MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MAY 8, TO JULY 28, 1891.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 86.

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Rec. Dec. 28, 1891

SUPREME COURT RULE 64.

Adopted October 8, 1891.

RULE 64.—Any person who is not a citizen of this State or of the United States, who is twenty-one years of age, and has been duly admitted to practice under the laws of a foreign country in the courts of record thereof, and who has come into this State with the intention of becoming a resident thereof, and who has declared his intention to become a citizen of the United States, may be admitted to practice in the several courts of this State by the Supreme Court, upon filing with the clerk of said Court proofs satisfactory to the Court of his having been admitted to practice in the courts of record in the country from which he came, and the certificate of at least two reputable members of the bar of this Court, certifying to his good moral character: *Provided*, said Court may require the applicant to submit to an examination by said Court as to his qualifications and knowledge of the law. Any one seeking admission to practice under this rule shall present a petition duly verified, stating his name, age, and former residence, the number of years he read law before having been admitted, and with whom and where, and by what court or courts admitted, and the number of years he has been in actual practice, and that he has declared his intention to become a citizen of the United States, and file the same with the clerk of this Court with the papers above referred to.

CIRCUIT COURT RULE 6.

As amended October 8, 1891.

RULE 6.—All notices shall be in writing, and shall be served on the attorney in the cause, or his agent; and where a party prosecutes or defends by two or more attorneys of record who are not partners, notices and papers may be served upon either of such attorneys, and either of such attorneys may sign notices, papers, or stipulations, with the same force and effect as if signed by all of such attorneys; and where a party, who is also an attorney of this court, shall prosecute in person, or if a defendant shall give notice that he is an attorney, and will defend in person, all notices and other papers shall be served on him in like manner; and when the object is to bring the party into contempt for disobeying any rule or order of the court, the service shall be on such party personally, unless otherwise specially ordered by the court. In all cases where service of papers can not reasonably be made, on account of the absence of the attorney of record from his usual place of abode, residence, or office, or for any other reason, the court in which such cause is pending, or judge thereof, at chambers, upon an *ex parte* application on cause shown, may direct in what manner and on whom service may be made.

CIRCUIT COURT RULE 10.

As amended October 8, 1891.

RULE 10.—Notices of trial may be served by mail in the same cases and in like manner as other notices. In cases where there are two or more defendants who appear by different attorneys, notice of trial, if served by the plaintiff, shall be served on all the defendants entitled to notice. If served by any of the defendants it shall be served on the plaintiff and on all the other defendants entitled to notice, and cases thus noticed shall be for trial the same as though notice had been served on plaintiff by all the defendants. In cases of appeal, and in all cases commenced in the circuit court, where the party upon whom notice is sought to be served has not appeared by attorney, service shall be made on such party, if he is a resident of the State and his place of residence can be ascertained. If he is not a resident of the State, and his place of residence cannot be ascertained, notice may be served by filing the same in the cause, and posting a copy thereof in some conspicuous place in the office of the county clerk; but in such case notice shall be filed, and a copy posted, at least twenty days before the first day of the term for which such case is noticed. Proof of all facts necessary to make such notice valid must be filed immediately after posting or mailing such notice.

STATE JUDICIAL DIRECTORY

For 1891.

SUPREME COURT.

JOHN W. CHAMPLIN (CHIEF JUSTICE), . . GRAND RAPIDS.
[TERM EXPIRES DECEMBER 31, 1891.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
ALLEN B. MORSE, . . .	IONIA, ...	Dec. 31, 1893.
JOHN W. McGRATH, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

COURT OFFICERS:

CHARLES C. HOPKINS, .	CLERK, ...	LANSING.
MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
ADOLPHUS A. ELLIS, . .	ATTORNEY GENERAL, . .	IONIA.

CIRCUIT JUDGES.

1.	VICTOR H. LANE,	ADRIAN.
2.	THOMAS O'HARA,	BERRIEN SPRINGS.
3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	FRANK A. HOOKER,	CHARLOTTE.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	HOUGHTON.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	HOWELL.
31.	WILLIAM T. MITCHELL,	PORT HURON.
32.	NORMAN W. HAIRE,	ONTONAGON.
33.	CHARLES J. PAILTHORP,	PETOSKEY.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder.

