and surety upon a joint liability, after the return of process personally served,' etc. The statute contains numerous provisions for the benefit and protection of sureties for stay of execution. See sections 6969–6971. This last section subrogates the surety who has satisfied the judgment to all the rights which the judgment creditor had. In other words, it is competent and proper for the person who has become surety for the stay of execution to satisfy the judgment, and then proceed to sue out execution on such judgment, and proceed to collect of defendant. But will any offer or action by the defendant, short of a tender of the amount due, in lawful money of the United States, release the liability of the person who has become surety for the stay of execution? It seems to me not. Under section 6953, the liability of the surety is the same as though judgment had been rendered against both principal and surety on a joint liability, after the return of process personally served. In my judgment, sections 6977 and 6978 do not apply to the person who has become surety for the stay of execution. Such person is amply protected by section 6971."

The judgment is affirmed.

The other Justices concurred.

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RUSSELL *v.* NORTH AMERICAN BENEFIT ASSOCIATION.

1. BENEFIT INSURANCE — BY-LAWS — ARBITRATION — VALIDITY OF AWARD.

   Where the by-laws of a benefit association, which, by reference, are made a part of its policy, contain a provision that an award by arbitrators, who, under the terms of the policy, are to decide all disputed claims, shall be legal only if signed by all three of the arbitrators, an award signed by two of the arbitrators, but not signed by the one appointed by the association, cannot be enforced against it, although it is shown that the assured had never been furnished with a copy of the by-laws, and that the association refused to produce a copy before the arbitrators when requested to do so.

2. SAME.

   By-laws of a benefit association, referred to in its policy and made a part thereof, providing for arbitration of disputed claims, and that the award shall be final, but that no award shall be valid if not signed by all of the arbitrators, in which case either party shall have the right to a new arbitration, and providing that no suit in law or equity shall be commenced or maintained by any member against the association, will not be declared inoperative on the ground that they are unreasonable and oppressive.

3. APPEAL—COSTS.

   The Supreme Court will, in its discretion, disallow costs on appeal, where the conduct of the prevailing party in relation to the suit is not such as to commend itself to a sense of justice.

Error to Wayne; Grove, J., presiding. Submitted April 7, 1898. Decided May 6, 1898

Assumpsit by Wilber Russell against the North American Benefit Association upon an award made under a policy of insurance. From a judgment for defendant on verdict directed by the court, plaintiff brings error, Affirmed.

R. C. Barnes, for appellant.

George W. Bates, for appellee.

MOORE, J. This suit is on an award made on a claim for a funeral benefit of $50 upon a policy of insurance. The court below directed a verdict in favor of defendant. The certificate of insurance contained a reference to the constitution and by-laws of the company, and made them a part of the policy. On the back of the policy, among other statements, was this one:

"In case any question shall arise as to the validity of any claim for sickness, injury, or death, the same shall be arbitrated by a board of three physicians in good standing; said board to consist of one physician to be appointed by the medical director, and to be paid for by the association, and one physician to be selected by the member, and to be paid for by the said member; the third physician to be selected by the medical director's appointee and the member's appointee; said third physician to be paid for equally by the association and the member; and the decision of said board of arbitrators shall be final."

On the presentation of the claim to the defendant it did not pay the claim, but demanded an arbitration, and arbitrators were selected. It is the claim of the attorney for the plaintiff that he heard, shortly before the arbitration, that defendant meant to defeat the claim through the provisions of the by-laws, and that he demanded from its manager that a copy of them be produced before the arbitrators, and that this demand was refused; that he requested the arbitrators to require a copy of the by-laws to be produced, but they declined to do so upon the ground of want of authority. It is also claimed by plaintiff that a copy of the by-laws was never furnished the assured, and that it was supposed by the plaintiff that the condition indorsed on the back of the policy, in relation to arbitration, was the only provision made between the parties in relation thereto. The claim is also made that all the arbitrators agreed upon awarding $50 to plaintiff, but that, for want of time to draw the finding, it was not signed on the eve-

ning of said agreement, but an adjournment was had until next morning to draw and sign it; that at this adjourned meeting the arbitrator selected by the defendant absented himself, and sent a note in effect declining to sign the award. It was signed by the other two arbitrators. The defendant refused to pay the award, and suit was brought upon it. The defense was that it was not a valid award, because not signed by the three arbitrators, as required by the by-laws. The by-laws were produced for the first time on the trial, and introduced in evidence, and, so far as material, are as follows:

"In case any question shall arise as to the validity of any claim for sickness, accident, or death, the same shall be arbitrated by a board of three registered physicians in good standing; said board to consist of one physician to be appointed by the medical director, and to be paid for by the association, and one physician to be appointed by the member, and to be paid for by the member; the third physician to be selected by the medical director's appointee and the member's appointee, to be paid for equally by the association and the member. The award of said board of arbitrators must be signed by all the arbitrators, and in all such cases, when so signed, shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary against the North American Benefit Association. If the award is not signed by the full board of arbitrators, then, in that case, either party shall apply for a new arbitration, and the said board of arbitrators shall be appointed as stated heretofore; and all awards made by any board of arbitrators must be signed by all the arbitrators, and, if not so signed, then there is no legal award, and either party shall apply for a new arbitration; and no suit in law or equity shall be commenced or maintained by any member or beneficiary against the North American Benefit Association."

The trial judge felt it his duty, in view of the provisions of these by-laws, to direct a verdict in favor of defendant. It is now urged that, as defendant failed to produce the by-laws at the hearing before the arbitrators, it must be deemed to have waived the signing of the award by all the arbitrators as provided in the by-laws. If this was a

case where suit might be brought upon the policy itself in case an effort to arbitrate had failed without the fault of the plaintiff,— a question upon which we express no opinion,—there would be a good deal of force in this contention. This is not a suit of that character; it is a suit upon an award which is shown by the contract made by the parties to be invalid. It is urged by plaintiff that the by-laws are unreasonable and oppressive, and should not be allowed to control. By-laws of a similar character have been before the courts in this State so often that their *status* is settled. *Canfield* v. *Knights of Maccabees*, 87 Mich. 626 (24 Am. St. Rep. 186); *Hembeau* v. *Knights of Maccabees*, 101 Mich. 161 (45 Am. St. Rep. 400); *Raymond* v. *Insurance Co.*, 114 Mich. 386. The decision of the court must be affirmed.

This suit originated in justice's court. As the question of costs is discretionary, and the conduct of the defendant in relation to the by-laws is not such as to commend itself to our sense of justice, no costs will be allowed to either party.

The other Justices concurred.

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ABANDONMENT OF TRACKS—See RAILROAD COMPANIES; WRIT AND PROCESS.

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ACCRETIONS—See WATERS (2).

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ACQUIESCENCE—See BOUNDARIES.

ACTIONS.

1. Separate suits may be brought by a creditor upon the claims embraced in an open account, subject, under 2 How. Stat. § 6876, to the penalty of loss of costs in subsequent suits where the whole of the claim upon such an account is not included in one action. *Phelps* v. *Abbott*, 624.

2. An objection that the owner of municipal bonds has no right to put his claim thereon into judgment, but is limited to *mandamus* to compel an assessment to pay them as they become due, cannot be urged for the first time in a proceeding to enforce the judgment. *Hammond* v. *Place*, 628.

3. But the objection is without force; since the right of the owner to sue upon these bonds exists, notwithstanding an amount sufficient to pay them has been included in prior assessments, and has failed of collection or been misappropriated. *Id.*

See ASSUMPSIT; CONDITIONAL SALE; HUSBAND AND WIFE (6); MUNICIPAL CORPORATIONS (28–30); MUTUAL BENEFIT ASSOCIATIONS (6); TITLE TO PERSONALTY (2).

ADJOURNMENT OF SCHOOL MEETING—See TAXES (27).

ADVERSE POSSESSION.

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AMENDMENTS.

A declaration in an action for personal injuries caused by a defective sidewalk, alleging that the place of the injury was at a point about 264 feet west of a given street, may on the trial be amended to correspond with the proof that the place was in fact about 364 feet west of such street, where it is evident that the defendant was not misled. *Grattan* v. *Village of Williamston*, 462.

See BILL OF PARTICULARS; CORPORATIONS (1); PLANK-ROAD COMPANIES.

APPEAL AND ERROR.

1. The findings of the court in a case tried without a jury will not be disturbed on appeal if there is evidence fairly tending to establish them. *Fuller* v. *Ehle*, 13.

2. A party cannot complain that the method of computing damages adopted by the court resulted in an inadequate award, where such method was the only one open upon the testimony because of the failure of such party to introduce the necessary proofs. *Culver* v. *Nester*, 192.

3. A finding of the circuit judge as to the value of a stock of goods involved in a chancery suit heard before him, concerning which the opinions of witnesses are not in harmony, will not be disturbed on appeal, unless it clearly appears to be erroneous. *Union National Bank* v. *Rich*, 414.

4. Special findings of fact in a case tried before the court without a jury have the force of a verdict, and will not be disturbed if there is any testimony to support them. *Childs* v. *Nordella*, 511.

5. Rulings to which no exceptions were taken will not be reviewed on appeal. *Id.*

6. Where a case is tried before the court without a jury, and no exceptions are taken to the findings of fact and law by the court, the only question that can be raised upon appeal is whether the findings support the judgment; and that question is not open for consideration unless it is made the basis of an assignment of error. *Weist* v. *Morlock*, 606.

7. Affidavits claimed to have been introduced in the trial court cannot be considered on appeal where they are not made a part of the record. *Holton* v. *Holton*, 669.

8. The Supreme Court will, in its discretion, disallow costs on appeal, where the conduct of the prevailing party in relation

APPEAL AND ERROR—Continued.

to the suit is not such as to commend itself to a sense of justice. *Russell* v. *North American Benefit Ass'n*, 699.

See ATTACHMENT (2); CERTIORARI; COSTS; MANDAMUS; NEW TRIAL; PROBATE COURTS (2–7); RECEIVERS; RES JUDICATA (2, 4); TRIAL.

APPEARANCE—See GARNISHMENT (6).

APPORTIONMENT—See TAXES (17).

ARBITRATION AND AWARD.

1. An estimate of the quantity of standing timber, made by the arbitrator named in a contract looking to its purchase, is not conclusive, where there was no such separation of varieties as the contract contemplated, and one of the parties had no part in directing the estimate, and it was not reported to him. *Culver* v. *Nester*, 191.

2. Defendant agreed to hold certain money in trust, pending a decision by arbitrators as to whether it should be paid to complainant or to the holder of a specified promissory note. The arbitration failed, and defendant made a full settlement with the holder of the note, who was *prima facie* entitled to the fund, and was by him released from all liability. Complainant afterwards purchased the note, which was then past due, and filed a bill to establish his right to the fund. *Held*, that he had made no case. *Wilson* v. *Wright*, 476.

See MUTUAL BENEFIT ASSOCIATIONS (5, 6).

ARTICLES OF ASSOCIATION—See CORPORATIONS (1); PLANK-ROAD COMPANIES.

ASSAULT.

1. An assault upon one who had been invited to attend a spiritualistic seance for the purpose of investigating the same cannot be justified upon the ground that he was disturbing a religious meeting, if he was doing nothing not reasonably calculated to carry out the purpose for which he was invited. *People* v. *Hughes*, 80.

2. An instruction, in an action for assault and battery, that, if plaintiff was removing defendant's property "with no manifestation of force, then defendant would not be excusable in using force, or legally allowed to do so," is harmless error, where it was elsewhere clearly charged that he might use sufficient force to reclaim the property, or to prevent its removal, and where the evidence tends to show the use of excessive force. *Hamilton* v. *Arnold*, 684.

See CRIMINAL LAW (1); EVIDENCE (1, 3); HOMESTEAD.

ASSESSMENTS—See TAXES.

ASSIGNMENT OF DEBT—See BANKS AND BANKING (2).

ASSIGNMENTS FOR BENEFIT OF CREDITORS — See EQUITY PRACTICE (2).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (6).

ASSUMPSIT.

1. One who, having been induced by fraudulent representations to sell property for less than its real value, under the advice of counsel, and with full knowledge of the facts, makes a sale of a purchase-money mortgage received by him, thereby affirming the contract, cannot afterwards maintain an action of *assumpsit*, based upon an implied contract, to recover the avails of the property in the hands of the grantee. *Bedier* v. *Fuller*, 126.

2. Act No. 195, Pub. Acts 1897, permitting an action of *assumpsit* in all cases where, by the fraudulent representations or conduct of any person, an injury has been produced for which an action on the case for fraud or deceit may be brought, does not affect litigation pending on appeal when the act took effect. *Id.*

3. In *assumpsit* against an officer to recover moneys paid on an execution issued upon a void judgment, the execution is admissible in evidence under a plea of the general issue. *Miller* v. *Hahn*, 607.

See PUBLIC OFFICERS (5); SALE.

ASYLUMS—See BOARDS OF SUPERVISORS.

ATTACHMENT.

1. A trial of the issue in attachment proceedings cannot be avoided by a motion to quash based upon the merits, even if it be accompanied by a stipulation of the facts. *S. K. Martin Lumber Co.* v. *Menominee Circuit Judge*, 354.

2. *Certiorari*, and not *mandamus*, is the proper remedy to review a ruling of the circuit judge upon an application to dissolve a writ of attachment under 2 How. Stat. § 8026. *Id.*

See ESTOPPEL.

ATTORNEY AND CLIENT.

Where an attorney who had been employed to bring about a judicial sale of his clients' property, the title to which was in dispute, with their knowledge and consent executed a contract with a prospective purchaser whereby he was to receive from the latter, in case he should be the successful bidder at a stated amount, a commission upon the purchase price, such commission being in lieu of direct compensation from the clients, the agreement was not invalid as violating the clients' interests. *Culver* v. *Nester*, 191.

BALLOTS—See BOARDS OF SUPERVISORS (3).

BANKS AND BANKING.

1. Where a bank receives for collection a check drawn upon it by a depositor, and, after charging the same to his account,

BANKS AND BANKING—Continued.

pending payment to the owner, passes into insolvency, the amount of the check does not constitute a trust fund in the hands of the receiver. *Sunderlin* v. *Mecosta County Savings Bank*, 281.

2. The giving and receipt of a draft, drawn by a bank upon its correspondent, in the ordinary form, in favor of one from whom it has received certain paper for collection, does not constitute an equitable assignment *pro tanto* of an indebtedness owing by the correspondent, so as to entitle the payee, in the event of the drawer's becoming insolvent before presentation of the draft, to priority over general creditors. *Id.*

See BILLS AND NOTES (7).

BAR—See BILLS AND NOTES (10); JOINT DEBTORS.

BENEFIT ASSOCIATIONS—See MUTUAL BENEFIT ASSOCIATIONS.

BETTERMENTS—See TAXES (10, 11); TENANCY IN COMMON (4–6).

BIGAMY—See CRIMINAL LAW (3).

BILL OF EXCEPTIONS.

Mandamus will not issue to compel the circuit judge to settle a bill of exceptions after the expiration of the time provided for by Circuit Court Rule No. 47, in the absence of a stipulation extending the time. *Lake Shore, etc., R. Co.* v. *Branch Circuit Judge*, 399.

See NEW TRIAL (3, 4); WITNESSES.

BILL OF PARTICULARS.

A bill of particulars stated that in October, 1892, on a full settlement of partnership dealings, it was found that defendant owed plaintiff $1,000, which he agreed to pay. The evidence showed that, while there was a partial settlement in October, there was no full settlement until November, and that the amount actually due was $528.50. It appeared that the settlement was made with defendant personally, and that the books and papers of the partnership had been all the time in his custody. *Held*, that the bill of particulars did not surprise or mislead defendant so as to prevent an amendment at the trial to correspond with the proofs. *Sogge* v. *Schwartz*, 635.

BILL OF REVIEW—See EQUITY PRACTICE (4).

BILL OF SALE—See CHATTEL MORTGAGES (3).

BILLS AND NOTES.

1. An instrument in the form of a promissory note, which contains a recital that the consideration for it and for certain other notes is a soda fountain, described in a contract of sale of even date; that the maker, to whom the apparatus has been delivered, is to acquire no title thereto until all the notes are paid; and that the payee is to have the right, in case of nonpayment at maturity of either of the notes, to "enter

BILLS AND NOTES—Continued.

and retain immediate possession of the property, * * * and remove the same,"—imports an absolute, not a conditional, sale, with reservation of title by way of security. *Choate* v. *Stevens*, 28.

2. The negotiability of such note is not impaired by the recitals as to the consideration and reservation of title. *Id.*

3. Whether the written contract of sale, executed some days before, in accordance with the terms of which the notes in question were given, could properly be examined by the court for the purpose of determining the character of the transaction as bearing upon the negotiability of the note, in case the recitals in the note had left the matter in doubt,—*quære*. *Id.* 29.

4. Want of consideration for a note executed by defendant to decedent in her lifetime is established where it is shown that the note was executed merely as a memorandum of a previous transaction, whereby decedent paid to defendant the amount of the note in consideration of his agreeing to use the same in the construction of a house where she might make her home and receive maintenance and support, which agreement was carried out to the satisfaction of decedent. *Kelley* v. *Guy*, 43.

5. A want or failure of consideration may always be shown in defense of an action on a note. *Id.*

6. The mere fact that a bank had represented in writing that a certain company was, in its opinion, reliable, has, of itself, no tendency to show that it was not a good-faith purchaser of a note fraudulently obtained by an agent of such company from one to whom the recommendation was exhibited. *Drovers' National Bank* v. *Potvin*, 474.

7. The testimony of the cashier of a bank that he had purchased, as agent for the bank, for value and before maturity, from the payee, a note which the latter had fraudulently obtained; that he had no notice of the fraud; and that the bank had no committee or agent in the matter except himself,—is a sufficient *prima facie* showing of the bank's good faith. *Id.*

8. The direction of a verdict for the plaintiff in an action on a note purchased by it is proper where the only question is as to the good faith of the purchase, and there is *prima facie* evidence of good faith, which is undisputed. *Id.*

9. In an action upon a promissory note by the payee, parol evidence is admissible to show that the defendant, who indorsed the note before delivery, was, as between the maker and himself, a surety, and that the payee had knowledge of the fact. *Hitchcock* v. *Frackelton*, 487.

10. Under the laws of Minnesota, the maker of a promissory note, and a third person indorsing the same before delivery, stand in the relation of joint and several makers of the note, and a judgment against one is no bar to an action against the other; which rule will be applied in determining the rights of

BILLS AND NOTES—Continued.

the several parties under a note executed, delivered, and made payable in that State. *Id.*

See ARBITRATION AND AWARD (2); CONTRACTS (11); EVIDENCE (18, 19); GARNISHMENT (1, 2); LIENS (2); PARTNERSHIP (4); PAYMENT (2); PRINCIPAL AND SURETY (3).

BOARD OF STATE AUDITORS—See STATE PRINTING.

BOARDS OF DIRECTORS—See TRIAL (11).

BOARDS OF EDUCATION—See SCHOOLS AND SCHOOL DISTRICTS; TAXES (5, 7, 23).

BOARDS OF HEALTH—See PUBLIC HEALTH.

BOARDS OF REVIEW—See TAXES (12, 13, 19-21, 25, 26).