Terms of Court.

September 2 and November 4, 1891.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

Terms of Court.

Sept. 14 and Dec. 14, '91, March 10 and May 12, '92.

TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	February 10.	June 23.	November 17.	
Alger	11	June 2.	Nov. 10.		
Allegan	20	February 9.	May 18.	October 5.	December 7.
Alpena	26	February 10.	May 5.	August 11.	November 3.
Antrim	13	March 10.	May 19.	July 28.	November 10.
Arenac	18	February 23.	Aug. 24.		
Baraga	12	January 5.	June 8.	October 5.	
Barry	5	February 9.	May 11.	August 17.	November 9.
Bay	18	March 3.	June 2.	September 1.	December 1.
Benzie	28	April 14.	Sept. 1.	December 1.	
Berrien	2	January 13.	March 17.	May 19.	October 20.
Branch	15	March 2.	June 1.	October 5.	December 7.
Calhoun	5	March 9.	June 1.	September 14.	December 7.
Cass	2	February 17.	April 28.	September 22.	December 1.
Charlevoix	13	February 17.	May 12.	July 21.	November 17.
Cheboygan	33	January 27.	March 24.	June 16.	September 22.
Chippewa	11	February 3.	May 12.	September 15.	
Clare	21	January 5.	March 30	June 22.	September 21.
Clinton	29	February 2.	April 27.	June 29.	November 9.
Crawford	23	January 13.	April 21.	October 6.	
Delta	25	January 6.	May 5.	September 29.	
Eaton	5	January 19	April 20.	July 20.	October 19.
Emmet	33	February 10.	May 5.	July 14.	October 27.
Genesee	7	February 23.	May 25.	August 17.	November 16.
Gladwin	18	January 19.	May 25.	October 12.	
Gogebic	32	January 29.	May 11.	August 3.	November 2.
G'd Traverse	13	January 6.	April 7.	June 23.	October 13.
Gratiot	29	March 9.	June 1.	September 14.	December 7.
Hillsdale	1	January 13.	March 17.	September 1.	November 10.
Houghton	12	February 9.	May 25.	August 17.	November 16.
Huron	24	January 5.	March 2.	June 1.	October 26.
Ingham	30	January 5.	March 9.	May 25.	October 19.
Ionia	8	February 2.	May 4.	September 21.	November 2.
Iosco	23	March 3.	June 2.	September 1.	December 1.
Iron	25	January 14.	May 13.	October 7.	
Isabella	21	February 23.	May 18.	September 7.	October 19.