BOARDS OF SUPERVISORS.

1. The board of supervisors of a county may, by a mere majority vote of the members elect, adopt a resolution to submit to the electors of the county a proposition to borrow money for the purchase of a site for a county asylum for pauper insane, and the erection of suitable buildings thereon, under 1 How. Stat. §§ 475, 483 (subd. 7), empowering a majority of the board to borrow or raise by tax any sums necessary for any of the purposes mentioned in the act, provided that no greater sum than $1,000 shall be borrowed or raised in any one year for the purpose of repairing or constructing public buildings, unless authorized by a majority of the electors of the county voting therefor, although by section 484 a two-thirds vote is required before the board can exercise the power conferred by section 483, subd. 6, to "cause" such buildings "to be erected." *Thomas* v. *Kent Circuit Judge*, 106.

2. The adoption of a resolution which recites that such asylum, if erected, would within a few years be a self-sustaining institution and a saving to the county, and which fixes the amount of the proposed loan, is a sufficient determination by the board of the necessity for the building and of the sum necessary to be raised, within 1 How. Stat. § 492. *Id.*

3. The resolution of submission provided that the ballots should be in the following form: "Shall the board of supervisors * * * borrow * * * the sum of $50,000, and spread upon the various assessment rolls, * * * for the repayment of said money, $10,000 in the year 1898 * * * [providing for five annual payments], for the purpose of purchasing a suitable site, and the erection of suitable buildings thereon, for a county pauper insane asylum?" followed by the word "Yes," and a duplicate thereof, by the word "No." *Held*, a sufficient compliance with 1 How. Stat. § 492, providing that such ballots shall have thereon the words, "For the Loan," and "Against the Loan," which is to be construed as a directory provision. *Id.*

BOARDS OF SUPERVISORS—Continued.

4. The fact that the proposition, as submitted to the electors, embodied method and time of payment, did not render it objectionable. *Id.* 107.

See MANDAMUS (2); PUBLIC HEALTH (3); TAXES (14–17).

BONA FIDE PURCHASER—See BILLS AND NOTES (6–8).

BONDS—See ACTIONS (2, 3); PLEADING (2); PRINCIPAL AND SURETY (1, 2, 4).

BOUNDARIES.

The rule that a boundary line, long treated and acquiesced in as the true line, becomes the legal boundary of the premises, regardless of the result of new surveys, is applicable to a case where the owners of premises divided by a township line, agreeing that the government surveyed line was crooked and incorrect, established by parol, and marked by a fence, a different line, in which they acquiesced for upwards of 30 years. *Tritt* v. *Hoover*, 4.

BRIDGES.

In an action against a township for damages occasioned by the collapse of a bridge, evidence that there was a decayed spot in the stringer, the breaking of which caused the accident, which looked darker than the other portions of the stringer, at least when it was wet, does not show conclusively that the township had constructive notice that the structure was in need of repair, but its force as bearing upon that question is for the jury. *Randall* v. *Township of Southfield*, 500.

See MUNICIPAL CORPORATIONS (19).

BURDEN OF PROOF—See LIENS (3).

BY-LAWS—See MUTUAL BENEFIT ASSOCIATIONS (5, 6).

CARRIERS.

A railroad company becomes immediately liable as a common carrier, where goods properly marked for shipment are placed inside its freight depot for immediate transportation, with the agreement by its agent that they will be shipped the following morning, although no shipping bill or written contract is given. *Meloche* v. *Chicago, etc., R. Co.*, 69.

See CUSTOM (1).

CERTIFICATE OF ACKNOWLEDGMENT—See MORTGAGES (3).

CERTIFICATE OF SALE—See TAXES (3).

CERTIORARI.

1. *Certiorari* will not lie, as a matter of right, to review the action of a circuit court commissioner in denying an application for a continuance in summary proceedings, since complete justice may be obtained by an appeal and a trial on the merits. *McNaughton* v. *Evert*, 141.

CERTIORARI—Continued.

2. Where an affidavit of account, which stated that between specified days plaintiff worked for defendants in their mine under an agreement with them through their foreman, was received in justice's court without objection, and was treated by the justice as evidence upon which to base a finding that defendants were copartners, the finding was properly sustained on *certiorari*. *Mero* v. *Button*, 680.

See ATTACHMENT (2).

CHALLENGE FOR CAUSE—See JURY.

CHATTEL MORTGAGES.

1. A mortgage of an undivided half interest in a growing crop of peppermint, made by one in possession of the land on which the crop is growing, under a verbal contract good for only one year, cannot, as against the owner of the land, be held valid as to the crop grown by the mortgagor the following year, although the owner knew of the mortgage, and permitted the mortgagor to continue in possession the second year. *Brown* v. *Bolt*, 52.

2. An intervening creditor does not lose the right to avail himself of 2 How. Stat. § 6193, making a chattel mortgage, unaccompanied by change of possession, invalid as against a creditor whose claim accrues between the execution of the mortgage and the filing thereof, by taking a chattel mortgage to secure his claim under circumstances not entitling him to protection as a subsequent good-faith incumbrancer; nor is such right affected by his failure either to take possession by virtue of his mortgage, or to have the same properly filed. *Vining* v. *Millar*, 144.

3. The fact that the vendee in a bill of sale placed the same on file in the office of the township clerk may be considered on the question whether it was given as security or as an absolute sale. *Black* v. *Simon*, 382.

4. A mortgage of a stock of goods is not void as against the creditors of the mortgagor because it covers after-acquired goods, and permits the mortgagor to sell in the usual course of trade, and apply the proceeds to his own use. *Huellmantel* v. *Vinton*, 621.

5. The holder of a second mortgage upon chattels may maintain trover against one who has wrongfully converted them, without paying or tendering the amount of a judgment theretofore recovered against the defendant for the conversion of the interest of the prior mortgagee, and may recover in the action such portion of the value of the property converted, up to the amount of his claim, as remains after satisfying the former judgment. *Id.*

CHECKS—See BANKS AND BANKING (1)

CHURCHES—See CONSTITUTIONAL LAW (1).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

CIVIL-DAMAGE ACT—See INTOXICATING LIQUORS (2, 3).

CLERICAL ERROR—See TAXES (16).

COLLATERAL ATTACK—See RES JUDICATA (5).

COLLECTIONS—See BANKS AND BANKING.

COLLUSION—See DIVORCE (3).

COMITY—See MUTUAL BENEFIT ASSOCIATIONS (1).

COMMERCIAL PAPER—See BILLS AND NOTES.

COMMISSIONS—See ATTORNEY AND CLIENT; CONTRACTS (1, 2).

COMMON CARRIERS—See CARRIERS.

COMPLAINT—See CRIMINAL LAW (3); SUMMARY PROCEEDINGS (1).

CONDEMNATION PROCEEDINGS—See PROBATE COURTS (3).

CONDITIONAL SALE.

Under a contract for the sale of personal property which provides that title shall remain in the vendor until the full purchase price is paid, and that, in case of the vendee's default in the payment of either of three purchase-money notes, the vendor may retake the property, in which case all payments previously made shall be deemed to be for the use, wear, and tear of the property up to the time of retaking, and that the commencement of suit upon the notes shall not be deemed a waiver of the right to retake the property, the vendor is entitled, on the vendee's default, either to retake the property, and treat the payments up to that time as for the wear and tear thereof, or to sue on the notes, and take and retain possession of the property until the judgment is paid; but he cannot retake the property, apply the invoiced price, less a stated per cent. for alleged depreciation, upon the notes, and bring suit for the balance. *Perkins* v. *Grobben*, 172

See BILLS AND NOTES (1); PAYMENT (1).

CONDITIONS—See CONTRACTS (11).

CONFLICT OF LAWS—See BILLS AND NOTES (10); GARNISHMENT (4); MUTUAL BENEFIT ASSOCIATIONS (1).

CONFUSION OF GOODS—See CONVERSION.

CONSIDERATION—See BILLS AND NOTES (1, 2, 4, 5); CONTRACTS (11); FRAUDULENT CONVEYANCES (3, 4); RES JUDICATA (3).

CONSTITUTIONAL LAW.

1. Act No. 209, Pub. Acts 1897, entitled "An act to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies," is constitutional, so far as it affects churches, whether or not the provisions embodied therein relative to "societies for the diffusion of moral or religious knowledge" are within the title. *Graham* v. *Muskegon County Clerk*, 571.

CONSTITUTIONAL LAW—Continued.

2. It is beyond the power of the legislature, under the Constitution, so to limit the taxing power of a municipality as to preclude it from raising an amount necessary to satisfy its pre-existing legal obligations. *Hammond* v. *Place*, 629.

CONTINUANCE.

1. The matter of the continuance of causes is one resting in the sound discretion of the court, which is not reviewable except where there is the clearest evidence of willful or wanton disregard of justice or a mistake of law. *McNaughton* v. *Evert*, 141.

2. The fact that an application for a continuance is supported by an affidavit setting forth the serious illness of a witness whose testimony is alleged to be material does not render its denial an abuse of discretion, where two continuances have already been granted the affiant, and no showing is made by him, aside from his statement, that the testimony of the absent witness is material, and the circumstances surrounding the case are such as to cast doubt upon the good faith of the application. *Id.*

3. Defendant's motion for a continuance in an action for conversion, made after the plaintiff's proof is all in and without any showing, is properly overruled, although the court has in effect allowed the plaintiff to amend his declaration with reference to the time of the conversion. *Crane Lumber Co.* v. *Bellows*, 304.

See CERTIORARI (1).

CONTRACTS.

1. Defendant agreed to bid up to $4 per M. for timber of which plaintiff, an attorney, undertook to procure a judicial sale, and to pay to plaintiff, if such bid should be accepted, a commission of $1 per M. Defendant further agreed that, "at the option of the second party," he would bid any sum named by him less than $5 per M., and pay as commissions the difference between the sum so bid and $5 per M. *Held*, that the defendant was not liable to pay the full commission of $1 per M. upon timber bid in by him at a price exceeding $4 per M., although the bid accepted was not made at plaintiff's suggestion. *Culver* v. *Nester*, 191.

2. There was nothing in such contract which contravened public policy, as it had no tendency to prevent free competition at the sale, but merely imposed an obligation upon defendant to bid up to a certain amount, leaving it optional with him to bid as much more as competition should make necessary without incurring any penalty under the contract. *Id.*

3. Plaintiff voluntarily prepared and submitted to the general solicitor of the defendant railroad company a plan for new terminal and depot facilities in a certain city. In the course of sundry correspondence and conversations with the solicitor, who, to plaintiff's knowledge, had no authority to bind the company by a contract to buy the plan, plaintiff was

CONTRACTS—Continued.

given to understand that, in case his plan should be adopted, he would be given employment in the way of negotiating for the required lands, on a basis of compensation which would guarantee to him a sum corresponding with the value placed by him upon the plan. The plans were afterwards submitted to the defendant's president, and he, while engaged in their examination, either by word or nod indicated acquiescence in plaintiff's statement as to the substance of the previous negotiations with the general solicitor. *Held*, not to amount to an agreement by the company to pay plaintiff for the plan if used. *Moore* v. *Flint, etc., R. Co.*, 196.

4. A contract between a logger and a sawyer was evidenced by two papers delivered at the same time, the one, a letter offering to sell the logs for a stated price per M., payments to be made in advance in negotiable paper of specified amounts, upon which letter the sawyer's acceptance was indorsed; the other, a letter bearing date one day later, offering to buy back the lumber manufactured from the logs at the same price per M. that was paid for them, and to pay a stated amount per M. for the sawing, which likewise contained the sawyer's written acceptance. The logger agreed to take care of the sawyer's paper whether or not the logs were delivered as agreed. *Held*, that it was competent for the sawyer to show by parol that the transaction was not a purchase and resale, but that it merely provided a security for advances. *Germain* v. *Central Lumber Co.*, 245.

5. One engaged in building a gunboat for the government under contract is liable to his subcontractor, who has agreed to equip the boat with electric lights, for damages resulting from delay in furnishing drawings, specifications, and other information mentioned in the contract, although the delay was caused by the government inspector's failure to provide them. *Fisher Electric Co.* v. *Bath Iron Works*, 293.

6. A subdivision of a contract to install a boat with electric lights was designated as "plant." The first sentence defined the plant as consisting of two engines and two dynamos, and the other provisions in the subdivision referred to the plant in language consistent with such definition. *Held*, that it had such meaning wherever found in the subdivision, though ordinarily it has a broader meaning, and other subdivisions of the contract used it in the latter sense. *Id.*

7. In a suit by an electric company upon a subcontract to install a government gunboat with electric lights, plaintiff sought to recover at the rate of $90 per week for extra labor, the actual cost of which to it was only $26.50 per week, claiming that the former amount was agreed upon because of an understanding with the contractor that the government would be "soaked" for extras. *Held*, that the agreement was against public policy, and void, and that plaintiff could recover only what the services were reasonably worth. *Id.* 294.

8. By the terms of the subcontract, plaintiff agreed to furnish search-lights at a stated price, defendant agreeing to pay all

CONTRACTS—Continued.

of the cost in excess of that sum. Defendant wrote urging plaintiff to purchase a certain expensive light, and affirming its liability for the excess. Plaintiff's president, in order to arrange the purchase, made several trips to a distant city, but kept no account of his expenses, and rendered no bill therefor at the time. *Held*, that a charge for such services and expenses should be disallowed, as not within the contemplation of the parties. *Id.*

9. One who contracts to purchase land from executors, expecting to receive a deed at once, is justified in rescinding the contract on learning that the executors have no power to sell under the will, even though they offer to indemnify him against loss if he will allow the contract to stand, and accept a deed when they can procure one. *Potter* v. *Ranlett*, 454.

10. So much of a decree as awarded damages to complainant, based upon a finding that, as a part of the contract between the parties, defendants were to make certain advances to aid in its performance, which they failed to do, was reversed, as not warranted by the evidence. *Sheridan* v. *Peninsular Savings Bank*, 545.

11. A promissory note reciting that it is given in consideration of the construction of a certain railroad, and the completion and operation of the same by a specified date, makes the provision as to time a condition precedent to liability on the note, a nonperformance of which renders the note void. *Jordan* v. *Newton*, 674.

12. One cannot ratify a written agreement, and at the same time assert a different parol one. *Schmoltz* v. *Schmoltz*, 692.

See ASSUMPSIT (1); ATTORNEY AND CLIENT; BILLS AND NOTES; CONSTITUTIONAL LAW (2); CUSTOM (1); DURESS; HUSBAND AND WIFE (5, 6); MARRIED WOMEN (2–4); MUNICIPAL CORPORATIONS (1–3, 5–8, 10, 11); PRINCIPAL AND SURETY (1, 2); PRISONS; PUBLIC HEALTH (3); STATE PRINTING; STATUTE OF FRAUDS; TITLE TO PERSONALTY.

CONTRIBUTION.

One who, knowing of the right of another to be subrogated to the claim of a beneficiary under a trust mortgage, purchases the property covered thereby, paying the full purchase price to the other beneficiaries, cannot complain that a decree by which he is held liable to the excluded claimant for the latter's proportion of the purchase price, and which is made without prejudice to his right to bring an action at law against the other beneficiaries to recover the amounts paid to them in excess of their *pro rata* shares, does not go further, and enforce contribution in the same suit. *Union National Bank* v. *Rich*, 414.

See RAILROAD COMPANIES.

CONTRIBUTORY NEGLIGENCE.

1. A boy who has sufficient intelligence to appreciate the danger of running in front of a street car, and has in mind the necessity of taking precautions, is guilty of contributory negligence in running in front of a car, even though he did not fully possess the intelligence of an adult. *Henderson* v. *Detroit Citizens' Street-Railway Co.*, 368.

2. The fact that a person injured by a defective sidewalk had knowledge of the defect may be taken into account by the jury in determining whether he used due care, but it is not conclusive against his right to recover. *Grattan* v. *Village of Williamston*, 463.

3. A motorman who runs an electric car, upon a foggy morning, at a rate of speed which does not permit of its being stopped in time to avoid collision with a vehicle after the same becomes discernible upon the track ahead, is guilty of contributory negligence. *La Pontney* v. *Shedden Cartage Co.*, 514.

See INFANTS; TRIAL (9).

CONVERSION.

Appropriating and sawing the logs of another, though without knowledge or fault, and commingling the lumber with one's own, so that it cannot be identified, is a conversion, and no demand is necessary. *Crane Lumber Co.* v. *Bellows*, 304.

See CHATTEL MORTGAGES (5)

CONVEYANCES—See DEEDS.

CONVICT LABOR—See PRISONS.

CO-OPERATIVE ASSOCIATIONS—See CORPORATIONS (3).

CORPORATIONS.

1. An amendment of the articles of association of a corporation, extending the period of its existence at a time when there was no statute allowing such an amendment, which provision is continued in a subsequent amendment of the articles, made after the passage of an act authorizing such an amendment, operates as a valid extension of the corporate existence, even though the preamble to the amended articles does not refer to the proposed extension. *People, ex rel. Ward,* v. *Green,* 505.

2. A receiver should not be appointed for a corporation on the application of one comparatively small stockholder, on the ground that another stockholder has obtained full management of the corporation, and that there has been no meeting of the directors, and that no reports of the condition of the company have been filed, and that such other stockholder has declared dividends only when threatened with proceedings for a receiver, and has then withheld the applicant's share of the dividend, where no other stockholders are dissatisfied with the management, and it does not appear that the corporation or the managing stockholder is insolvent, or that the

CORPORATIONS—Continued.

latter has converted any of the corporate property to his own use. *Rumney* v. *Detroit & Montana Cattle Co.*, 640.

3. 1 How. Stat. § 3940, making each of the stockholders and directors of an incorporated co-operative association individually liable for goods sold the corporation "to the amount of his capital stock therein and no more," imposes a liability equal to and over and above the full-paid value of the stock held. *Kirkpatrick* v. *Bessalo*, 657; *Same* v. *Costo*, 662.

See MUNICIPAL CORPORATIONS; MUTUAL BENEFIT ASSOCIATIONS; PLANK-ROAD COMPANIES; RELIGIOUS SOCIETIES; TRIAL (11); VOLUNTARY ASSOCIATIONS.

COSTS.

Where the court, in determining the amount for which the complainant in lien proceedings was entitled to a decree, overlooked the fact that certain payments had been made upon the claim in question, making an application for rehearing necessary, no costs of the rehearing were allowed. *Fairbairn* v. *Moody*, 62.

See ACTIONS (1); APPEAL AND ERROR (8); TRESPASS (1).

COUNSEL, CONDUCT OF—See TRIAL (3, 4, 14).

COURTS—See PROBATE COURTS.

CRIMINAL LAW.

1. Upon a trial for assault and battery, the prosecuting attorney does all that is required of him when he calls the witnesses who were present at the time the offense is claimed to have been committed, swears them on behalf of the people, and tenders them to the defense for cross-examination. *People* v. *Hughes*, 80.

2. An information for manslaughter, which clearly apprises the respondent that he is charged with causing the death of a pregnant woman through an unlawful attempt to procure a miscarriage, but alleges that the act was committed "with force and arms," will support a conviction under proof that the deceased consented to the attempt; the question of consent being immaterial. *People* v. *Abbott*, 263.

3. An objection that the complaint in a prosecution for bigamy was made by the husband of the respondent is waived by pleading to the information. *People* v. *Turner*, 390.

4. It is not essential that a hypothetical question propounded by the people to an expert witness should embrace all the proofs in the case, but it may be based solely on those adduced by the prosecution. *People* v. *Foglesong*, 556.

See ASSAULT; EVIDENCE (1, 5–7, 15–17); INTOXICATING LIQUORS (1); JURY; LARCENY; MANSLAUGHTER; NEW TRIAL (2); RAPE.

CROPS—See CHATTEL MORTGAGES (1).

CUSTOM.

1. Where plaintiff in an action against a carrier of freight relies upon an express contract for the transportation of goods, a custom cannot change its terms. *Meloche* v. *Chicago, etc., R. Co.*, 69.

2. A sawyer's lien for his saw bill cannot be affected, while he retains the actual possession of the lumber, by any custom which relates merely to the method of removing lumber from the sawyer's docks when no lien rights are involved. *Germain* v. *Central Lumber Co.*, 246.

3. The admission of evidence as to such custom in a case involving a sawyer's lien is prejudicial error, where the jury are instructed that they may consider "all the evidence in the case" in determining whether or not the lien had been waived. *Id.*

DAMAGES.

An instruction in trespass *vi et armis* that the jury may award damages "by way of punishment," if defendant, in the commission of the trespass complained of, was actuated by malice or a reckless disregard of plaintiff's rights, is erroneous; compensatory damages being the limit of recovery in civil cases, —at least where unaffected by statute. *Haviland* v. *Chase*, 214.

See APPEAL AND ERROR (2); CHATTEL MORTGAGES (5); MARRIED WOMEN (1); TRIAL (10).

DANGEROUS MACHINERY—See NEGLIGENCE (4, 5).

DEBTOR AND CREDITOR—See BANKS AND BANKING; CHATTEL MORTGAGES (2, 4); FRAUDULENT CONVEYANCES; RES JUDICATA (1).

DEEDS.

1. A deed, purporting to convey lands specifically described, recited, immediately after the description, that the express intent of the instrument was to convey all of the grantor's right, title, and interest in the premises "by reason of her being an heir at law of J., * * * now deceased." It afterwards developed that the parties were mistaken in supposing that the grantor had an interest as heir of J., but that she was entitled, as heir of E., to an interest considerably larger. *Held*, that the court would not subvert the clear intent of the parties by giving the deed effect as a conveyance of the entire interest derived through E. *Mullreed* v. *Thumb*, 440.

2. Whether equity would so reform the deed that it should convey an interest equal to that supposed to be owned by the grantor at the time of its execution,—*quære*. *Id.* 441.

3. A finding that a deed, claimed by the grantor to have been delivered upon the understanding that it should be withheld from record until his death, was recorded with his full consent, is justified, where it appears that he knew of the recording at the time, but made no objection for seven years,

DEEDS—Continued.

during which time he continued in possession of the premises under a life lease from the grantee. *Ayris* v. *Ayris*, 484.

4. Under a deed to two persons, "to them and the survivor of them, parties of the second part," the grantees take each a moiety for life, with remainder to the survivor in fee, although the grant, in terms, is "to the parties of the second part, and to their heirs and assigns." *Schulz* v. *Brohl*, 603.

See EXECUTION (2); RES JUDICATA (3); TAXES (4).

DEFICIENCY—See MORTGAGES (1).

DELIVERY—See DEEDS (3); SALE; STATUTE OF FRAUDS (2).

DELUSIONS—See WILLS (5).

DEMAND—See CONVERSION.

DEMURRER—See EQUITY PLEADING (5); EQUITY PRACTICE (3); PARTIES (2); PLEADING (2).

DEPOSITIONS.

1. The court should not stay the further prosecution of a suit by a nonresident until he shall appear before a notary of the State of his residence, in pursuance of a notice to take his deposition, given under Act No. 180, Pub. Acts 1895, where he is in the State for the purpose of attending the trial, and offers to testify as a witness, and to produce all books and papers in his possession relating to the subject in litigation. *Young* v. *Kent Circuit Judge*, 10.

2. Where the plaintiff in a civil action notifies defendant of his willingness to appear as a witness at the trial of the cause, and to produce all books and papers in his possession relating to the subject in litigation, he cannot be compelled to submit to the taking of his deposition under Act No. 180, Pub. Acts 1895, merely to enable the defendant to inquire into the truth of his testimony before the case is brought on for trial. *Id.*

DESCRIPTION OF LANDS—See TAXES (1, 2, 18).

DESERTION—See DIVORCE (1).

DIRECTING VERDICT—See BILLS AND NOTES (8).

DISCLOSURE—See GARNISHMENT (2, 3).

DISCONTINUANCE.

By proceeding to judgment against one of several defendants, who alone was served, plaintiff elects to discontinue as to the others. *Hitchcock* v. *Frackelton*, 487.

DISSOLUTION OF ATTACHMENT—See ATTACHMENT (2).

DISSOLUTION OF INJUNCTION—See MANDAMUS (1).

DIVORCE.

1. The testimony of the husband in divorce proceedings based upon the wife's alleged desertion, that he never assented to her leaving him, and that she went away against his will, supports a finding that the separation was against the will of the husband, although it appears from his cross-examination that he did not object to her taking her things and going, where his conduct in this respect is explained by his statement that he knew it would do no good for him to object. *Northway* v. *Northway*, 19.

2. A bill for divorce, alleging that complainant and defendant lived together as husband and wife until defendant deserted and abandoned complainant, and that, some years before such desertion, defendant informed complainant that he had a former wife living, but had obtained a decree of divorce from her, of which he showed a copy, and that, after consultation, they deemed it unnecessary to have another marriage ceremony performed, and continued to live together as husband and wife until the husband's desertion,—does not show the nonexistence of the marital relation, so as to render illegal a commitment for failure to comply with an order for temporary alimony based thereon. *Flanagan* v. *Flanagan*, 185.

3. It being the duty of courts to see that no divorce is obtained by collusion between the parties, the circuit judge may, in a suit in which defendant fails to appear, order in evidence, and consider, the pleadings and proofs in a former suit between the same parties, in which a decree was denied. *Holton* v. *Holton*, 669.

DOLLAR MARK—See TAXES (17).

DOWER—See TENANCY IN COMMON (2).

DRAFTS—See BANKS AND BANKING (2).

DRAINS.

1. The duty of the township board, under chapter 5 of the drain law of 1885 (3 How. Stat. § 1740e2 *et seq.*), upon the appeal of a landowner assessed for benefits, is confined to the correction of any error or inequality in the assessment made by the commissioner upon the lands benefited; it having no authority to pass upon the validity of the drain proceedings, or to review the action of the commissioner in fixing the percentage of the cost to be borne by the township at large. *Thomas* v. *Walker Township Board*, 597.

2. Therefore, where a drain is established by the joint action of the commissioners of two counties, and the owner of lands assessed for benefits appeals to the township board of the township in which his lands so assessed are situated, the drain commissioner of the other county is not a necessary party to the appeal. *Id.*

3. The authority of the township board to correct any "error or inequality" in the assessment does not extend to the changing of the boundaries of the assessment district by excluding lands which the commissioner has determined to be benefited by the drain. *Id.* 598.

DRAINS—Continued.

4. Where a township board, upon the appeal of a landowner assessed for drain benefits, attempted, in excess of its authority, to exclude certain of the lands as not assessable, and failed otherwise to pass upon the errors and inequalities alleged, it was directed by the Supreme Court, upon the reversal of a judgment of the circuit court sustaining its action, to reconvene and review the assessment in accordance with the statute. *Id.*

See MUNICIPAL CORPORATIONS (20, 22).

DUPLICITY—See EQUITY PLEADING (6).

DURESS.

A payment made by a contractor to a subcontractor of an excessive charge for labor in order to secure the shipment of materials which he needs, and which the subcontractor has agreed to furnish, is not a ratification of the correctness of the bill, and will not preclude an adjustment of the items upon final settlement. *Fisher Electric Co.* v. *Bath Iron Works*, 294.

ECCLESIASTICAL BODIES—See CONSTITUTIONAL LAW (1); RELIGIOUS SOCIETIES.

EJECTMENT—See TENANCY IN COMMON (3).

ELECTIONS—See BOARDS OF SUPERVISORS; MILITIA; TOWNSHIPS.

ELECTRIC RAILWAYS—See CONTRIBUTORY NEGLIGENCE (3).

EMINENT DOMAIN—See PROBATE COURTS (3).

ENTIRETIES, TENANCY BY—See HUSBAND AND WIFE (1, 2); PARTIES (3).

EPIDEMICS—See PUBLIC HEALTH (3).

EQUALIZATION—See TAXES (14–17).

EQUITABLE ASSIGNMENT—See BANKS AND BANKING (2)

EQUITY JURISDICTION.

1. A bill in equity will not lie to recover damages for the wrongful act of a depositary in suppressing a conveyance, there being an adequate remedy at law. *Pulezer* v. *Kucharzyk*, 92.

2. The jurisdiction of equity over a suit to enjoin the sale of land on execution depends upon the value of the land, rather than upon the amount of the judgment. *Wight* v. *Roethlisberger*, 241.

3. The court will assume, in support of the jurisdiction over a bill to restrain the sale of 44 lots located in a thriving and populous city, that they are worth more than $100, in the absence of any allegation of value. *Id.* 242.

4. Whether a bill would lie to restrain the unlawful interference with the owner's enjoyment of property worth less than $100, —*quære*. *Id.*

See GARNISHMENT (5, 6); JUDGMENTS; PROBATE COURTS (1).

EQUITY PLEADING.

1. A bill to restrain the sale of land on execution, which alleges that defendant levied "as sheriff," sufficiently shows that the suit is against the defendant in his official capacity, although he is not described as sheriff in the prayer for relief. *Wight* v. *Roethlisberger*, 241.

2. The fact that the statute providing for the maintenance of bills to remove clouds from title does not authorize the assessment of damages in such a suit does not render such a bill multifarious because it embodies a claim for damages, since complainant would be entitled to such relief only as is consistent with the case stated in the bill. *Id.* 242.

3. A plea to a bill in equity must reduce the cause to a single point. *Mains* v. *Homer Steel-Fence Co.*, 526.

4. This is properly done by averring facts not appearing on the face of the bill, or by denying specifically facts stated in the bill; a general denial of particular averments being insufficient. *Id.*

5. Objections to the equity of complainant's claim as stated in the bill should be taken by demurrer, and not by plea. *Id.*

6. A plea to a bill for an accounting and for a receiver, which raises the question of jurisdiction on two distinct grounds, and alleges that the charge of defendant's insolvency is false, and also contains a general denial of all the material averments of the bill, is bad for duplicity. *Id.*

See DIVORCE (2).

EQUITY PRACTICE.

1. A bill in equity is properly dismissed where the complainant has by other means obtained all of the relief to which he is entitled, except damages for the wrongful act of the defendant, for which there is a complete remedy at law. *Pulezer* v. *Kucharzyk*, 92.

2. Complainants filed a bill to obtain a construction of certain instruments whereby the property of their debtor became vested in one of the defendants as trustee for creditors, certain of whom were preferred. The bill prayed that the instruments be decreed to amount to a common-law assignment and the preferences be declared void, that the trustee render an account as to his doings, which were alleged to have been fraudulent, and that a receiver be appointed to take charge of the property. Before any proofs were taken, the court, upon the hearing of a motion for an injunction and a receiver, entered a decree dismissing the bill, based upon a finding that the instruments were merely securities, and could not be construed as a common-law assignment. *Held*, that the court was in error, as complainants were entitled to be heard, in any event, upon the question of the fraud of the trustee. *Albion Malleable Iron Co.* v. *First National Bank of Albion*, 218.

3. Where a bill to restrain the sale, under an execution against a husband, of lands held by himself and wife as tenants by

EQUITY PRACTICE—Continued.

the entirety, contains nothing upon its face to show that he took the title in that manner for the purpose of defrauding his creditors, such claim cannot be raised by demurrer to the bill. *Wight* v. *Roethlisberger*, 242.

4. On the hearing of a petition for leave to file a bill of review, affidavits may be received denying the averments of the petition. *Loth* v. *Loth*, 634.

See CONTRIBUTION; DEEDS (2); PARTIES; PARTNERSHIP; (2, 3, 7); RAILROAD COMPANIES; TAXES (1, 2, 4, 10–12, 19, 28).

ESTATES IN LAND—See HUSBAND AND WIFE (1, 2); PARTIES (3); TENANCY IN COMMON; WILLS (1, 3, 7).

ESTATES OF DECEDENTS — See JUDGMENTS; PARTIES (1); PARTNERSHIP (5–8); PROBATE COURTS; TENANCY IN COMMON (2); WILLS.

ESTOPPEL.

The fact that the holder of an indorsed note of a corporation had some correspondence and conversation with the indorsers, advising them to take security for their claims, and thereby protect his interests as well as their own, and that, after what purported to be a trust mortgage for the benefit of all the creditors had been given to one of the indorsers, he wrote the latter with reference to his management of the business, will not estop him from attaching the property under a claim that the mortgage was never authorized by the directors of the corporation, and that he had never assented thereto, where he acted in entire ignorance of the fact that the indorsers were insolvent, and had covered up their individual property, and of the fact that the mortgage was unauthorized. *Murray* v. *Rugg*, 519.

See CONTRACTS (12); GARNISHMENT (6); MECHANICS' LIENS (1); PAYMENT (1).

EVICTION—See LANDLORD AND TENANT (3).

EVIDENCE.

1. In a prosecution for an assault and battery alleged to have been committed by the proprietor of a house where a spiritualistic seance was being held, upon one who had been invited there to investigate, evidence that prior to the assault, which was provoked by the investigator's striking a match, the medium had been tied to a chair, and a "dark circle" formed, was admissible as part of the *res gestæ*. *People* v. *Hughes*, 80.

2. The fact that a conversation, relied upon by plaintiff in an action of trover to show that defendant had knowledge that third person, from whom defendant bought the goods, was not authorized to dispose of plaintiff's interest in them, was held upon Sunday, does not render evidence of such conversation inadmissible. *Smith* v. *Bye*, 84.

3. In a suit for trespass to the person based upon the forcible removal of plaintiff from premises which she was occupying

EVIDENCE—Continued.

with her husband as a homestead, a writ of assistance directed against the husband, under which the defendant assumed to act, is admissible in evidence, not as a justification, but as a part of the *res gestæ*, and as bearing upon the question of damages. *Haviland* v. *Chase*, 214.

4. Upon an issue whether a sawyer waived his lien on lumber for a saw bill by receiving notes in payment or by surrendering possession of the lumber, his testimony that he did not intend to waive his lien is inadmissible. *Germain* v. *Central Lumber Co.*, 246.

5. The testimony of a physician summoned to attend a woman upon whom a criminal operation had been attempted, that he understood that certain money paid to him was paid on behalf of respondent, charged with manslaughter in causing the death of the woman by means of such attempt, is hearsay, and inadmissible. *People* v. *Abbott*, 263.

6. The fact that such witness is adverse to the prosecution does not justify the introduction of such evidence. *Id.*

7. Upon a prosecution for manslaughter in causing the death of a pregnant woman by procuring a miscarriage by means of instruments, statements made in the absence of respondent, by the midwife who was alleged to have performed the operation, that she was in the habit of performing them for the purpose of abortion and miscarriage, and describing the methods adopted, are inadmissible. *Id.* 264.

8. Statements made by a deceased mortgagor, in his own interest, as to payments claimed to have been made by him upon the mortgage, are not admissible to prove such payments, though all the parties who knew the facts are dead. *Rose* v. *Lockerby*, 277.

9. The fact that a mortgage was assessed for taxation for the exact amount of the principal has no tendency to show that no interest was due at the time of the assessment, especially where it appears from the testimony of the local officers that all mortgages were customarily so assessed. *Id.*

10. No presumption arises that a memorandum on the back of a mortgage owned by a decedent, "No. 131. January 2. Quincy. $4,719.50,"—was made by the deceased in the year the mortgage matured, to represent the amount due at that time. *Id.*

11. *Memoranda* in the shape of books and papers purporting to contain a daily scale of logs and lumber, made in the course of business by and under the supervision of the witness producing them, may be used by him to refresh his recollection, and, so used, are admissible in evidence. *Crane Lumber Co.* v. *Bellows*, 304.

12. The opinion of a witness that a sidewalk in front of the premises of a railroad company was rebuilt because it needed rebuilding is inadmissible, where witnesses in the employ of the company have testified that the walk was in sound condition, and was rebuilt because of a change in grade. *Rogers* v. *Village of Orion*, 324.

EVIDENCE—Continued.

13. In an action against a village for injuries caused by a defective sidewalk, it is competent for defendant to show that it was the duty of one of its witnesses to look after the walk in question, as bearing upon the probability of his having made the examination testified to by him. *Id.*

14. An inventory based in part on information received by the one making it from other persons is inadmissible in evidence. *Black* v. *Simon*, 382.

15. Evidence that a witness had expressed an opinion that his brother and a certain woman were guilty of improper conduct is not admissible to impeach his testimony that he had never seen anything improper in their relations. *People* v. *Foglesong*, 556.

16. The admission of such evidence upon the trial of the brother for murder is reversible error, where the prosecution are proceeding upon the theory that the alleged improper relations furnished the motive for the crime; and the error is emphasized by the refusal of the circuit judge to charge that the evidence of the statements previously made by the witness can be used, if at all, only for the purpose of impeachment. *Id.*

17. Upon a prosecution for murder by poisoning, a physician whom the deceased consulted about a month before her death may testify as to what she told him about her condition at the time of the consultation, but not as to her statements concerning previous symptoms. *Id.* 557.

18. In an action on a note, defendant was permitted to cross-examine plaintiff as to his knowledge of a co-maker's insolvency, and the conveyance of some of his property to plaintiff. There was no pretense that the property was conveyed for the purpose of paying the note. *Held*, prejudicial error. *Weidman* v. *Symes*, 619.

19. In an action on a note, defendant claimed that the instrument had been altered, without his consent, by filling in a space which he had left blank. *Held*, that it was error to permit him to put in evidence other notes written by him, for the purpose of having the jury compare the handwriting. *Id.*

See ASSUMPSIT (3); BILLS AND NOTES (9); CONTRACTS (4); DEPOSITIONS; DIVORCE (3); EQUITY PRACTICE (4); GARNISHMENT (7); HUSBAND AND WIFE (1, 3, 4); MARRIED WOMEN (4); MUNICIPAL CORPORATIONS (16, 17, 25–27); PERSONAL INJURIES; RAPE; TITLE TO PERSONALTY; TRIAL (2, 5, 6, 9, 11, 13, 14); WITNESSES.

EXCLAMATIONS OF PAIN—See PERSONAL INJURIES.

EXECUTION.

1. It is the duty of an officer, who levies under an execution upon property which is exempt up to a certain value, to make an inventory, and allow the defendant in execution to select

EXECUTION—Continued.

his exemptions; and, not having done so, he is liable in trover for the part that he sells. *Parker* v. *Canfield*, 94.

2. A sheriff's deed on execution sale is not invalid because his return fails to show that notices of sale were duly posted. *Grand Rapids National Bank* v. *Kritzer*, 688.