TERMS OF COURT FOR 1891.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	February 2.	April 20.	September 14.	November 16.
Kalamazoo	9	February 16.	May 18.	October 12.	December 14.
Kalkaska	28	January 13.	April 21.	September 8.	
Kent	17	March 2.	May 4.	September 28.	December 7.
Keweenaw	12	January 12.	June 15.	October 12.	
Lake	19	February 16.	June 15.	October 12.	
Lapeer	6	January 12.	March 9.	July 13.	November 2.
Leelanaw	13	March 17.	June 9.	November 24.	
Lenawee	1	February 10.	April 28.	October 6.	December 8.
Livingston	30	January 12.	April 20.	June 15.	October 12.
Luce	11	May 5.	Nov. 3.		
Mackinac	33	February 24.	June 9.	October 13.	
Macomb	16	January 19.	April 20.	August 17.	October 19.
Manistee	19	January 19.	May 4.	August10.	October 26.
Manitou	33	June 23.	Oct. 27.		
Marquette	25	February 9.	May 20.	September 8.	December 1.
Mason	19	February 3.	May 18.	August 24.	November 9.
Mecosta	27	January 6.	April 7.	July 2.	November 3.
Menominee	25	January 20.	April 21.	August 25.	November 10.
Midland	21	January 19.	April 13.	August 31.	September 28.
Missaukee	28	March 3.	July 21.	December 8.	
Monroe	22	February 3.	April 7.	September 8.	November 3.
Montcalm	8	March 2.	June 1.	October 5.	December 7.
Montmorency	26	May 19.	Sept. 15.		
Muskegon	14	February 9.	May 11.	September 14.	November 23.
Newaygo	27	March 3.	June 2.	October 6.	December 1.
Oakland	6	February 2.	May 4.	September 21.	December 7.
Oceana	14	January 12.	April 20.	August 17.	October 26.
Ogemaw	23	January 27.	May 12.	October 20.	
Ontonagon	32	January 19.	June 22.	October 19.	
Osceola	19	March 2.	June 1.	September 14.	December 7.
Oscoda	23	February 23.	May 25.	November 2.	
Otsego	26	January 20.	June 16.	October 6.	
Ottawa	20	January 12.	March 9.	August 3.	November 2.
Presque Isle	26	January 13.	June 9.	October 13.	
Roscommon	28	February 3.	May 26.	October 13.	
Saginaw	10	February 2.	April 13.	June 8.	Oct. 5. | Dec. 7.
Sanilac	24	January 19.	April 13	June 2.	September 28.
Schoolcraft	11	January 20.	April 28.	September 8.	
Shiawassee	7	February 2.	May 4.	September 14.	December 14.
St. Clair	31	February 16.	May 18.	September 21.	November 16.
St. Joseph	15	January 20.	March 24.	July 14.	October 27.
Tuscola	24	February 2.	May 4.	September 7.	December 7.
Van Buren	9	January 12.	April 13.	September 14.	November 9.
Washtenaw	22	March 2.	May 4.	October 5.	December 7.
Wayne	3	January 6.	April 7.	June 16.	September 8.
Wexford	28	January 20.	April 28.	July 28.	November 3.

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APRIL TERM, 1891.*

JOHN J. SHAW v. A. CASS CANFIELD, J. HUFF JONES, AND HENRY B. LEDYARD, TRUSTEES.

Power of trustees—Principal and agent.[1]

1. Where several persons are appointed to execute a power or trust, and no authority is given to a less number than the whole to act, all must join in the execution. *Scott v. Society*, 1 Doug. 149; *Weise v. Rich*, 77 Mich. 325.
2. Permission by two of three trustees to their co-trustee to extend the term of a lease and collect the rents cannot be construed as giving him authority to purchase a house on the leased premises.

Error to Wayne. (Hosmer, J.) Argued April 17, 1891. Decided May 8, 1891.

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

Charles Flowers, for appellant.

Walker & Walker, for defendants.

[The points of counsel are fully stated in the opinion. —REPORTER.]

LONG, J. The plaintiff is the owner of a house situate upon lot 26, block 4, Cass Farm, Detroit. The fee

*Continued from Vol. 85.

[1]For full digest of points decided, see *Table of Cases Reported.*

of the lot is in the defendants as trustees. The plaintiff held a lease of the lot. The lease was originally executed in 1860 by Lewis Cass to Charles Gubby for 10 years. It was renewed from time to time, till May 1, 1880. Gubby held over without renewal, until March 2, 1882, at which time he transferred the lease to the plaintiff. On July 29, 1880, the property then being a part of the estate of Isabella Von Limburg, she executed a trust-deed to the defendants. After the transfer of the lease to the plaintiff, the following extension and agreement was indorsed on the lease:

"The within lease is hereby extended for the term of five years from and after the first of January, 1882, at the rate of two hundred dollars per year, payable half yearly; J. Shaw to pay all taxes and comply with the conditions of said lease; also to pay, on or before 1st July, 1882, balance of rent due by Gubby to 1st January, 1882, with interest.

'J. HUFF JONES, Trustee, etc."

The plaintiff on March 10, 1885, sublet said premises to Maggie Burns, by written lease, for $50 per month, and gave Mrs. Burns the option of buying the house on the lot for $700. This lease, by its terms, was to expire on May 1, 1887. The plaintiff's term was to expire under his lease on January 1, 1887. The plaintiff being back on his rent, on November 5, 1885, Mr. Jones sent him the following statement of account:

"*Mr. J. J. Shaw,*

"To VON LIMBURG ESTATE.

"J. Huff Jones, agent.

"January 1, 1886.

To bal. of rent and interest, as per statement given you	$554 00
By cash received on above in 1885	350 00
	$204 00
Int. to Nov. 15	22 00
	$226 00"

The claim of the plaintiff is that in the fore part of December, 1886, he received a letter from Mr. Jones stating that the trustees had decided not to renew the lease to him, and demanded the possession of the premises on January 1, 1887; that he saw Mr. Jones, and told him that it would be impossible to do anything about putting Mrs. Burns out until May 1, 1887, and that he would put her out at that time, if he would extend the lease; that Jones consented to such extension, and that Mrs. Burns might pay the rent over to him (Jones) from January 1 to May 1, 1887, and if she did not leave on that date the plaintiff was to put her out at his own expense; that Mrs. Burns consented to this; that about a week after this time the plaintiff received word that the defendants were about to take proceedings to put Mrs. Burns out; that he then told Mr. Jones he did not want to lose the building, and Mr. Jones then agreed to give him what the building was worth, and got a contractor to estimate the value, which he did at $500, and that Mr. Jones again consented to let Mrs. Burns remain until May 1, the rent to be paid by her to Mr. Jones, to pay up the amount of back rent due from the plaintiff on the lease, and that it was agreed that the plaintiff should then receive the pay for the house, which was to be settled and paid as soon as Mrs. Burns was out of the house. It is claimed that Mr. Jones violated this agreement by commencing proceedings to get possession of the property before May 1. This action was commenced to recover the amount which plaintiff claims Mr. Jones agreed to pay him for the house, less the amount of rent due from the plaintiff, amounting, as plaintiff claims, to about $300.

The defendants' claim on the trial was that on December 7, 1886, plaintiff was formally notified by the trustees that his lease would not be renewed; that plaintiff came to Detroit from Port Huron, where he then resided, and

had an interview with Mr. Jones, who told him that the lease would not be renewed, because Mrs. Burns was keeping a disreputable house there. Mr. Jones denies making any arrangement by which Mrs. Burns was to remain until May 1, but says he only agreed to submit the proposition to Mr. Ledyard.

It is admitted that on December 28, 1886, Mr. Jones sent to the plaintiff the following letter:

"I have had an interview with Mr. Ledyard in reference to your proposition, but he is unwilling to do anything in the matter until the premises are vacated. You will therefore see that the present tenant gives up possession on the first of January, 1887, when the lease expires."

Upon receipt or this letter the plaintiff again came to Detroit. Up to this time nothing had been said about the purchase of the house by the trustees. It is conceded that the plaintiff did not get Mrs. Burns out of the house on May 1, not did he attempt to do so, but aided her in retaining possession.

The court below, under this state of facts, directed the verdict for the defendants for the amount of the rent due, $546.53, and disallowed the plaintiff's claim for the value of the house, which plaintiff claims to have sold at $500 to Mr. Jones. The reason given by the court in directing the verdict is that the plaintiff failed to make his case by his proof, as under the trust-deed there is no authority shown in Mr. Jones to make the contract under which plaintiff seeks to recover. The judgment rendered was the amount of rent due, and taxes which the trustees paid, which by the terms of the agreement the plaintiff was to pay. The only claim is that the court was in error in directing the virdict for the defendants, and disallowing the plaintiff's claim.

The trust-deed contains the following clause:

"To take possession and control of all said property, with full power to sell the same, or any part thereof; to collect all moneys, rents, income, interest, or profits which may become due or accrue upon, from, or by reason of any of said property; to invest, upon safe security, proceeds of any sales, as well as any moneys collected; and generally to do any acts touching said trust property which the prudent and judicious management of the same may from time to time require."

The plaintiff's contention is that under this trust-deed the trustees had the power to appoint one of their number the agent to manage the estate, to make leases, collect rent, and negotiate with tenants as to the manner in which the rent should be paid or compromised, to make contracts of novation, substituting one tenant for another, and, in general, to do anything with reference to said property which a prudent and judicious management might require; that it is shown that Jones was appointed agent, or for years was permitted to act as such, and the management of the estate was left in his hands; and that, therefore, Jones had the right and authority to make the contract for the purchase of the house, and to release the plaintiff from the payment of rent, and look to Mrs. Burns therefor; and that he did accept Mrs. Burns in his stead, for the payment of the rent from January 1 to May 1, 1887, which was $50 per month, while his rent was only $200 per year.