See ASSUMPSIT (3); EQUITY PLEADING (1); PLEADING (2); PRINCIPAL AND SURETY (4); PUBLIC OFFICERS (4, 5); SUMMARY PROCEEDINGS (2).

EXECUTION, PROOF OF—See MORTGAGES (3).

EXECUTORS AND ADMINISTRATORS — See CONTRACTS (9); PARTNERSHIP (5-8); RES JUDICATA (5); WILLS (7).

EXEMPTIONS—See EXECUTION (1).

EXPERT WITNESSES—See CRIMINAL LAW (4); TRIAL (13)

EXTENSION OF TIME—See PRINCIPAL AND SURETY (3).

FAILURE OF CONSIDERATION—See BILLS AND NOTES (5).

FEES—See PUBLIC OFFICERS (5).

FIELD OFFICERS—See MILITIA.

FINDINGS OF FACT—See APPEAL AND ERROR (1, 4, 6).

FORECLOSURE—See MORTGAGES (1).

FOREIGN CORPORATIONS—See MUTUAL BENEFIT ASSOCIATIONS (1).

FORGERY.

The testimony of an aged man that he did not sign certain papers, which purport to have been executed by him 10 years previous as administrator, is insufficient to show a forgery, where it is so weakened on cross-examination that it amounts to little more than a statement that he has no recollection of signing them, and that, if he did sign them, it must have been when his hands were cold, and it further appears that he had little to do with the business of administrator, and that advanced age has rendered his memory very poor; especially if the papers are such as he would undoubtedly have signed upon request, thus doing away with any motive for forgery. *Stevenson* v. *Kurtz*, 95.

See EVIDENCE (19).

FRAUD.

An allegation that one defendant told plaintiff that the other defendant deemed certain land to be worth a specified amount, which was in fact worth more than that, is insufficient to support a charge of fraudulent misrepresentation as to the value of the land. *Schmoltz* v. *Schmoltz*, 692.

See ASSUMPSIT (1, 2); BILLS AND NOTES (6, 7); HUSBAND AND WIFE (6); STATUTE OF FRAUDS; TAXES (12, 13).

FRAUDULENT CONVEYANCES.

1. Evidence of the invalidity of a single claim sought to be secured with other valid claims by a mortgage executed by an insolvent is insufficient to show an intent to defraud unsecured creditors, where the amount of the invalid claim is trifling in proportion to the whole amount secured. *Burrows* v. *Leech*, 32.

2. Unsecured creditors of an insolvent cannot complain because assets of the debtor were applied by the secured creditors to the payment of an invalid claim, where the total assets were insufficient to satisfy the valid claims secured. *Id.*

3. A husband's parol agreement that lands purchased in his name shall eventually be exchanged for a homestead, which shall be taken in the name of his wife, does not operate to discharge a debt that he is owing her, so as to prevent him from thereafter conveying such lands to her in payment of the debt as against other creditors, who set up the invalidity of the secret trust. *Parker* v. *Barkenowitz*, 58.

4. Where a partner executed and filed a mortgage upon the firm stock in favor of one whose money he had been handling as agent, and in the capacity of agent accepted the same for the mortgagee, justifying the transaction by the claim that he had applied certain of the mortgagee's funds to the use of the firm, such mortgage was *held* fraudulent at the suit of a creditor who was at the time of its execution pressing the firm for security, and who immediately afterwards accepted a mortgage upon the same stock, it appearing that the only evidence, aside from the testimony of the mortgaging partner, which was not convincing, to show that the claimed consideration ever passed to the firm, was a statement in a book wherein he kept his accounts as agent that his principal had received a firm note for the amount, and, on the date of the mortgage, an entry of interest therein. *Williams* v. *Baker*, 66.

See CHATTEL MORTGAGES (2, 4); HUSBAND AND WIFE (2); PARTNERSHIP (1); RES JUDICATA (1).

GARNISHMENT.

1. A past-due promissory note is subject to garnishment. *Serviss* v. *Washtenaw Circuit Judge*, 101.

2. A disclosure by a garnishee that he does not know whether or not a past-due note executed by him to the principal defendant was still in the latter's hands at the time of service of process is not conclusive against his liability to the plaintiff, since the statute (2 How. Stat. § 8068) provides for a trial of the issue framed by the affidavit and the disclosure. *Id.*

3. The validity of the substituted form of service on the principal defendant in garnishment proceedings, where he is a nonresident, provided by 2 How. Stat. § 8087, does not depend upon the disclosure of the garnishee, although no judgment can be had in such case against the principal defendant unless some credits are found in the garnishee's hands; as the existence or nonexistence of such credits is the subject of inquiry under section 8068. *Id.*

GARNISHMENT—Continued.

4. The courts of this State may, by garnishee process, acquire jurisdiction over a nonresident defendant for the purpose of subjecting a debt due him from a citizen of the State to the payment of plaintiff's demand. *Id.*

5. An order of the chancery court permitting the complainant in a suit pending therein to commence an action at law for the same cause of action, and to sue out a writ of garnishment in aid thereof, but restraining all proceedings in the law court, after service of process, until the further order of the court, is unauthorized, as tying up the defendant's funds without giving him the rights conferred by the garnishee statutes. *Foster* v. *Kent Circuit Judge*, 285.

6. Defendant's appearance in the suit at law will not estop him from contesting the validity of such order. *Id.*

7. Where, in garnishment proceedings, the only material issue was whether the principal defendants were indebted to one to whom before garnishment they had assigned their claim against the garnishee, it was not error to exclude testimony bearing upon their insolvency. *Childs* v. *Nordella*, 512.

See MUTUAL BENEFIT ASSOCIATIONS (1); PAYMENT (1).

GENERAL ISSUE—See ASSUMPSIT (3).

GOVERNMENT CONTRACT—See CONTRACTS (5, 7).

GRANTS, SWAMP LAND—See PUBLIC LANDS.

GREAT LAKES—See PUBLIC LANDS (1, 2); WATERS

GROWING CROPS—See CHATTEL MORTGAGES (1)

GUARDIAN AND WARD—See PARTIES (2).

HANDWRITING—See EVIDENCE (19).

HEALTH OFFICERS—See PUBLIC HEALTH.

HEARSAY—See EVIDENCE (5, 7, 8, 14, 17); NEW TRIAL (2).

HIGHWAYS—See BRIDGES; CONTRIBUTORY NEGLIGENCE (2); MUNICIPAL CORPORATIONS (9, 21–30); NEGLIGENCE (5); TAXES (5–7, 24); TRESPASS (2).

HOMESTEAD.

One who forcibly ejects a wife from her homestead cannot justify under a writ of assistance issued in a proceeding against the husband alone, instituted at a time when the wife was also in possession. *Haviland* v. *Chase*, 214.

See PARTNERSHIP (8); TENANCY IN COMMON (2).

HOMICIDE—See CRIMINAL LAW (2); EVIDENCE (5–7, 15–17); JURY; MANSLAUGHTER.

HOSTILE WITNESS—See TRIAL (14).

HUSBAND AND WIFE.

1. A husband has no such separable interest in lands held by himself and wife as tenants by the entirety that his testimony may be received "as against his portion" of the estate, over the wife's objection, in a proceeding to subject the lands to the claims of his creditors. *Michigan Beef & Provision Co.* v. *Coll*, 261.

2. A husband's undivided interest in lands held by himself and wife by entireties may be subjected to a judgment against him, where moneys were applied by him to the purchase of the lands after the debt had been incurred, notwithstanding the lands were contracted for prior to such indebtedness; and, in the absence of a contrary showing, it will be presumed that one-half of the payments made upon the contract were made by the husband. *Id.*

3. A husband is incompetent, under 3 How. Stat. § 7546, to testify against his wife without her permission, even where she is suing for damages resulting from the sale of liquor to him. *Wood* v. *Lentz*, 275.

4. In a suit by a wife against her husband, the wife is competent to testify, under 3 How. Stat. § 7546, without his consent, in relation to a business transaction between them which is the subject-matter of the suit. *Dowling* v. *Dowling*, 346.

5. It is competent for a husband and wife to agree that the wife's earnings shall be her individual property. *Id.*

6. Since a wife has not a present subsistent, but only a contingent, interest in personal property owned by her husband, misrepresentation by him as to the value of such personalty, whereby she is induced to execute a contract of separation upon terms which, but for the misrepresentation, she would not have agreed to, will not entitle her to sue at law to recover her damages. *Schmoltz* v. *Schmoltz*, 692.

See CRIMINAL LAW (3); DIVORCE; EVIDENCE (3); FRAUDULENT CONVEYANCES (3); HOMESTEAD; INTOXICATING LIQUORS (2, 3); MARRIED WOMEN; PARTIES (3); PRINCIPAL AND AGENT; STATUTE OF FRAUDS (1).

HYPOTHETICAL QUESTIONS—See CRIMINAL LAW (4); TRIAL (13).

IMPEACHMENT OF WITNESS—See EVIDENCE (15, 16); WITNESSES.

IMPLIED CONTRACTS—See ASSUMPSIT (1).

IMPROVEMENTS—See TAXES (10, 11); TENANCY IN COMMON (4–6).

INFANTS.

Where, in an action by a father for damages resulting to him from the negligent running down of his eight-year-old son by a street car, the father testified that the boy was per-

INFANTS—Continued.

fectly competent to take care of himself upon the street, and the boy himself showed by his testimony that he possessed sufficient intelligence to appreciate the danger in crossing the tracks, it was error to submit the question of his capacity in this respect to the jury. *Henderson* v. *Detroit Citizens' Street-Railway Co.*, 369.

See CONTRIBUTORY NEGLIGENCE; NEGLIGENCE (4, 5); RAPE.

INJUNCTION—See EQUITY JURISDICTION (2–4); MANDAMUS (1); RAILROAD COMPANIES (1).

INSANE ASYLUMS—See BOARDS OF SUPERVISORS.

INSOLVENCY—See BANKS AND BANKING; FRAUDULENT CONVEYANCES; GARNISHMENT (7); MUTUAL BENEFIT ASSOCIATIONS (1).

INSTRUCTIONS TO JURY—See ASSAULT (2); CUSTOM (3); NEGLIGENCE (2, 6); TRIAL (1, 7, 8, 10–12, 15).

INSURANCE—See MUTUAL BENEFIT ASSOCIATIONS; TENANCY IN COMMON (7); VENDOR AND PURCHASER.

INTENT—See EVIDENCE (4); LARCENY.

INTEREST—See PRINCIPAL AND SURETY (3).

INTOXICATING LIQUORS.

1. A saloon is open, within the contemplation of 3 How. Stat. § 2283*e*, requiring saloons to be kept closed during Sunday, where a door leading from the saloon into a hallway is left open, and people are allowed to enter the hallway, which does not connect with any room other than the saloon. *People* v. *Schottey*, 1.

2. It is not essential to the liability of a saloon keeper under the civil-damage act for injuries sustained by a wife by reason of the sale of intoxicating liquors to her husband, whereby he became an habitual drunkard, that such sales should have been made when the husband was intoxicated, or after he had become in the habit of getting intoxicated. *Wood* v. *Lentz*, 275.

3. The declaration in such case may properly allege the cause of action as a continuing one. *Id.*

See HUSBAND AND WIFE (3).

INVENTORY—See EVIDENCE (14); EXECUTION (1).

ISLANDS—See PUBLIC LANDS (1, 2); WATERS.

JOINT DEBTORS.

A judgment in form against all of a number of joint debtors, one of whom only was served, does not constitute an extinguishment of the debt, so as to bar a subsequent action thereon. *Hitchcock* v. *Frackelton*, 487.

See DISCONTINUANCE.

JUDGMENTS.

A court of equity is not justified in setting aside a judgment against an estate merely because of the subsequent discovery of claimant's receipt running to the deceased, where the payment of certain moneys was admitted by the claimant, who took judgment for the balance only, and it is not clear but that the receipt refers to such admitted payments. *Mueller* v. *Marsh*, 375.

See BILLS AND NOTES (10); DISCONTINUANCE; JOINT DEBTORS; LIENS (4); MUNICIPAL CORPORATIONS (31, 32); MUTUAL BENEFIT ASSOCIATIONS (1, 2); PLEADING (2); RES JUDICATA.

JUDICIAL SALE—See CONTRACTS (1, 2).

JURISDICTION — See EQUITY JURISDICTION; PROBATE COURTS (1, 6); SUMMARY PROCEEDINGS; TAXES (29).

JURY.

It is not error, upon a prosecution for murder by poisoning, to refuse to excuse for cause a juror who testifies upon his *voir dire* that he has heard that poison was found at the inquest upon the body of the deceased, and that, from what he has heard, it is his impression that the deceased died from the effects of poison, and that he does not know but it would take evidence to remove such impression, where he further testifies that he has no impression as to the guilt or innocence of the respondent, and that he has no such fixed opinion as to the poisoning as would prevent him from giving the respondent a fair and impartial trial. *People* v. *Foglesong*, 556.

See NEW TRIAL (2).

JUSTICES OF THE PEACE — See CERTIORARI (2); SUMMARY PROCEEDINGS (1).

LABOR LIENS—See LIENS (4).

LAKES—See PUBLIC LANDS (1, 2); WATERS.

LAND CONTRACTS — See CONTRACTS (9); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. A landlord, in the absence of covenants on his part, is not required to repair, even when the premises become defective by reason of deterioration or decay. *Petz* v. *Voigt Brewery Co.*, 418.

2. Rent is payable even when demised premises have become untenantable by inherent defect, provided they were habitable at the time of the demise, and there was no fraud on the part of the landlord. *Id.*

3. Where premises demised without any covenant by the landlord to repair become unfit for occupancy while the tenant is in possession, and the landlord, with the tenant's consent,

LANDLORD AND TENANT—Continued.

enters upon them for the purpose of making repairs, and completes the same with reasonable promptness, the tenant, in the absence of an agreement to the contrary, is liable for rent during the time such repairs were being made, although he was excluded from the premises for such period. *Id.*

4. A tenant of a city in possession of a stall in a market, who continues in possession after the adoption of an ordinance discontinuing the market, is liable thereafter only for the reasonable worth of the premises, without regard to the rent provided for in the lease. *City of Detroit* v. *Gleason*, 564.

See CHATTEL MORTGAGES (1)

LARCENY.

One who obtains money from another upon the representation that he will procure certain property therewith for the latter, intending at the time to convert the money, and actually converting it, to his own use, is guilty of larceny. *People* v. *Martin*, 446.

See TRIAL (8).

LEADING QUESTIONS—See TRIAL (14).

LIENS.

1. The fact that a logger was to take up his sawyer's notes, made for the former's accommodation, on or before a certain date "from proceeds of sales of lumber," that the time for the payment of the saw bill was extended beyond such date, and that shipments of lumber were in fact made from time to time, would not deprive the sawyer of his lien for the saw bill upon lumber remaining in his possession. *Germain* v. *Central Lumber Co.*, 246.

2. Taking a note for a saw bill does not release a lien on the lumber for sawing, unless it is shown to have been accepted in payment of the bill. *Id.*

3. The burden is on the purchaser of lumber in possession of a sawyer to show that his lien for sawing had been terminated. *Id.*

4. A judgment giving a lien on real as well as on personal property in an action for work and labor, in which the summons and declaration claimed a lien on the personal property only, under 1 How. Stat. § 4063, will be treated as surplusage, so far as the lien on the real property is concerned, and the validity of the judgment as to the lien on the personal property will not be affected thereby. *Conlin* v. *Lamont Iron Co.*, 626.

See CUSTOM (2); EVIDENCE (4); MECHANICS' LIENS; TAXES.

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIQUORS—See INTOXICATING LIQUORS.

LOGGING CONTRACTS—See CONTRACTS (4).

MALICIOUS PROSECUTION.

The record disclosing no prejudicial error, a judgment for plaintiff in an action for malicious prosecution was affirmed. *Brouso* v. *Gentle*, 83.

MANDAMUS.

1. *Mandamus* to compel the dissolution of an injunction is a proper remedy where the dispute is one of law merely. *Thomas* v. *Kent Circuit Judge*, 106.

2. *Mandamus* is the proper remedy to compel a board of supervisors to pay the bill of a health officer, duly allowed and certified by the township board of health, for services rendered during an epidemic by direction of such township board. *McKillop* v. *Board of Supervisors of Cheboygan Co.*, 614.

See ATTACHMENT (2); BILL OF EXCEPTIONS; MUNICIPAL CORPORATIONS (31); PUBLIC OFFICERS (1).

MANSLAUGHTER.

A person who, while doing or attempting to do an unlawful act dangerous to human life, undesignedly kills another, is guilty of manslaughter at least, even though the act attempted was not unlawful at the common law. So *held* where the death of a woman pregnant, but not with a quick child, resulted from an attempt to procure a miscarriage by means of instruments, made punishable as a misdemeanor by 2 How. Stat. § 9108. *People* v. *Abbott*, 263.

See CRIMINAL LAW (2); EVIDENCE (5–7).

MARRIAGE, PROOF OF—See DIVORCE (2).

MARRIED WOMEN.

1. In an action by a married woman for personal injuries, a recovery cannot be had for the services of a physician, where there is no testimony that she has paid or has promised to pay him therefor. *Rogers* v. *Village of Orion*, 324.

2. A married woman may bind herself by contracts relating to her separate property, and may borrow money upon her own account; but she cannot bind herself by a note given as surety for her husband, or to secure the payment of money nominally received by her, yet in fact received for the use of her husband. *Feather* v. *Feather's Estate*, 384.

3. Claimant presented for allowance a claim against the estate of his deceased wife for moneys paid in discharge of a note executed by himself and wife, which he claimed to have signed as surety merely. Upon appeal from an order disallowing the claim, claimant's daughter testified that she went, under her mother's directions, to the person who was to loan the money in consideration of which the note was given, obtained it, and took it to her mother; that her mother prepared a note, which both of her parents signed, and that she delivered the same to the lender. It appeared that the wife owned the farm upon which she and her husband lived,

MARRIED WOMEN—Continued.

and there was testimony tending to show that she conducted the same in her own interest. The testimony of the daughter was disputed by the lender, who testified that she loaned the money to claimant; but other testimony tended to impeach that of the lender. *Held*, that there was evidence to go to the jury in support of the claim. *Id.*

4. The testimony of laborers who had worked upon a farm owned by a married woman, and occupied by herself and husband, that their wages were paid by the wife, is competent in support of the contention that the farm was conducted in the interest of the wife. *Id.* 385.

See HUSBAND AND WIFE.

MASTER AND SERVANT—See NEGLIGENCE (1–3).

MECHANICS' LIENS.

1. A subcontractor is estopped to assert a mechanic's lien as to payments that have been made by the owner to the contractor in reliance upon the subcontractor's expressed desire that they be so made. *Fairbairn* v. *Moody*, 61.