The court was not in error in directing the verdict. It was held in *Scott v. Society*, 1 Doug. 149, that where several persons are appointed to execute a power of trust, and no authority is given to a less number than the whole to act, all must join in the execution. The claim made by the plaintiff is for the value of the house sold to Mr. Jones as trustee. Clearly, within the terms of this trust-deed, Mr. Jones had no power to purchase this property without the consent of the other trustees, and no such

consent is proven or claimed. On the contrary, the plaintiff had express notice on December 28, 1886, that Mr. Ledyard was unwilling to let Mrs. Burns stay in the house after January 1, and demanded that it should be surrendered on that day. The trust established by the deed is a joint one, requiring the consent of all the trustees to any valid action in regard to the estate, and a contract made by only one trustee would be void. *Scott v. Society*, 1 Doug. 149. The powers of the trustees are limited by the instrument. *Weise v. Rich*, 77 Mich. 325.

These propositions are not disputed by the counsel for plaintiff, but it is claimed that as agent for the trustees Mr. Jones was impliedly, at least, vested with sufficient power to make the contract claimed by plaintiff. This is claimed to be established—

1. By the previous dealings between the plaintiff and Mr. Jones as manager of the estate.
2. By Mr. Jones' testimony.

The only dealings between the plaintiff and Mr. Jones shown by this record were the extension of the lease made in 1882, and the collection of the rents under it. Being permitted by the other trustees to extend this lease and collect rents could not be construed as giving him authority to purchase this house. It is admitted that the trustees had refused to allow Mr. Jones to negotiate at all in reference to the matter so long as the Burns woman occupied the house. The letter of December 28, 1886, was sufficient notification to the plaintiff of that fact, and the plaintiff was not in a position to claim that Mr. Jones had any such power after the receipt of this notice. If he regarded Mr. Jones as the agent of the trustees, it was his duty to inquire into the scope of the authority vested in him. This he did not do, though notified that Mr. Ledyard would not accept his proposition, or do any-

thing in the matter until the premises were vacated. The court was not in error in directing the verdict. It must be conceded that, unless this claimed arrangement was a valid one, the defendants had a right to recover the rent and taxes due, with interest.

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

The other Justices concurred.

MICHAEL SULLIVAN v. EDMUND HALL.

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Log-lien proceedings—Statement of lien—Jurat—Notary public—Certiorari.

1. Where the return of a justice to a writ of *certiorari* in a log-lien case does not contain the evidence taken before him, which was not reduced to writing, but states that the plaintiff was sworn in his own behalf, and that after listening to the testimony, and after due deliberation, he gave judgment for the plaintiff, the appellate court cannot presume that there was no evidence tending to support such judgment.
2. Where in such a case the description of the property is the same in the writ of attachment and the declaration, there is no force in an objection that there was no evidence tending to prove that the property mentioned in the writ and the declaration was identical.
3. The appearance of an attorney at law who, as notary public, had sworn a claimant to a statement of lien, as attorney for the claimant in a suit in justice's court to enforce said lien, will not affect such verification, which is not in violation of How. Stat. § 637.
4. The failure of a notary public appointed by the Governor under Act No. 117, Laws of 1887, before whom a statement of lien purports to have been sworn to, and which contains no caption showing in what county or state it was made, to designate in

the jurat the county from which he is appointed, will not invalidate the statement of lien.

5. The log-lien law of 1887 (Act No. 229) is constitutional; citing *Craddock v. Dwight*, 85 Mich. 587.

Error to Clare. (Hart, J., Argued April 16, 1891. Decided May 8, 1891.

Proceedings under log-lien law of 1887. Defendant brings error. Affirmed. The facts are stated in the opinion.

C. W. Perry and *Henry A. Chaney*, for appellant, contended:

1. The statement of lien is a nullity. The law (Act No. 229, Laws of 1887, § 2) requires it to be sworn to, and this involves an affidavit, which "is an oath in writing, sworn before and attested by him who has authority to administer the same;" citing 1 Bac. Abr. 146; and the jurat should state when, where, and before whom the affidavit is sworn; citing 1 Tidd, Prac. 494.

2. The authority to administer the oath, and the fact that it was taken before the officer having such authority, are indispensable to a good affidavit. It is not enough that those conditions exist in *fact*, but they must appear affirmatively, though whether they appear from the venue, the body of the affidavit, the jurat, or the signature thereto is immaterial. This is the ruling in the English cases, as followed by this Court in *Smart v. Howe*, 3 Mich. 590; *Cross v. People*, 10 Id. 24; *In re Teachout*, 15 Id. 346; *Griffin v. Forrest*, 49 Id. 311; and in those cases in which the Court has seemed to modify this rule, or to dispense with the technical form of a notarial certificate, it still recognizes the necessity of a showing of the substantial conditions; citing same cases.

3. A notary in Michigan is an inferior officer, deriving all the power he has from positive statute; citing How. Stat. § 631; and the jurisdiction of such an officer should appear affirmatively. His certificate must be "under his hand and seal" to be presumptive evidence of the facts contained in it; citing How. Stat. § 632.

4. But the mere signing of one's name cannot be the official signature contemplated. The authority to sign must be disclosed.

It must be shown, for example, where conveyances are made by a guardian, a trustee, an executor, or by any one who acts in any special capacity. The entry of a justice's judgment must be signed officially; citing *Howard v. People*, 3 Mich. 207; *Hollister v. Giddings*, 24 Id. 501; and so must a transcript of it; citing *Bigelow v. Booth*, 39 Id. 622; and where an affidavit is made for an appeal from before a justice, it is evident from the decision in *Dickinson v. Simondson*, 25 Mich. 113, that, if taken before any one but the justice himself, an official signature to the jurat is necessary. The certificate of acknowledgment to any sort of a deed must be signed; citing *Ryerson v. Eldred*, 18 Mich. 12, 15; *Marston v. Brashaw*, Id. 81; and signed officially; citing *Final v. Backus*, 18 Mich. 218; *Wright v. Wilson*, 17 Id. 192; and the clerk of a court is expected to sign officially on verifying an information; citing *People v. Murphy*, 56 Mich. 546; and a supervisor must sign officially his warrant for the collection of taxes; citing *Bank v. St. Joseph*, 46 Mich. 526.

5. To say nothing, then, of the affidavit's having no venue (*Persinger v. Jubb*, 52 Mich. 304), it is not even entitled; citing *Graham v. Elmore*, Har. Ch. 265; *Whipple v. Williams*, 1 Mich. 115; *Arnold v. Nye*, 11 Id. 456; and, what is also fatal, it is sworn to before a person who had no right to administer the oath (*Greenvault v. Bank*, 2 Doug. 498), because, as the record shows, he was claimant's attorney, and an attorney cannot swear his own client; citing How. Stat § 637; *McCaslin v. Camp*, 26 Mich. 390; *Snyder v. Hemmingway*, 47 Id. 549; *Bradley v. Andrews*, 51 Id. 100.

W. A. Burritt, for plaintiff.

LONG, J. This action was brought by attachment in justice's court under Act No. 229, Laws of 1887, to enforce a lien upon certain logs of the defendant. On the trial plaintiff had judgment for $16 and costs of suit, and for a lien upon the logs. The cause was removed by *certiorari* to the circuit court for Clare county, where the judgment was affirmed. The cause comes to this Court by writ of error.

The errors complained of are set forth in the affidavit for the writ of *certiorari* to the justice, and are:

1. That the notice of the lien was not properly sworn to as required by the act.

"2. Because no testimony was given on the trial tending to prove any agreement with defendant or any authorized agent of his, or any contractor under defendant, with plaintiff that he should do any work on said logs, and no proof that defendant or any agent of his or contractor under him knew that plaintiff was doing work on said logs.

"3. Because no testimony was offered of any contract with defendant or his agent for any specific wages, and no proof of how much his labor was worth.

"4. Because said justice gave judgment in said cause for an attorney fee of five dollars.