2. Under section 1 of the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893), providing that the owner shall not be liable to any subcontractors, material men, or laborers for any greater amount than he contracted to pay the original contractor, but that the risk of all payments made to the original contractor before the expiration of the period within which claims for liens may be filed, without the latter's having furnished a sworn statement as to the number and names of subcontractors, etc., shall be upon the owner, and that such payments shall not defeat any lien unless distributed among the subcontractors, material men, or laborers, "or, if distributed in part only, then to the extent of such distribution," the owner is not protected in such payments, though they equal the full contract price, and are distributed for labor and materials, if the distribution is not made *pro rata* among all those entitled to the fund. *Id.*

3. The lapse of a day between the date and the filing of an affidavit and claim of lien, under section 5 of the act, will not invalidate the lien. *Id.*

4. Service of a copy of a claim of lien upon the owner on the day of its date, being the day before it is filed, is a substantial compliance with the provision of the statute requiring such service to be made within 10 days after filing. *Id.*

5. A mechanic's lien is not invalidated because the claim of lien, through an honest mistake, was for an excessive amount. *Id.*

6. Where the claims of subcontractors, material men, and laborers exceed the contract price, the amount for which a lien may be enforced by one who has received payments upon his claim, and who has estopped himself from claiming a portion of the balance, is limited to the amount in which his *pro rata*

MECHANICS' LIENS—Continued.

share of the whole exceeds the aggregate of the payments made and the sum he is estopped from claiming. *Id.* 62.

MENTAL COMPETENCY—See WILLS (4–6).

MERGER.

It is the rule in equity that a mortgage is not merged by a purchase by the mortgagee of the equity of redemption where the interest of the mortgagee requires the titles to be kept separate. *Quick* v. *Raymond*, 15.

See JOINT DEBTORS.

METHODIST CHURCHES—See RELIGIOUS SOCIETIES.

MILITIA.

1. Act No. 63, Pub. Acts 1895, relative to the Michigan National Guard, provides that the field and line officers, except when elected to fill a vacancy, shall be commissioned for a term of three years from the date of their election, and until their successors are commissioned. *Held*, that no vacancy exists upon the expiration of a regular term, but the incumbent holds over pending the issuance of a commission to his successor. *Baxter* v. *Latimer*, 356.

2. 1 How. Stat. § 901, relative to the organization of the Michigan National Guard, provides that the regimental field officers may be elected by the company officers. Act No. 198, Pub. Acts 1893, empowers the "field and company officers," by a majority vote, to fill vacancies in the field offices. Authority is nowhere conferred upon the field officers to participate in a general election. *Held*, that an election for a regimental field officer for a full term, participated in by certain field officers whose votes were required to make a majority for the person declared elected, was void, and that a new election was properly ordered by the commander-in-chief. *Id.* 357.

MINERAL LANDS—See TAXES (12).

MINES AND MINING—See NEGLIGENCE (1–3).

MISCARRIAGE—See CRIMINAL LAW (2); EVIDENCE (5–7); MANSLAUGHTER.

MONOPOLY—See MUNICIPAL CORPORATIONS (6).

MORTGAGES.

1. At the request of the administrator of a mortgagor's estate, the mortgagee, who had secured a decree in foreclosure proceedings, consented to postpone the sale as long as the administrator should keep the yearly interest paid and take good care of the premises. Two years later, the administrator found himself unable to pay the interest, and an arrangement was made whereby the heirs of the mortgagor quitclaimed the premises to the mortgagee, and the latter leased the same to the administrator under an agreement that the estate

MORTGAGES—Continued.

should be entitled to a deed upon payment of the amount due under the decree, with interest, taxes, and insurance. A year later, the administrator, being unable to make the payment, voluntarily surrendered possession to the mortgagee. Upon the final account of the administrator, the amounts paid as interest money were disallowed, and these payments were thereafter recovered back in an action instituted on behalf of the estate. Subsequently the heirs of the mortgagor filed a bill in equity to declare the foreclosure decree satisfied by reason of their quitclaim to the mortgagee. *Held*, that complainants' contention was inequitable; that the mortgagee, having been obliged to refund the interest money, the payment of which by the administrator was an essential part of the transaction, should be permitted to pursue his remedy under his decree, and to enforce against the estate a claim for a deficiency arising after sale. *Quick* v. *Raymond*, 15.

2. Upon a review of the evidence, a decree canceling a mortgage and a sheriff's deed on foreclosure thereof was affirmed. *Fyfe* v. *English*, 21.

3. A certificate of acknowledgment of a mortgage, in proper form, raises a presumption of the execution of the paper as stated therein. *Shelden* v. *Freeman*, 646.

See CHATTEL MORTGAGES; ESTOPPEL; EVIDENCE (8-10); FRAUDULENT CONVEYANCES; MERGER; PARTNERSHIP (1); TRIAL (11).

MOTION TO QUASH—See ATTACHMENT (1).

MULTIFARIOUSNESS—See EQUITY PLEADING (2).

MUNICIPAL CORPORATIONS.

POWER TO CONTRACT: TAXATION.

1. Under the general statute for the incorporation of villages, which empowers the common council to raise by general tax a sum, not exceeding in any one year one and one-fourth per cent. of the assessed valuation (1 How. Stat. § 2923), and which permits it to raise and expend, in making repairs or alterations upon waterworks previously constructed, such sum, not exceeding in any one year one-half of one per cent., as it may see fit, without submitting the question to the electors (3 How. Stat. § 2973), provided such sum shall be included in the one and one-fourth per cent. limitation, *it seems* that an indebtedness not exceeding one-half of one per cent., incurred by the common council for waterworks appliances, would, as against the objection that, together with the amount raised for the general fund, it exceeded one and one-fourth per cent., be presumed, in the absence of evidence that the general fund had been otherwise appropriated, to be payable out of such fund, and therefore to be valid. *Trump Manfg. Co.* v. *Village of Buchanan*, 113.

2. The council, however, in view of the provision (1 How. Stat. § 2957) that "no loans shall be made by the council, or

MUNICIPAL CORPORATIONS — *Power to Contract: Taxation* — Continued.

by its authority, in any year, exceeding the amounts prescribed" by the act, has no power to anticipate the revenues of succeeding years by executing a contract of purchase upon terms of credit which make the purchase price payable beyond the current fiscal year. *Id.*

3. And it cannot be presumed, in order to sustain such a contract, that the council intended to raise the amount during the current year, and set it aside to meet the payment when due. *Id.*

4. The fixing of city limits and taxing districts is within the legislative discretion, and the determination of the legislature in relation thereto will not be disturbed by the courts. *Pioneer Iron Co.* v. *City of Negaunee*, 430.

5. The fact that a waterworks system contracted for by a village does not furnish water to the whole territory incorporated will not render the contract void. *Lewick* v. *Glazier*, 493.

6. A contract entered into by village officers for the construction of waterworks, pursuant to authority conferred upon them by section 11 of chapter 11 of the general charter, accompanied by a grant of rights in the streets necessary to the carrying out of the contract, is valid, although it creates a monopoly, to the extent of the powers delegated by the charter. *Id.*

7. Since, under section 5 of chapter 5 of the general charter of villages, appropriations of money may be either by ordinance or resolution, a contract for waterworks in the form of an ordinance is valid, though lacking formalities requisite to ordinances, if action by resolution taken in the same manner would have been sustained. *Id.* 494.

8. The fact that a proposed contractor for the construction of a waterworks system in a village is a son of one of the members of the council does not disqualify such member from voting upon the proposition. *Id.*

9. Under 1 How. Stat. § 3621, authorizing a majority of a city council, in writing signed by them, to grant a right to construct a plank road in a street, such a right is obtained by a conveyance executed by the mayor and two of the four aldermen of a city whose charter makes the mayor and aldermen the common council. *People, ex rel. Ward*, v. *Green*, 505.

10. Poverty is no more a defense to the enforcement of a just demand against a municipal corporation than it is where the defendant is a private corporation or an individual. *Hammond* v. *Place*, 628.

11. The validity of a contract of a municipal corporation necessarily involves the right to raise by taxation the amount for which it thereby becomes obligated. *Id.*

See CONSTITUTIONAL LAW (2); LANDLORD AND TENANT (4).

MUNICIPAL CORPORATIONS—Continued.

ORDINANCES.

12. The authority to prescribe penalties for violations of city ordinances, conferred upon the common council of Detroit by section 257 of the charter of 1893, is not limited to such ordinances as are adopted under the police power of the council, but includes those that may be enacted by virtue of contract relations existing between the city and the owner of a public franchise; and, under section 249, the recorder's court of said city has jurisdiction over a prosecution for a violation of *any* ordinance of the city. *People* v. *Detroit Citizens' Street-Railway Co.*, 132.

13. A city ordinance requiring a street-railway company to run its cars every six minutes on a specified street will not be held unreasonable, where no trial has been made of its provisions, upon a showing merely that the average number of passengers to a car, under the existing 12-minute service, is between seven and eight only. *Id.* 133.

See PUBLIC OFFICERS (2); STREET RAILWAYS.

APPOINTMENTS TO OFFICE.

14. Act No. 374, Local Acts 1897, revising the charter of Grand Rapids, provides (title 2, § 6) for the appointment of a building inspector on the first Monday in May after the passage of the act, and each year thereafter, who shall hold his office for one year. Title 12, § 33, provides that all the officers of the city, in office at the passage of the act, who were appointed for a longer period than till the first Monday in May thereafter, shall continue in office until the term for which they were appointed expires by limitation, "except as herein otherwise provided." *Held*, that the office of building inspector was within the exception. *People, ex rel. Ryan*, v. *Van Anden*, 654.

15. Where a charter provides for nominations to city offices by the mayor, subject to the confirmation of the common council, and confers upon the president of the council the right to discharge the municipal duties of the mayor during the latter's absence, a nomination to office by the president of the council, made and confirmed during the mayor's absence from the State, is valid. *Id.*

SPECIAL MEETINGS OF COUNCIL.

16. Technical nicety is not required in the proofs adduced to show that a special meeting of a village council was properly called, and that notice thereof was properly served upon the members, but, where they satisfy any express requirements of the statute upon the subject, they will be aided by a presumption in favor of the regularity of the proceedings. *Lewick* v. *Glazier*, 493.

17. The general act for the incorporation of villages (Act No. 3, Pub. Acts 1895) provides (chap. 5, § 4) that the president or any three members of the council may appoint special meetings thereof, "notice of which, in writing, shall be given to

MUNICIPAL CORPORATIONS—*Special Meetings of Council*—Continued.

each trustee, or be left at his place of residence, at least six hours before the meeting." In a suit involving the validity of a special meeting, the president testified that he called the same, and the marshal testified that he served notices thereof upon all of the trustees that he could find, and left such notices at the respective residences of the others, six hours before the time appointed for the meeting; and that, after the meeting, he made a return of service, and certified it, and gave it to the clerk. There was pasted upon the records of the council the marshal's certificate showing service of written notice in due time, but it did not appear when or by whom this certificate was attached. Only one member of the council was absent from the meeting, and he was not produced to deny the service. *Held*, that the proof was sufficient to show a valid meeting. *Id.*

18. A city tax, voted at a special meeting of the common council at which all of the members were not present, will not be held invalid because the record of the council fails to show that due notice of the meeting was given, where the charter, if it requires proof of notice to be preserved at all, does not require it to be incorporated in the record, and it is not shown that such proof was not properly filed. *Auditor General* v. *Sparrow*, 576.

NEGLIGENCE IN GENERAL.

19. A city is not liable, in the absence of statute, for an injury to a vessel resulting from its failure to maintain a draw in a bridge in such condition that it may be properly operated, where the city does not derive any benefit from the bridge, but simply maintains it for the public good. *Corning* v. *City of Saginaw*, 74.

20. A city is bound to use due caution in establishing a system of drainage; and if, through its negligence in not providing reasonably efficient means to carry off the water that it should reasonably expect to accumulate by reason of its gutters, water is collected and cast upon premises which otherwise would not have been invaded, the city is liable for the resulting damages. *Seaman* v. *City of Marshall*, 327.

See PLEADING (1); PUBLIC HEALTH (1, 2).

DEFECTIVE STREETS AND SIDEWALKS.

21. A city is under legal obligation to maintain in a reasonably safe condition for pedestrians that section of the highway at a street crossing which lies within the lines of the sidewalk if extended, where it appears, from the existence of a beaten foot-path at such point, that the same is used for public travel, even though the city has constructed a cross-walk on the opposite side of the street. *Comiskie* v. *City of Ypsilanti*, 321.

22. Whether the highway at such a crossing was in a reasonably safe condition for public travel was a question for the jury, where it appeared that a tile drain, which received the

MUNICIPAL CORPORATIONS — *Defective Streets and Sidewalks* — Continued.

water from an open ditch on the opposite side of the street, was allowed to discharge it into a continuation of the ditch at a point within the lines of the sidewalk if extended. *Id.*

23. Notifying a member of the street committee of a village of a loose plank in a sidewalk, without specifying the location, is not sufficient to charge the village with notice of the defect. *Rogers* v. *Village of Orion*, 324.

24. A declaration averring that the defendant city permitted a dangerous hole to exist in a sidewalk, and that, the walk being unlighted, plaintiff was injured, states a cause of action. *Griswold* v. *City of Ludington*, 401.

25. A resolution of the common council of a village, requiring a new sidewalk to be built at a place at which plaintiff was subsequently injured, is admissible to show knowledge on the part of the village authorities of the defective condition of the old walk. *Grattan* v. *Village of Williamston*, 463.

26. Proof that the authorities of a village had knowledge that a sidewalk on which plaintiff was injured was defective for its entire length is sufficient, without showing that they had notice of the particular defect which caused the injury. *Id.*

27. Evidence that a walk in front of certain premises had been, for its full length, in a rotten and loose condition for some six months previous to an accident thereon, is admissible on the question of notice, even though it appears that some repairs were made upon the walk two months before the accident, where there is testimony tending to show that the general condition of the walk was not improved by the repairs. *Butts* v. *City of Eaton Rapids*, 539.

See BRIDGES; CONTRIBUTORY NEGLIGENCE (2); EVIDENCE (12, 13); TRIAL (12).

CLAIMS FOR PERSONAL INJURIES.

28. Although a statement of claim for personal injuries against a city of the fourth class is duly filed within 60 days after the injury occurs, as required by section 1 of chapter 22 of the general charter (Act No. 215, Pub. Acts 1895), the city cannot be held liable therefor where claimant fails to verify the same, or to have it certified by an officer of the city, as required by section 20 of chapter 8, which provides for the certification or verification of claims, and makes it a sufficient defense to any action for the collection of any demand or claim against a city, "for personal injuries or otherwise," that it has never been certified or verified as therein provided. *Griswold* v. *City of Ludington*, 401.

29. The certificate or affidavit, by the terms of section 20 of chapter 8, must "accompany" the statement of the claim or account; and therefore the filing of a separate verification after the expiration of the 60 days does not meet the requirements of the statute. *Id.*

MUNICIPAL CORPORATIONS — *Claims for Personal Injuries* — Continued.

30. But the failure to verify is a defect which may be waived by the common council; and evidence that it received an unverified claim without objection, and kept the same under advisement, carrying on negotiations with claimant, until after the time for filing a verified claim had elapsed, tends to show such a waiver. *Id.*

COLLECTION OF JUDGMENTS AGAINST.

31. Under 3 How. Stat. § 8218, providing that judgments rendered against a municipality shall be assessed upon its taxable property, and the amount thereof added to the other municipal taxes, *mandamus* will lie to compel the levy of an assessment to pay a judgment against a city, even though the rate of taxation will thereby be increased beyond the limit established by the charter. *Hammond* v. *Place*, 628.

32. Act No. 354, Local Acts 1897, amendatory of the charter of the city of North Muskegon, providing that, when the city shall be unable to meet the payment of any judgment or decree by reason of the limitation of its power of taxation, it shall be lawful for the council to issue bonds to pay the same, which shall not be disposed of at less than par value, is permissive merely, and does not impair the judgment creditor's right, under the general statute, to have his demand collected by assessment against the taxable property. *Id.*

See ACTIONS (2, 3).

MURDER—See EVIDENCE (15–17); JURY.

MUTUAL BENEFIT ASSOCIATIONS.

1. A member of an insolvent mutual benefit society incorporated in another State will not be allowed, through garnishment proceedings instituted after the appointment of a receiver in such State, though before the appointment of an ancillary receiver in this State, to subject property of the society within this State to a judgment upon a membership certificate maturing after the commencement of insolvency proceedings, though before a receiver was actually appointed. *Wheeler* v. *Dime Savings Bank*, 271.

2. The fact that the member was allowed to prosecute to judgment his claim upon the certificate does not render *res judicata* the question of his right to satisfy his judgment out of the local assets of the society. *Id.*

3. Where the constitution of a mutual benefit company provides that any member may make a deposit in advance for the payment of assessments, which money shall not be used by the company for any other purpose, and that, when an assessment is made, a notice shall be sent to members, stating "the amount due from the member to whom the notice is sent," a notice to a member, wherein no credit is given for an advanced deposit which has been made, is invalid, and nonpayment of the assessment does not forfeit the policy. *Dowling* v. *Knights Templars, etc., Indemnity Co.*, 471.

MUTUAL BENEFIT ASSOCIATIONS—Continued.

4. One whose certificate of membership in a mutual benefit company has been canceled for nonpayment of an assessment, of which he received no valid notice, does not waive the defects in the notice by subsequently offering to pay the assessment, at the same time insisting that he was not in fault. *Id.*

5. Where the by-laws of a benefit association, which, by reference, are made a part of its policy, contain a provision that an award by arbitrators, who, under the terms of the policy, are to decide all disputed claims, shall be legal only if signed by all three of the arbitrators, an award signed by two of the arbitrators, but not signed by the one appointed by the association, cannot be enforced against it, although it is shown that the assured had never been furnished with a copy of the by-laws, and that the association refused to produce a copy before the arbitrators when requested to do so. *Russell* v. *North American Benefit Ass'n*, 699.

6. By-laws of a benefit association, referred to in its policy and made a part thereof, providing for arbitration of disputed claims, and that the award shall be final, but that no award shall be valid if not signed by all of the arbitrators, in which case either party shall have the right to a new arbitration, and providing that no suit in law or equity shall be commenced or maintained by any member against the association, will not be declared inoperative on the ground that they are unreasonable and oppressive. *Id.*

NATIONAL GUARD—See MILITIA.

NAVIGABLE WATERS—See WATERS.

NEGLIGENCE.

1. A plank in a platform constructed in a mining shaft was disturbed by blasting at a lower level, and plaintiff, an employé in the mine, while attempting to cross such platform, fell and was injured. Upon the question of fact whether the planks were spiked down, the workman who supervised the construction of the platform, and a shift-boss who was with plaintiff at the time of the injury, testified in the affirmative. The latter further testified that, upon replacing some of the planks after the explosion, the spikes fitted the same holes they had been drawn out of; that the planks "went down even" at the first effort, with no more force applied than simply stepping upon them. A fellow workman testified that he saw no spikes in the plank, and other witnesses testified that blasts such as the one used would not be likely to disturb a platform if spiked down. *Held*, that, upon the whole evidence, the question was for the jury. *Smizel* v. *Odanah Iron Co.*, 149.

2. An instruction that the company would be liable to plaintiff for his injuries if the platform in question was insufficient and unsafe for such general use as the company was putting it to, and was liable to be loosened by explosions in the shaft below, was not objectionable as withdrawing from the jury

NEGLIGENCE—Continued.

the question as to whether the accident to plaintiff was one which the company might reasonably have anticipated, when it was given in connection with instructions that the burden was upon plaintiff to show that the platform was not such a one as a reasonably prudent company would, under the circumstances, have erected, and that no presumption of want of reasonable care arose from the fact of the planking's being disturbed by the firing of the blast, and that such care would not require the company to build a platform which could not be disturbed by blasts below, unless experience had shown that such blasts would probably disturb such platform. *Id.* 150.

3. The company was bound so to construct the platform that it should be capable of withstanding the strain to which the ordinary operations of the mine would subject it; and if the platform became loosened under the strain of such ordinary operations, by reason of defects in the original construction, the company would not be entitled to have the operations themselves treated as an intervening cause of injuries to a workman under whom it gave way. *Id.*

4. A small flat or platform car, mounted on four wheels, plainly constructed, with no machinery about it, is not a dangerous machine, within the rule recognized by some of the courts that one who leaves upon his property dangerous machinery, likely to attract children, so unsecured that children may put it in motion, is guilty of negligence. *Kaumeier* v. *City Electric R. Co.*, 306.

5. A street-railway company, therefore, which leaves a car of such description unblocked upon the track in the highway, is not liable for injuries received by a child by falling under the wheels of the car while it was being pushed along the track by her companions, although the company knew that children were accustomed to make such use of the car when it was left unguarded. *Id.* 307.

6. It is error for the court to submit to the jury an action for personal injuries under instructions which permit them to find the defendant negligent upon grounds which are negatived by the undisputed evidence. *Henderson* v. *Detroit Citizens' Street-Railway Co.*, 369.

7. A shipper of lumber is not liable for injury to a railroad brakeman while coupling cars, by the shifting of the lumber because it was negligently loaded, where the accident happened after it had become the duty of the railroad company to provide for the inspection of the car. *Fowles* v. *Briggs*, 425.

See BRIDGES; CONTRIBUTORY NEGLIGENCE; MUNICIPAL CORPORATIONS (19-30); PLEADING (1); PUBLIC HEALTH (2).

NEGOTIABLE PAPER—See BILLS AND NOTES.

NEW TRIAL.

1. The action of the circuit judge in denying a motion for a new trial, based upon the alleged excessive character of the

NEW TRIAL—Continued.

verdict, will not be disturbed on appeal, where some of the evidence, which is very conflicting on the question of damages, fairly tends to support the verdict. *Meloche* v. *Chicago, etc., R. Co.*, 69.

2. An application for a new trial in a criminal case, based solely upon the affidavit of counsel that a newspaper article relating to the case was read by the jury after the cause had been submitted to them, and that he had been informed by some of the jurors that such article influenced them in arriving at their verdict, is properly denied. *People* v. *Martin*, 446.

3. Alleged error in refusing a new trial will not be considered on appeal, where the record does not show why the trial judge refused the motion, and there is nothing to indicate that he was requested to give his reasons. *Griffin* v. *McKnight*, 468.

4. To present a case for review under Act No. 134, Pub. Acts 1893, empowering the Supreme Court to review orders overruling motions for new trial, a statement of the reasons given by the circuit judge for his ruling must be incorporated in the bill of exceptions. *Finley* v. *Widner*, 679.

NONRESIDENTS—See GARNISHMENT (3, 4).

NOTICE—See BRIDGES; EXECUTION (2); MUNICIPAL CORPORATIONS (16-18, 23, 25-27); MUTUAL BENEFIT ASSOCIATIONS (3, 4); PROBATE COURTS (6); SCHOOLS AND SCHOOL DISTRICTS; TAXES (29); WRIT AND PROCESS.

OBLIGATION OF CONTRACTS—See CONSTITUTIONAL LAW (2).

OFFICERS—See PUBLIC OFFICERS.

OPEN ACCOUNT—See ACTIONS (1).

OPINIONS—See EVIDENCE (12, 15, 16).

ORDER OF PROOF—See TRIAL (2).

ORDINANCES—See MUNICIPAL CORPORATIONS (7, 12, 13); PUBLIC OFFICERS (2); STREET RAILWAYS.

PAROL EVIDENCE—See BILLS AND NOTES (9); CONTRACTS (4).

PART DELIVERY—See STATUTE OF FRAUDS (2).

PART PAYMENT—See STATUTE OF LIMITATIONS.

PARTIES.

1. All of the heirs of a decedent are necessary parties to a bill to establish a deed alleged to have been executed by him in his lifetime. *Pulezer* v. *Kucharzyk*, 92.

2. A bill to restrain the sale of land on execution by one who obtained a judgment as guardian is not demurrable on the ground that the ward is not made a party, where it does not show that the ward is interested. *Wight* v. *Roethlisberger*, 241.

PARTIES—Continued.

3. A wife is a proper party to a bill to restrain the sale, under an execution directed against her husband, of lands held by them as tenants by the entirety. *Id.* 242.

4. But a tenant in common with them, whose interest is not affected, no levy having been made thereon, is not a necessary party to such a bill. *Id.*

See DRAINS (2); RAILROAD COMPANIES (1).

PARTITION—See TENANCY IN COMMON.

PARTNERSHIP.

1. A mortgage given by an insolvent firm to another firm to secure a valid indebtedness is not fraudulent, as a matter of law, as against unsecured creditors, by reason of the fact that the firms have a common partner. *Burrows* v. *Leech,* 32.

2. The disposition of equity, when once it acquires jurisdiction of a controversy, to make its examination broad enough to do full and exact justice between the parties, would not necessarily impel it, in a suit involving an indebtedness between firms having a common partner, to go beyond the adjustment of the claim as between the firms, for the purpose of ascertaining, by taking an account of the business of the creditor firm, what, if any, balance could be found in favor of the common partner, in order that such balance might be deducted from the amount of the recovery. *Id.*

3. The argument, therefore, that firms having a common partner cannot have their controversies adjusted at law, nor in equity except upon the basis of individual, as contradistinguished from firm, rights, is of no force when invoked by unsecured creditors of the debtor firm in support of a contention that security given to the creditor firm should be applied to the claims of general creditors to the extent that it benefits the common partner. *Id.*

4. A note executed by a partnership will be presumed, in the absence of a contrary showing, to be a valid claim against the firm, although it was given for the debt of one of the members. *Id.*

5. A surviving partner cannot, by will, confer upon his executor a right to continue the business for any longer period than he himself might lawfully have continued the same, which is limited to such time as is necessary to close out the business without sacrificing it. *Frey* v. *Eisenhardt,* 160.

6. Where an executor or administrator, instead of closing out decedent's business with reasonable promptness, assumes, with the consent of the parties interested, to conduct the same as a going concern for a series of years, contracting extensive debts and sustaining heavy losses, only the trade assets—*i. e.,* the property employed in the business or resulting from it—can be subjected to the payment of such debts. *Id.*

PARTNERSHIP—Continued.

7. Nor will decedent's widow and children be compelled in a court of equity, as a condition to their being allowed an injunction restraining the application of the general assets to the payment of the trade debts, to refund amounts which had been allowed to them for their support out of the funds of the estate when the same was solvent. *Id.*

8. Premises purchased by two brothers in their individual names, with moneys taken from the funds of a brewing business, in which they were copartners, at a time when the firm was entirely solvent, and occupied for years by their families under circumstances indicating that they regarded them as their respective homesteads, will not be held liable as trade assets for the payment of debts contracted by the administrator of the partners, who ran the business to insolvency, although it appears that water for the use of the brewery was procured from a pipe running across the property, that empty beer barrels were at times piled upon the lots, and that employés sometimes boarded with the families. *Id.*

9. In an action to recover for goods alleged to have been furnished to defendant by plaintiffs as copartners, in which defendant denied the existence of the partnership, and claimed that the goods were received from one of the plaintiffs in payment of a debt due from him, but further contended that, if such partnership did exist, defendant was ignorant of the fact, and that the other plaintiff knew of and assented to the arrangement under which the goods were furnished, a judgment for defendant, based upon a verdict rendered under full and fair instructions as to the law applicable to the case, was affirmed. *Neely* v. *Flumerfelt,* 344.

See BILL OF PARTICULARS; CERTIORARI (2); FRAUDULENT CONVEYANCES (4).

PAYMENT.

1. A payment enforced by garnishee process is not a voluntary payment such as will estop the debtor from asserting that the creditor had previously satisfied his claim by taking possession of property on a conditional sale of which the claim was based. *Perkins* v. *Grobben,* 172.

2. The taking of an acceptance for the price of goods sold does not, in the absence of special agreement, amount to a payment of the debt. *Kirkpatrick* v. *Bessalo,* 657; *Same* v. *Costo,* 662.

See DURESS; EVIDENCE (4, 8); LIENS (2); MANDAMUS (2); MECHANICS' LIENS (1, 2, 6); MORTGAGES (1); PARTNERSHIP (9); PROBATE COURTS (1); STATUTE OF LIMITATIONS; TAXES (9).

PERSONAL INJURIES.

Former decisions of the court upon the admissibility of evidence of exclamations of pain by a plaintiff suing for personal injuries are referred to with approval. *Butts* v. *City of Eaton Rapids,* 589.

PERSONAL INJURIES—Continued.

See AMENDMENTS; CONTRIBUTORY NEGLIGENCE; MARRIED WOMEN (1); MUNICIPAL CORPORATIONS (21–30); NEGLIGENCE; TRIAL (3, 9, 10, 12).

PHYSICIANS AND SURGEONS—See EVIDENCE (5, 17); PUBLIC HEALTH (3).

PLANK-ROAD COMPANIES.

Under 1 How. Stat. § 4866, providing that any corporation may amend its articles of association in manner consistent with the provisions of the act under which it was organized, a plank-road company incorporated under 1 How. Stat. § 3597 *et seq.*, may, by amendment, continue its corporate existence beyond the time fixed by the original articles, provided the entire term does not exceed that for which it might have incorporated in the first instance. *People, ex rel. Ward,* v. *Green,* 505.

See MUNICIPAL CORPORATIONS (9).

PLEA IN EQUITY—See EQUITY PLEADING (3–6).

PLEADING.

1. A declaration, in an action against a city, which alleges the ownership by the city of gutters and sewers, its duty to keep them open and clear, and not to permit them to become dammed, or the flow of the water through them to be impeded in any way, and charges that the city negligently permitted and allowed to remain in the gutters and sewers of a certain street divers impediments, by reason of which, and of the improper construction of said gutters and sewers, the water became dammed up until it overflowed the gutter, and ran down upon and injured plaintiff's property,—is sufficient to sustain a verdict for negligence in not removing obstructions, or in constructing a sewer inadequate for the exigencies of ordinary floods. *Seaman* v. *City of Marshall,* 327.

2. An objection that the declaration, in an action against a surety upon an undertaking for a stay of execution on a justice's judgment, counts upon a common-law, instead of a statutory, obligation, must be taken by demurrer. *Sweeney* v. *Lustfield,* 696.

See AMENDMENTS; ASSUMPSIT (3); BILL OF PARTICULARS; CRIMINAL LAW (2, 3); EQUITY PLEADING; FRAUD; INTOXICATING LIQUORS (3); SUMMARY PROCEEDINGS (1).

POLICE POWER—See MUNICIPAL CORPORATIONS (12).

POSSESSION OF LANDS—See ADVERSE POSSESSION; SUMMARY PROCEEDINGS; TENANCY IN COMMON.

POWER OF SALE—See WILLS (7).

PRACTICE IN CIRCUIT COURT—See AMENDMENTS; ATTACHMENT (1); BILL OF EXCEPTIONS; BILL OF PARTICULARS; BILLS AND NOTES (8); CONTINUANCE; DEPOSITIONS; DISCONTINUANCE; EQUITY PRACTICE; TRIAL.

PRACTICE IN SUPREME COURT — See APPEAL AND ERROR; COSTS.

PRESUMPTIONS — See MUNICIPAL CORPORATIONS (1, 3, 16); PARTNERSHIP (4); TAXES (14).

PRINCIPAL AND AGENT.

Evidence that plaintiff's husband had general authority from her to act as her agent in purchasing contracts; that he had purchased several for her like the one in suit; that he was authorized to check her money out of the bank, signing her name to the checks, by himself, as agent; that, when the contract in suit was purchased, payment was made by giving such a check, together with certificates of deposit made to plaintiff, and indorsed in her name, by her husband as agent; and that he had authority to and did receive payments upon the contracts,—is sufficient to go to the jury on the question of the husband's authority to accept a mortgage as payment of the contract in suit. *Griffin* v. *McKnight*, 468.

See ATTORNEY AND CLIENT.

PRINCIPAL AND SURETY.

1. The surety upon a bond of indemnity conditioned for the faithful performance by the principal of an agreement whereby he was to act as agent for the handling of the obligee's goods in certain territory, and was to account weekly, in specified sums, for all wringers and clocks sold by him, and for "other articles as per price list," and whereby the obligee was bound to furnish, not only wringers and clocks, but "such other goods" as might be further agreed upon,—is liable for the principal's default with respect to goods other than wringers and clocks which were furnished in accordance with the terms of the contract. *Colby Wringer Co.* v. *Coon*, 208.

2. The surety upon such a bond is not relieved from liability because the obligee failed to notify him that the agent was not remitting the full amounts shown to be due by his weekly reports, even though it subsequently develops that the deficiency was underreported, if the obligee had no notice of such dishonesty. *Id.*

3. Evidence that a sum equal to the interest on a note for 90 days was accepted by the payee in advance from the maker, and that a notice that the note would fall due at a date three months later than the original date of maturity was sent out by the payee, is competent to show that the time of payment was extended and the surety thereby released. *Hitchcock* v. *Frackelton*, 487.

4. A surety upon an undertaking given under 2 How. Stat. § 6963, to stay execution, is not entitled to the protection of sections 6977, 6978, relating to the right of a surety to have the property of the principal first resorted to to satisfy an execution, as section 6953 provides that execution may issue against both principal and surety upon such an undertaking, with the same effect as if the judgment had been rendered against both upon a joint liability, and section 6971 amply

PRINCIPAL AND SURETY—Continued.

protects the surety by subrogating him, after satisfaction of the judgment, to all the rights which the judgment creditor had. *Sweeney* v. *Lustfield*, 696.

See BILLS AND NOTES (9); MARRIED WOMEN (2, 3).

PRINTING—See STATE PRINTING.

PRISONS.

Section 34 of Act No. 118, Pub. Acts 1893, makes it the duty of the boards of control of the various prisons in the State to meet once in six months in joint session to determine what lines of labor shall be pursued in each prison. Other sections of the act require the wardens to keep prisoners constantly employed at hard labor "beneficial to the State," and provide that "all the fiscal transactions and dealings on account of each prison shall be conducted by and in the name of the warden." *Held*, that, where the joint prison board has taken no action in the way of determining the lines of employment to be pursued in a prison, the warden thereof may, with the approval of the board of control, make a valid contract for the employment of convicts, for a term of years, along any line consistent with the provisions of the act. *Wallerstein* v. *Board of Control of State House of Correction*, 365.

PROBATE COURTS.

1. Under 2 How. Stat. § 6760, providing that the judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of deceased persons, the probate court has authority to determine whether a promissory note given by an executor to a legatee was accepted by the latter in payment of her legacy, upon a petition by the legatee to require the executor to account for her interest in the estate, even though the circumstances of the case are such that equity would also have jurisdiction of the controversy. *Fingleton* v. *Kent Circuit Judge*, 211.

2. An order denying such petition is appealable, under 2 How. Stat. § 6779, giving a right of appeal to any person aggrieved by any order, sentence, decree, or denial of a judge of probate. *Id.*

3. An order of the probate judge determining who is entitled to moneys paid into court under 1 How. Stat. § 3338, as compensation for lands condemned for railroad purposes, is appealable, under 2 How. Stat. § 6779, providing for appeals from probate court in cases "not otherwise provided for." *Defoe* v. *Bay Circuit Judge*, 567.

4. A statute requiring judicial action by the probate judge, and the entry of a final order or decree, passed subsequent to 2 How. Stat. § 6779, will be presumed to have been framed with reference to the provisions of the existing statute, where there is nothing in the later statute to indicate that the legislature deemed an appeal from the order inexpedient. *Id.*

PROBATE COURTS—Continued.

5. It cannot be successfully urged that a probate order is not appealable because no provision is made in the statute relating thereto for a stay of proceedings in case of an appeal, as 2 How. Stat. § 6788, provides for such stay "after an appeal is claimed" from any order of the probate court. *Id.*

6. The circuit court has jurisdiction to entertain an appeal from probate court, although notice thereof was not given to all of the adverse parties, if the appellant has complied with 2 How. Stat. § 6781, which provides that notice shall be given in such manner as the probate court shall direct; it being within the power of the circuit judge to require notice to be served upon any other necessary parties. *Id.*

7. An order of the probate court under 3 How. Stat. § 5992*a et seq.*, determining who are the heirs, minor heirs, or legal representatives of a decedent, which order, under section 5992*c*, is only *prima facie* evidence of the facts found therein, is not appealable under the general statute (2 How. Stat. § 6779) providing for appeals from probate court "in all cases not otherwise provided for." *Lorimer* v. *Wayne Circuit Judge*, 682.

PROMISSORY NOTES—See BILLS AND NOTES.

PROSECUTING ATTORNEY, DUTY OF—See CRIMINAL LAW (1).

PROXIMATE CAUSE—See NEGLIGENCE (7).

PUBLIC BUILDINGS—See BOARDS OF SUPERVISORS.

PUBLIC CONTRACTS—See STATE PRINTING.

PUBLIC HEALTH.

1. A municipal board of health will not be required to allow compensation for losses occasioned by the quarantining and disinfecting of premises infected with smallpox, where the only use made of the premises was such as was necessary for the proper care of the patients who were there found suffering from the disease. *Webb* v. *Detroit Board of Health*, 516.

2. If the officers of a municipal board of health are negligent in the matter of disinfecting property, and thereby cause unnecessary damage, such officers, as individuals, and not the municipality, are liable, if any liability attaches. *Id.*

3. A board of supervisors has no authority to disallow a portion of a physician's charges, as allowed and certified by the board of health of a township, for services rendered under the direction of the latter board in time of epidemic, upon the ground that some of the persons to whom the services were rendered were financially able to pay for them. *McKillop* v. *Board of Supervisors of Cheboygan Co.*, 614.

See MANDAMUS (2).

PUBLIC LANDS.

1. A marshy island in one of the Great Lakes, not in existence at the time of the swamp-land grant by Congress to the State in 1850, belongs to the State, by virtue of its ownership of the soil beneath the waters of the Lakes. *People* v. *Warner*, 228.

2. A marshy island in one of the Great Lakes, existing as unsurveyed land at the time of the certification by the secretary of the interior of the list of swamp lands covered by the grant, will not, because of its being omitted from such list, be deemed to have been determined by the secretary not to be within the grant, unless there is evidence tending to show that the question as to such land was actually considered and passed upon. *Id.*

3. The swamp-land grant was a grant *in præsenti*, conveying to the State the title to such lands as came within its terms, but suspending the right of entry until the lands covered thereby should either be determined by the secretary of the interior, or he should refuse to act. *Id.*

4. Where the secretary of the interior refuses to make the determination as to particular unsurveyed lands claimed by the State under the terms of the grant, the State may cause a survey to be made, and have the matter adjudicated in the courts. *Id.*

5. The swamp-land grant of 1850 covered all swamp and overflowed lands, and not those alone which were susceptible of profitable reclamation by drains and levees. *Id.*

See ADVERSE POSSESSION.

PUBLIC OFFICERS.

1. Where one's unfitness for an official position from which he has been summarily removed is conceded, he cannot invoke the aid of the discretionary writ of *mandamus* to exact payment of salary for a period succeeding his discharge, even though his removal may have been illegal because without opportunity for hearing and defense. *McQueen* v. *Common Council of Detroit*, 90.

2. It will not be presumed that the members of a city council were actuated by improper motives in the passage of an ordinance prescribing the frequency with which street cars should be run, but, on the contrary, it will be presumed that such action was taken in the exercise of a judgment based upon an acquaintance with all the facts; and such judgment, as embodied in the ordinance, will control the courts, upon inquiry as to the reasonableness of such ordinance, unless it clearly appears that it was improperly exercised. *People* v. *Detroit Citizens' Street-Railway Co.*, 132.

3. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally-

PUBLIC OFFICERS—Continued.

qualified incumbent who has a lawful right to continue therein until the happening of some future event. *Baxter* v. *Latimer*, 356.

4. An execution valid on its face protects a public officer against an action for damages resulting from its enforcement, even though the judgment on which it is based is invalid, and the debtor threatens to make him trouble if he enforces it. *Miller* v. *Hahn*, 607.

5. An officer who enforces an execution valid on its face is not liable in *assumpsit* for fees collected under the writ, even though the judgment on which it was issued is invalid. *Id.*

See ASSUMPSIT (3); EQUITY PLEADING (1); EXECUTION; MILITIA; MUNICIPAL CORPORATIONS (8, 14, 15).

PUBLIC POLICY—See CONTRACTS (2, 7).

PUBLICATION—See TAXES (29).

PUNITORY DAMAGES—See DAMAGES.

QUARANTINE—See PUBLIC HEALTH.

RAILROAD-AID NOTE—See CONTRACTS (11).

RAILROAD COMPANIES.

1. The fact that private individuals, resident and owning property in a given city, contributed money towards the building and equipping of a line of railroad through such city, upon the representation and understanding that the road would increase the value of their property, does not give them the right to maintain a bill in equity to restrain the company from taking up or discontinuing the use of its track through the city, at least where the injury resulting from such action is not specific to them or their property, but is common to all citizens and property holders of the city; the remedy being by suit in the name of the proper officer of the State. *Henry* v. *Ann Arbor R. Co.*, 314.

2. Prior to the passage of Act No. 125, Pub. Acts 1891, those who contributed to the construction of a railroad had no right of action against the company for abandoning and taking up its track. That act makes the taking up of the track unlawful, unless by virtue of proceedings in court, where decree is to be granted only upon condition that the company pay back all moneys received as a bonus. It is further provided that no decree or order for a proposed abandonment shall take effect, or be of any force, until all awards of contributors be first legally and fully settled and paid. The act designates no method for ascertaining who are claimants, or for bringing them before the court if they do not voluntarily appear. *Held*, that the act does not give to contributors a right to have their claims heard and allowed at any time, but contemplates an expeditious adjudication of their rights in the proceeding instituted by the company for leave to take up its track. *Williams* v. *Flint, etc., R. Co.*, 392.

RAILROAD COMPANIES—Continued.

3. Where, therefore, after application made by the company for leave to abandon, a contributor files a petition, upon behalf of himself and such others as may choose to avail themselves of the proceeding, for the appointment of a time and place at which all parties who have contributed to the road may be notified to appear and prove the amount of their several contributions, and an order is entered thereon that all contributors shall prove their claims before a commissioner upon a certain day, which order is published, as directed by the court, in a county paper, contributors who fail to appear and make proof of their claims will be deemed to have waived their right to reimbursement. *Id.*

4. The fact that an order for the presentation of claims for contributions against a railroad company which has filed its petition under Act No. 125, Pub. Acts 1891, for permission to abandon its tracks, is issued at the instance of a contributor instead of at the instance of the company, does not render it the less binding upon contributors who fail to comply with its provisions. *Id.* 393.

See CARRIERS; NEGLIGENCE (7); PROBATE COURTS (3); WRIT AND PROCESS.

RAPE.

In a prosecution for carnally knowing a female under the age of 16 years, the prosecution attempted to show, as a corroborative circumstance, that pregnancy had resulted from the alleged intercourse with respondent. Upon cross-examination, the prosecutrix admitted having written certain confessions of respondent's innocence and of her own misconduct, but claimed that they were written by direction of respondent, and under threats. *Held*, that it was competent for respondent to show, as bearing on the truthfulness of the prosecutrix, that the girl had had intercourse with others. *People* v. *Craig*, 388.

RATIFICATION—See ASSUMPSIT (1); CONTRACTS (12); DURESS.

RECEIVERS.

Where a bill of complaint was dismissed, without the taking of proofs, under a misapprehension of the rights of the parties, and the property in controversy was already in the hands of a receiver, and all charges of fraud were denied by the answer, the appellate court, upon reversing and remanding the cause, refused to pass upon the matter of the appointment of a new receiver, but left the same for determination by the lower court. *Albion Malleable Iron Co.* v. *First National Bank of Albion*, 218.

See CORPORATIONS (2); MUTUAL BENEFIT ASSOCIATIONS (1).

RECORD ON APPEAL—See APPEAL AND ERROR (7); NEW TRIAL (3, 4).

REFORMATION OF DEED—See DEEDS (2); TAXES (4).

REHEARING—See COSTS.

RELEASE OF SURETY—See PRINCIPAL AND SURETY (2, 3).

RELIGIOUS SOCIETIES.

Act No. 110, Pub. Acts 1895, entitled "An act for the organization of corporate Methodist Episcopal Churches," was superseded by Act No. 209, Pub. Acts, 1897, entitled "An act to revise, amend, and consolidate the laws for the incorporation of ecclesiastical bodies." *Graham* v. *Muskegon County Clerk*, 571.

See CONSTITUTIONAL LAW (1).

REMARKS OF COURT AND COUNSEL—See TRIAL (3, 4, 6, 14).

REMOVAL OF OFFICERS—See PUBLIC OFFICERS (1).

RENT—See LANDLORD AND TENANT.

RENTS AND PROFITS—See TENANCY IN COMMON (1, 2, 4, 6).

REPEAL OF STATUTE—See RELIGIOUS SOCIETIES.

REPLEVIN—See RES JUDICATA (3); TITLE TO PERSONALTY.

REQUESTS TO CHARGE—See TRIAL (1, 8, 12, 15).

RESCISSION OF CONTRACT—See CONTRACTS (9); RES JUDICATA (5).

RES GESTÆ—See EVIDENCE (1, 3, 17).

RES JUDICATA.

1. The adjudication of the rights of secured creditors of an insolvent under their several securities, postponing them to a certain mortgage, will not preclude them from asserting, as against unsecured creditors, their superior claim to a fund appropriated by the trustee under the prior mortgage to the payment of an invalid claim. *Burrows* v. *Leech*, 33.

2. Where the court, upon reversing a judgment, rules adversely to the appellant on some of his assignments of error, the questions raised by such assignments are not open for consideration on a second appeal. *Breitenwischer* v. *Clough*, 340.

3. A defense pleaded upon the retrial of a suit in replevin, that defendant's father deeded to plaintiff a farm leased to defendant, in consideration of an agreement that defendant should be allowed to raise thereon a crop of wheat, a portion of which was replevied by plaintiff, is substantially the same as a defense decided on a former appeal to be permissible, that the deed was in consideration of an agreement that the grantor should be allowed to raise the wheat, which agreement inured to defendant's benefit,—and the same rule of law is applicable to both. *Id.*

4. A question directly raised on appeal, and passed upon by the court after a full discussion and citation of authorities by counsel, is not open for consideration on a second appeal. *Union National Bank* v. *Rich*, 414.

RES JUDICATA—Continued.

5. Executors who have contracted to sell land, having no power to do so, cannot defeat their vendee's right to rescind the contract on that ground by showing that a decree has been rendered by the judge of another circuit, in a proceeding to which the vendee was not a party, instituted after they had received notice of the vendee's intention to rescind, whereby their right to sell the lands in question is sustained; for while such decree, though erroneous, would not be subject to collateral attack, it could not control the relations of parties whose *status* was properly to be determined with reference to a time prior to the institution of the proceedings wherein the decree was rendered. *Potter* v. *Ranlett*, 454.

See ACTIONS (2); MUTUAL BENEFIT ASSOCIATIONS (2).

RETURN—See EXECUTION (2); TAXES (19).

RIPARIAN RIGHTS—See WATERS.

SALE.

Assumpsit will not lie for the price of a machine purchased under a written order directing that it be consigned for the purchaser to the care of a local agent of the seller, to be paid for in approved notes on delivery, where the purchaser refuses to execute the notes as agreed, and the property is not turned over to him; there being no such delivery as to pass the title. *McCormick Harvesting Machine Co.* v. *Cusack*, 647.

See BILLS AND NOTES (1–3); CONDITIONAL SALE; CONTRACTS (1, 2, 4, 9); CONTRIBUTION; EXECUTION; LIENS (3); TAXES (8, 28).

SALOONS—See INTOXICATING LIQUORS (1).

SAWYER'S LIEN—See CUSTOM (2); EVIDENCE (4); LIENS (1–3).

SCHOOLS AND SCHOOL DISTRICTS.

Under section 6 of the statute relating to township school districts in the Upper Peninsula (Act No. 176, Pub. Acts 1891), which authorizes special meetings of the board of education to be called by giving at least three days' notice to each member of the board "if within the district," action taken at a meeting called upon a shorter notice, which was not attended by one of the members, is invalid, even though the absent member was not within the district when the meeting was called or held. *Schafer* v. *School Dist. No. 1 of Baraga*, 206.

See TAXES (5, 7, 23, 27).

SEPARATION AGREEMENT—See HUSBAND AND WIFE (6).

SERVICE OF PROCESS—See WRIT AND PROCESS.

SETTLEMENT.

A judgment for defendant in an action to recover an alleged balance of a loan was affirmed; there being testimony in the

SETTLEMENT—Continued.

case which, if believed, would sustain the jury's finding that the claim in suit had been included in a settlement between the parties. *Kunst* v. *Ringold*, 88.

See BILL OF PARTICULARS.

SEWERS—See MUNICIPAL CORPORATIONS (20); PLEADING (1).

SHERIFFS—See EQUITY PLEADING (1); EXECUTION; PUBLIC OFFICERS (4, 5).

SIDEWALKS—See CONTRIBUTORY NEGLIGENCE (2); EVIDENCE (12, 13); MUNICIPAL CORPORATIONS (21–30); TRIAL (12).

SPECIAL MEETINGS—See MUNICIPAL CORPORATIONS (16–18); SCHOOLS AND SCHOOL DISTRICTS.

SPIRITUALISTIC SEANCE—See ASSAULT (1); EVIDENCE (1).

STATE COMITY—See MUTUAL BENEFIT ASSOCIATIONS (1).

STATE LANDS—See PUBLIC LANDS; WATERS.

STATE PRINTING.

The board of state auditors, in determining who is the lowest responsible bidder for the state printing, may take into consideration the fact that the doing of the work away from the capital would entail additional expense to the State. *Seventh-Day Adventist Pub. Ass'n* v. *Board of State Auditors*, 672.

STATUTE OF FRAUDS.

1. A wife is not liable upon a parol promise to pay for supplies previously furnished to a boat owned by her husband, upon which she held a mortgage, although she knew, at the time of making such promise, that the claim for such supplies was a lien upon the boat, and although the creditor thereafter took no steps to enforce a lien, where there was no express agreement that the lien should be released, and the creditor did not know of the wife's interest in the boat. *Goodman* v. *Felcher*, 348.

2. Where an agent for a harvesting machine company, to induce a customer to order a binder, agreed to "put in on the deal," without extra charge, a corn sheller belonging to him, and of which the company had no knowledge, and the order as signed made no mention of the sheller, its delivery by the agent did not operate as a part delivery, sufficient to take the agreement for the purchase of the binder out of the statute of frauds. *McCormick Harvesting Machine Co.* v. *Cusack*, 647.

STATUTE OF LIMITATIONS.

Plaintiff, who held defendant's note, wrote him that he would like to indorse upon the note, as a payment, the price of a cloak which plaintiff's daughter had purchased upon defendant's credit, with his consent. Defendant replied: "The

STATUTE OF LIMITATIONS—Continued.

cloak is not paid for yet; still, I shall try and take care of it." Plaintiff thereupon made the indorsement, and afterwards wrote defendant, advising him of the fact, to which letter defendant made no reply. *Held*, to support a finding that the indorsement was authorized, so as to arrest the running of the statute of limitations. *Brockett* v. *Sagendorph*, 643.

See ADVERSE POSSESSION; TENANCY IN COMMON (4).

STATUTES—See ASSUMPSIT (2); CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS (4, 32); PROBATE COURTS; RELIGIOUS SOCIETIES; VOLUNTARY ASSOCIATIONS (2).

STAY BOND—See PLEADING (2); PRINCIPAL AND SURETY (4).

STAY OF PROCEEDINGS—See PROBATE COURTS (5).

STOCKHOLDERS, INDIVIDUAL LIABILITY OF—See CORPORATIONS (3).

STREET RAILWAYS.

By ordinance passed in 1862, when street railroading was in its experimental stage, the common council of a city of 50,000 inhabitants granted to a street-railway company a 30-year franchise. Among other provisions, the ordinance prescribed that cars should be drawn by animals only, at a speed not exceeding six miles per hour, and should be run as often as public convenience should require and the council should direct, provided that the council should not require the running of cars oftener than once in 20 minutes during 14 hours in the day for part of the year, and 12 hours in the day for the rest of the year. In 1879, the city having in the meantime doubled in population, a new ordinance was adopted, and accepted by the company, extending the franchise for 30 years, and providing merely, with reference to car service, that the cars on all lines should be operated "as the public convenience may require and the common council order." It was further provided that all ordinances or parts of ordinances not in conflict therewith should continue in force. *Held*, that the limitation upon the authority of the council with respect to the service of cars, contained in the earlier ordinance, was abrogated by the later one. *People* v. *Detroit Citizens' Street-Railway Co.*, 132.

See CONTRIBUTORY NEGLIGENCE (1, 3); MUNICIPAL CORPORATIONS (13); NEGLIGENCE (4, 5); PUBLIC OFFICERS (2); TRESPASS (2).

STREETS—See MUNICIPAL CORPORATIONS (21–30).

SUBCONTRACTOR, RIGHTS AND LIABILITIES OF—See CONTRACTS (5, 7); MECHANICS' LIENS (1).

SUBROGATION—See CONTRIBUTION; PRINCIPAL AND SURETY (4).

SUBSTITUTED SERVICE—See GARNISHMENT (3, 4); TAXES (29); WRIT AND PROCESS.

SUMMARY PROCEEDINGS.

1. The fact that there is no circuit court commissioner residing in the township in which summary proceedings to recover the possession of land are instituted before a justice under 2 How. Stat. § 8296, conferring jurisdiction upon a justice under such circumstances, need not be set up in the complaint. *Grand Rapids National Bank* v. *Kritzer*, 688.

2. The validity of a sale of land on execution is properly triable in summary proceedings by the purchaser to recover the possession of the premises sold. *Id.*

See CERTIORARI (1).

SUNDAY LAW—See EVIDENCE (2); INTOXICATING LIQUORS (1).

SUPERVISORS—See BOARDS OF SUPERVISORS.

SURETYSHIP—See PRINCIPAL AND SURETY.

SURPLUSAGE—See LIENS (4).

SURVEYS—See BOUNDARIES; PUBLIC LANDS (2, 4).

SWAMP LANDS—See ADVERSE POSSESSION; PUBLIC LANDS.

TAXES.

1. Act No. 206, Pub. Acts 1893, § 25, subd. 4, provides that platted lands may be described in the assessment roll by reference to the plat, and by the number of the lots and blocks thereof. Subdivision 5 provides that when two or more parcels adjoin, and are used and occupied together, they may be assessed by one valuation. Section 53 provides that a part owner of property assessed as one description may pay on the part owned by him. Section 66 empowers the court, before decreeing the sale of lands of different owners which have been assessed together, to separate the same, and apportion to each parcel its just proportion of the taxes. Section 70 provides that each parcel described in the decree shall be separately exposed to sale for the total taxes, interest, and charges. *Held*, that where several platted lots have been properly assessed as one description, and the tax extended against that description as a whole, it is proper to treat it as one parcel in subsequent proceedings. *Kneeland* v. *Hull*, 55.

2. When a decree is entered against such a description as one parcel, it is a determination of the legality of the assessment. *Id.*

3. In case of conflict between the tax record and the county treasurer's certificate of sale as to the interest in the land sold, the former will control. *Id.*

4. A tax deed issued under the law of 1893 will not be held absolutely void, in a suit to quiet title based thereon, because it purports to convey the entire land, when in fact only an undivided interest was sold, but the error may be corrected by the decree in such suit. *Id.*

5. Unless propositions to raise money for highway and school purposes were submitted to the electors at their annual

TAXES—Continued.

township meeting, they cannot be said to have neglected or refused to vote the same, within 3 How. Stat. § 1328, providing that, in case the electors present at any annual township meeting shall neglect or refuse to vote any highway taxes, the township board may order the same to be levied, and Act No. 176, Pub. Acts 1891, § 9, conferring like authority upon the board of education, under such circumstances, with reference to school taxes. *Auditor General* v. *Duluth, etc., R. Co.*, 122.

6. Where the township board, in levying highway taxes upon the property of the township, exempts the property in a particular village in the township, the levy is void. *Id.*

7. The curative provision of the tax law of 1893 (Act No. 206, § 99) does not relieve against defects which go to the jurisdiction of the body authorizing the levy. So *held*, where a board of education and a township board assumed to determine the amounts to be raised for school and highway taxes, without the questions' having been submitted to the electors at the annual meeting, and their having neglected or refused to act. *Id.*

8. A purchaser at a void tax sale does not, in the absence of statute, acquire the lien of the State by his purchase. *Croskery* v. *Busch*, 288.

9. Taxes subsequently paid by the holder of a void tax title are voluntary payments, and cannot be recovered from the owner of the land. *Id.*

10. The dispossession of a claimant under a void tax deed need not be by suit, in order to entitle him to compensation for improvements under section 104 of the tax law of 1893 (Act No. 206, Pub. Acts 1893). *Id.*

11. Evidence that such a claimant cleared several acres of the premises, which were theretofore unimproved, built a brush fence around the clearing, and raised one or more crops thereon, establishes a possession sufficient to entitle him to the benefit of said section, where he was afterwards excluded from the land by the act of the original owner. *Id.*

12. Complainants filed a bill to restrain the collection of certain taxes against their lands, alleging a willful and fraudulent overvaluation of the same by the assessor and board of review. It appeared from the evidence that the lands were located in a mineral belt, near to developed mines, which had a large output, and that the assessment in question was made against them as mineral lands, instead of as wild lands, as had theretofore been the custom. The assessor and the several members of the board, who had some knowledge of mining and mineral lands, testified that they acted honestly and fairly in the discharge of their duties, and used their best judgment in fixing the valuations; and the opinions of other witnesses as to the value of the lands were conflicting. Complainants were heard at length before the board, but offered no affidavits or sworn witnesses. *Held*, that a finding that the allegations of fraud were not established was warranted. *Pioneer Iron Co.* v. *City of Negaunee*, 430.

TAXES—Continued.

13. Under Act No. 206, Pub. Acts 1893, § 76, subd. 5, providing that taxes may be held illegal if the supervisor or board of review acted fraudulently, the action of the board, where fraud is alleged, is reviewable in the courts. *Id.*

14. In the absence of a contrary showing, it will be presumed that the equalization of the several assessment rolls of a county by the board of supervisors was based upon the valuation of the real estate, as required by the statute, and not upon that of both the real and personal property. *Auditor General* v. *Sparrow*, 574.

15. Hence, the statutory requirement that the amount added to or deducted from the valuation of the real estate as assessed be entered upon the records of the board is sufficiently complied with where the record discloses the aggregate valuation of the real and personal property as assessed and as equalized. *Id.*

16. The use of the term "taxes" instead of "valuation," in the record of equalization, is not a fatal defect, where it is manifest that the latter term was intended. *Id.*

17. The absence of the dollar sign in the record of the equalization and apportionment of taxes by a board of supervisors does not invalidate the action taken, where the figures are separated in such manner as to indicate places for dollars and cents. *Id.*

18. The description of the several quarters of a quarter section of land in an assessment roll is sufficient to authorize a decree against them for the amount of the tax, where one of the quarters is identified by the abbreviations "N. E.-N. E." under the heading "Description," and by the appropriate figures under the respective headings "Sec.," "Town," "Range," and "Acres," and the other quarters in their order by the abbreviations "N. W.," "S. W.," and "S. E.," respectively, placed directly under the first abbreviation "N. E." (indicating the particular quarter), and by the figures "40," repeated in each instance under the heading "Acres," although the second abbreviation "N. E." (indicating the quarter section), and the number of the section, town, and range, are not repeated or indicated by ditto marks. *Id.*

19. Under the method of enforcing the payment of delinquent land taxes by a foreclosure of the lien in chancery, and particularly in view of the curative provisions of the tax law (Act No. 206, Pub. Acts 1893, § 99), irregularities in the prior proceedings which do not prejudice the property rights of the person whose land is taxed will not defeat the claim of the State. Thus, it is no defense to the entry of a decree against the land—

(1) That no warrant was annexed to the tax roll delivered to the collecting officer;

(2) That the return of delinquent taxes was not verified; or

(3) That a majority of the board of review did not sign the certificate attached to the assessment roll. *Id.* 575.

TAXES—Continued.

20. But a change of valuations in a township assessment roll by the board of review, upon its own motion, after the expiration of the time allowed for that purpose by section 29 of the tax law of 1893, invalidates the entire tax. *Id.*

21. And, likewise, the addition of lands to a roll by the board after the expiration of such period invalidates the tax as to the lands so added. *Id.*

22. Under 3 How. Stat. § 750, authorizing the township board to vote the sum necessary to be raised by tax for the ordinary expenses of the township in case the qualified electors, at the annual township meeting, shall "neglect or refuse" to do so, a tax levied for such purpose is invalid if based upon a vote of the board without a previous submission of the question to the electors. *Id.*

23. And taxes levied for school purposes in a township school district are subject to the same consideration, under Act No. 176, Pub. Acts 1891, § 9, conferring like authority upon the board of education of such district with respect to school taxes. *Id.* 576.

24. But under 3 How. Stat. § 1356, providing that the township board shall fix the amount to be raised as a money tax for highway purposes in case the electors "do not determine" the same, a previous submission of the question to the electors is not a prerequisite to the authority of the board to act. *Id.*

25. Under section 29 of the tax law of 1893, providing that the township board of review shall add to the assessment roll the description and value of real property liable to assessment in such township, omitted from the roll, shall correct all errors in the assessment and valuation of property thereon, and shall cause to be done whatever else may be necessary to make the roll comply with the provisions of the act, the board has the power to add the values opposite the descriptions of real property on the roll, where the supervisor has failed to do so. *Id.*

26. The fact that the record of the board of review of a city fails to show that it met upon a given Monday, to which day an adjournment was taken on the previous Saturday, but shows that it did meet, and adjourn *sine die*, upon the following Tuesday, is not conclusive of the authority of the board, under the charter, to continue its sessions for as many days as might be necessary. *Id.*

27. School taxes are not void because voted at an adjourned session of the annual school meeting; since, in the absence of statutory provision to the contrary, a regular meeting of a public body may adjourn to a future time. *Id.*

28. A sale of land for State and county taxes will be set aside at the instance of a mortgagee thereof, on payment by him of the amount of such taxes, with interest and charges, where he attempted to pay to the city treasurer, within the time prescribed by law, all taxes standing against the land, and failed to pay the State and county taxes because he was misled by

TAXES—Continued.

that officer into a belief that the amount paid by him included all of the taxes; and this even though the roll containing the State and county taxes had not yet been received by the treasurer. *Hough* v. *Auditor General*, 663.

29. Act No. 162, Pub. Acts 1895, providing for the publication of the petition and order of hearing in proceedings for the sale of lands delinquent for taxes, contemplates a publication in English, in a newspaper printed in the English language; and anything less than that is insufficient to confer jurisdiction upon the court. *Visscher* v. *Ottawa Circuit Judge*, 666.

See CONSTITUTIONAL LAW (2); DRAINS; EVIDENCE (9); MUNICIPAL CORPORATIONS (1–4, 11, 18, 31, 32).

TENANCY BY ENTIRETIES—See HUSBAND AND WIFE (1, 2); PARTIES (3).

TENANCY IN COMMON.

1. 2 How. Stat. § 5778, which provides that one tenant in common may maintain an action for money had and received against his co-tenant for receiving more than his just proportion of the rents and profits, and which is construed to justify a recovery only for moneys actually received, exclusive occupancy not being sufficient to create a liability under the statute, does not impair the right of a tenant against whom the premises have been held adversely by his co-tenant to have an allowance made in partition proceedings for the value of the use and occupancy. *Fenton* v. *Miller*, 45.

2. The widow of a deceased tenant in common, who, after her husband's death, holds the entire premises adversely to her co-tenant, will not be relieved from liability to such co-tenant for the rental value of his undivided interest, because of her homestead and dower rights in the undivided interest which belonged to her husband. *Id.*

3. The commencement of an action of ejectment by one tenant in common against a co-tenant who has excluded him is a sufficient demand to be let into possession. *Id.* 46.

4. Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other from possession, the former asks credit for betterments and improvements made during the entire period, he cannot equitably have the statute of limitations applied against the excluded tenant's right to an allowance for use and occupation during the same period. *Id.*

5. A tenant in common who makes improvements upon the common property, which substantially increase its value, is entitled, after a sale of the property in partition proceedings, to have the improvements considered in determining his just share of the proceeds of the sale. *Id.*

6. Where, in partition proceedings between tenants in common, one of whom has for a number of years excluded the other

TENANCY IN COMMON—Continued.

from possession, the excluded tenant is to be allowed for rental and the tenant in possession for betterments and improvements, equity requires either that the former should be limited in his credit for rents to the value of the premises in their original state, or, if he is to have the benefit of disbursements made in improving the premises to add to their rental value, be charged with his share of the cost of the improvements at the time they were made, rather than with their depreciated value at the time of partition. *Id.*

7. A co-tenant in possession is not entitled, upon partition, to an allowance for insurance claimed to have been paid by him, where it does not in any way appear that the insurance inured to the benefit of the excluded tenant. *Id.*

See PARTIES (4).

TITLE OF ACT—See CONSTITUTIONAL LAW (1).

TITLE TO LANDS—See PUBLIC LANDS; SUMMARY PROCEEDINGS (2); TRESPASS (1).

TITLE TO PERSONALTY.

1. The fact that plaintiff bases his right to wheat replevied upon a cropping agreement between defendant and himself, the making of which is denied by defendant, does not render inadmissible evidence of an arrangement between plaintiff and defendant's father, whereby defendant was to be permitted to raise a crop of wheat, since such evidence tends to throw light upon the transaction, and to corroborate defendant's denial. *Breitenwischer* v. *Clough*, 340.

2. Even if it were admitted that both bargains were made, it would be competent to show that defendant did not perform one, and did put in the wheat by consent of his father under the other; in which case plaintiff's remedy would be an action for damages for not raising wheat under his contract, not replevin for the wheat raised under a valid contract with another. *Id.*

See CONDITIONAL SALE; SALE; TRIAL (8).

TOWNSHIPS.

The fact that a township is divided into election districts, and that one of the polling places is nine miles distant from the one at which, under 1 How. Stat. § 131, the township meeting is to be held, does not render it legally impossible for the electors to attend such meeting. *Auditor General* v. *Duluth, etc., R. Co.*, 122.

See BRIDGES; DRAINS; MANDAMUS (2); PUBLIC HEALTH (3); TAXES (5-7, 20-25).

TRADE ASSETS—See PARTNERSHIP (6-8).

TRESPASS.

1. The defendant in an action for trespass to lands, brought in the circuit court, is entitled to costs, where the title is not

TRESPASS—Continued.

put in issue by the pleadings, or contested upon the trial, and the verdict is less than $100. *Sands* v. *Manistee Circuit Judge*, 9.

2. One who, in sport, attempts to make use of a street car left unguarded upon the track in the public highway, is a trespasser. *Kaumeier* v. *City Electric R. Co.*, 306.

See DAMAGES.

TRIAL.

1. Respondent cannot complain of the court's failure to give a specific request to charge if the subject-matter of the request was sufficiently covered in the general charge. *People* v. *Hughes*, 80.

2. The court, under its authority to direct the order of proof, may refuse to take proposed testimony until other facts material to the case are shown. *Smith* v. *Bye*, 84.

3. A judgment for a railroad company in an action to recover for personal injuries will not be reversed because counsel for defendant said to the jury in his argument that they had evidently learned that damage suits for personal injuries had developed into quite a business. *Baxter* v. *Detroit Railway*, 188.

4. A judgment for defendant will not be reversed because the trial court allowed counsel for defendant in his argument to the jury to comment on the fact that counsel for plaintiff had objected to the admission of a writing signed by one of plaintiff's witnesses. *Id.*

5. The exclusion of competent testimony, offered to show the real character of an ambiguous instrument, is prejudicial, although the court afterwards construes the instrument in accordance with the contention of the party offering such testimony, where the testimony might have aided the jury to a better understanding of the matters involved. *Germain* v. *Central Lumber Co.*, 246.

6. A remark by the court in the course of a cross-examination which he thought was being unduly protracted, with reference to a mistake which the witness claimed to have made in his testimony, that he did not see the materiality of the matter, that the witness had stated that he had made a mistake, and that it was clear upon the record that he did make a mistake,—was not prejudicial to the cross-examining party, where no question or answer was excluded. *Crane Lumber Co.* v. *Bellows*, 304.

7. An instruction in an action for personal injuries that "if the jury believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides, plaintiff has made out a case," is prejudicial to defendant, where many of the facts testified to by plaintiff's witnesses might be true, and yet no liability exist. *Henderson* v. *Detroit Citizens' Street-Railway Co.*, 368.

8. Where it appeared from the undisputed testimony of the prosecutrix, upon a trial for larceny, that the money alleged

TRIAL—Continued.

to have been feloniously converted by respondent was intrusted to her by the prosecutrix for the purpose of purchasing a bicycle for the latter, there was no error in a refusal to instruct the jury as to what should be their verdict in case they should find that the prosecutrix, at the time of the delivery of the money, intended to pass the title to the same. *People* v. *Martin*, 446.

9. Error in permitting plaintiff in an action for personal injuries to state that, at the time, he was endeavoring to exercise care and caution, is harmless to defendant, where plaintiff had already testified fully as to what he did at the time of the accident, and the trial judge directed the jury that, in determining whether plaintiff exercised due care and caution, they must take into consideration the entire circumstances. *Grattan* v. *Village of Williamston*, 462.

10. An instruction, in an action for personal injuries, that the jury might consider plaintiff's infirmities if resulting from the injury's having caused his "rheumatism to centralize," could not have misled the jury into believing that they might award damages for an aggravation of an existing disease, which was not alleged, where, in other parts of the charge, they were told that plaintiff could not recover such damages, as he had denied the existence of rheumatism before the injury. *Id.* 463.

11. It is error for the court to exclude testimony tending to show that a trust mortgage purporting to be executed by a corporation was not authorized by the board of directors, and afterwards leave it to the jury to determine whether it was authorized or not. *Murray* v. *Rugg*, 519.

12. Where the plaintiff, in an action for injuries sustained by falling upon a defective sidewalk, testified that the place where she fell was only three or four feet west of a certain private walk, and her husband testified that he found the walk broken, and the boards and stringers rotted, at such point, and defendant's witnesses claimed that the defect which caused the injury was located some 12 feet west of the private walk, and consisted of a board which had been broken only a short time before the accident by a heavily-loaded wagon passing over it, but which was otherwise comparatively sound,—the court properly refused to charge that the "undisputed evidence" showed the facts to be in accord with defendant's theory. *Butts* v. *City of Eaton Rapids*, 539.

13. To lay the foundation for an exception to the form of a hypothetical question, the particulars wherein the question leaves out anything that ought to be embraced within it, or embraces anything that ought to be excluded, should be clearly pointed out. *People* v. *Foglesong*, 556.

14. The court may in its discretion permit counsel, in the examination of a hostile witness called by him, to put leading questions with reference to his testimony upon a previous occasion, and to state the grounds upon which he relies as justifying such course; care being taken to check promptly any appar-

TRIAL—Continued.

ent effort to make the statement the means of bringing inadmissible matter to the attention of the jury. *Gilbert* v. *Michigan Cent. R. Co.*, 610.

15. A party who, by his requests to charge, has treated certain questions of fact as disputed, cannot complain because the court treats them in the same way in its general instructions. *Hamilton* v. *Arnold*, 684.

See AMENDMENTS; APPEAL AND ERROR; ASSAULT (2); BILL OF PARTICULARS; CRIMINAL LAW (1, 3, 4); INFANTS; NEGLIGENCE (2, 6); NEW TRIAL.

TROVER—See CHATTEL MORTGAGES (5); CONVERSION; EXECUTION (1).

TRUSTS—See ARBITRATION AND AWARD (2); BANKS AND BANKING (1); CONTRIBUTION; FRAUDULENT CONVEYANCES (3); WILLS (7).

UNDUE INFLUENCE—See WILLS (6).

USAGE—See CUSTOM.

USE AND OCCUPATION—See TENANCY IN COMMON (1, 2, 4, 6).

VACANCY IN OFFICE—See MILITIA; PUBLIC OFFICERS (3).

VENDOR AND PURCHASER.

A vendee in a land contract requiring him to keep the premises insured, who takes out insurance payable to himself as his interest may appear, is entitled to the proceeds of the policy, as between himself and the vendor, where the damage sustained is repaired by him at his own expense. *Sheridan* v. *Peninsular Savings Bank*, 545.

See TAXES (8).

VILLAGES—See MUNICIPAL CORPORATIONS.

VOLUNTARY ASSOCIATIONS.

1. The withdrawal of two-thirds of the members of a voluntary association does not change its identity, and the remaining members are entitled to the property. *Schiller Commandery No. 1, United Friends of Michigan*, v. *Jaennichen*, 129.

2. The provision of Act No. 119, Pub. Acts 1893, that voluntary associations may become bodies corporate if two-thirds of the members present and voting at any regular meeting shall vote in favor of such incorporation, does not operate, so far as it relates to associations formed before and existing at the time of the enactment, to vest in the corporation funds belonging to the association, where the action to incorporate was not acquiesced in by all the members of the association. *Id.*

VOLUNTARY PAYMENTS—See PAYMENT (1); TAXES (9).

WAIVER—See CRIMINAL LAW (3); EVIDENCE (4); MUNICIPAL CORPORATIONS (30); MUTUAL BENEFIT ASSOCIATIONS (4, 5); RAILROAD COMPANIES (3).

WARDEN, POWERS OF—See PRISONS.

WARRANT—See TAXES (19).

WATERS.

1. The limit of private ownership of islands in the Great Lakes is the water line, regardless of the fact that adjacent land is submerged only to a slight depth, and is grown up to aquatic plants. *People* v. *Warner*, 228.
2. Additions to the land of a littoral proprietor by the action of the water become a part of the land, and belong to the owner, where they are so gradual as to be imperceptible; but if an island arises out of the water, and afterwards becomes connected to the land of the littoral proprietor, it belongs to the State. *Id.* 229.
3. The owner of an island in one of the Great Lakes has no such right of access to navigable water as will support a claim of title in fee, as against the State, to an intervening island. *Id.*

WATERWORKS—See MUNICIPAL CORPORATIONS (1, 5-8).

WILLS.

1. A devise which, standing alone, would confer an estate in fee, may be modified by a subsequent provision of the will which discloses an intent to limit the estate granted. *Robinson* v. *Finch*, 180.
2. Thus, a devise absolute in form to A. is effectually limited by a subsequent provision that, in the event of A.'s death without wife or children, such of the estate as should not have been used by A. should go to B. *Id.*
3. In such a case, upon the death of A. without wife or children, the heirs of B., who had died in the meantime, became entitled to the property, to the exclusion of the heirs of A.; the omission of the word "heirs" in the devise to B. not operating to defeat the manifest intention of the testator to grant an estate of inheritance. *Id.*
4. One has sufficient capacity to make a will where he understands the business in which he is engaged, and the extent and value of his property, and knows who are his relatives, and who would be his heirs at law if no will were made. *Peninsular Trust Co.* v. *Barker*, 333.
5. That a testator was subject to certain delusions does not invalidate his will if they did not dictate its provisions. *Id.*
6. Upon a review of the evidence on the contest of a will, *held*, that there was nothing to go to the jury upon the question either of mental incompetency or of undue influence. *Id.*

WILLS—Continued.

7. A devise to executors in trust, to pay the income annually to the testator's daughters, and to the survivor of them, for life, the trust estate, after the death of said daughters, to go to their children in equal proportions, does not confer a power of sale upon the executors. *Potter* v. *Ranlett*, 454.

WITNESSES.

A witness cannot be impeached by introducing a bill of exceptions containing a statement of his testimony on a former trial, unless the correctness of the transcript is established; the usual method being to call the stenographer, and prove the statements made upon his oath. *Breitenwischer* v. *Clough*, 341.

See EVIDENCE; HUSBAND AND WIFE (1, 3, 4); TRIAL (14).

WRIT AND PROCESS.

Substituted service of a notice to contributors to the construction of a railroad to appear and submit their claims on abandonment of the road under Act No. 125, Pub. Acts 1891, is permissible. *Williams* v. *Flint, etc., R. Co.*, 392.

See GARNISHMENT (3, 4); MECHANICS' LIENS (4).

WRIT OF ASSISTANCE—See EVIDENCE (3); HOMESTEAD.

WRITTEN CONTRACTS—See CONTRACTS (12).

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