"5. Because the person who claimed to be the attorney for plaintiff, and was so recognized by said justice, undertook to administer the oath to plaintiff of the notice claiming lien against the property attached.

"6. Because the evidence given at the hearing of said cause did not warrant any of the findings or judgment of the court.

"7. Because no evidence was given tending to prove that the property mentioned in said writ of attachment and in plaintiff's declaration are the same."

There is no force in the objections made that there was no evidence tending to show the plaintiff's claim. The evidence was not reduced to writing, and is not returned. The justice, in his return, states that the plaintiff was sworn in his own behalf, and after listening to the testimony, and after due deliberation, he gave judgment for the plaintiff. Under these circumstances we cannot presume that there was no evidence tending to support the judgment.

The writ of attachment contains a description of the property attached, and the declaration contained the same description, and there is therefore no force in the seventh assignment of error.

It is not shown that the notary public who administered the oath to the plaintiff on the statement or claim of lien was the attorney for the plaintiff at that time. The lien was sworn to, and filed in the office of the

county clerk, as provided by the statute. The notary public who administered the oath thereto afterwards appeared in justice's court as attorney for the plaintiff. This is not in violation of section 637, How. Stat., and does not fall within the ruling of cases cited by defendant's counsel.

The fourth assignment of error is not noticed in the brief of counsel, and will be treated as abandoned.

The only remaining assignment of error is the first, which relates to the notice of lien. No objection is made to the statement except that the same does not show in what county the oath was administered. The claim of the lien is in the following form:

"The statement of lien made under oath of Michael Sullivan for work and labor performed by Michael Sullivan in manufacturing, cutting, skidding, the following described property, to wit: One million feet of white pine, and hemlock saw-logs, marked as follows: 

"That the last day's work of said labor was done on the 8th day of February, 1889, and said labor was performed in the county of Clare; and the said described property, or a portion of the same, is now situated in the county of Clare, State of Michigan; and that there is now due claimant for said work and labor, over and above all legal set-offs, the sum of $16, as near as may be, for which said sum a lien is claimed upon said described property.

"MICHAEL SULLIVAN.

"Subscribed and sworn to before me this 9th day of February, 1889.

"HENRY K. WICKHAM, Notary Public."

The statement of lien has no caption showing the county or state in which it was made. It follows the form laid down in the statute, but, inasmuch as the notary public does not state in the jurat the county in which he acts as such officer, it is contended that no

valid lien was filed authorizing the bringing of the writ of attachment under this statute. How. Stat. § 632, provides that his certificate, when under his hand and seal, shall be presumptive evidence of the facts contained in it, except in certain specified cases. His right to the office comes from an appointment by the Governor of this State, and his compliance with the requirements of the statute in filing oath of office, bond, etc. Act No. 117, Laws of 1887. By this same statute the county clerk of the county in which the oath of office and bond are filed is required to transmit the name of such person to the State Treasurer and Secretary of State. Thus it is that the fact whether one is a notary public may always be ascertained in the office of the State Treasurer and of the Secretary of State, as well as in the office of the county clerk in the county for which the appointment is made. Therefore the objection that the statement of lien contains no venue, and the party whose property is thus incumbered has no means of ascertaining whether the person who acts as notary public is such in fact, has no force. It is not true, as claimed, that the party who desires to ascertain the fact must go from one county clerk's office to another to get the desired information. An inquiry at the office of the Secretary of State would at once show the fact, as it is a matter of record there. A notary public is in no sense a county officer.

"The Governor, by and with the advice and consent of the Senate, may appoint one or more persons notaries public in each county, who shall hold their offices," etc. Act No. 117, Laws of 1887.

While it is very proper that a notary public should sign himself as a notary public in and for the county from which he is appointed, yet his certificate would not

be fatally defective if the designation of the county is omitted. He may act in any part of the State, and his official acts are not confined to the county where he resides.

It is true that under the amendatory act of 1889 (Act 74, Laws of 1889) no person is eligible to the office of notary public unless the person is a resident of the county of which he or she desires to be appointed, yet their official acts are not necessarily confined to that county. The office would undoubtedly become vacant by removal from that county, but it does not follow that for this reason the party is a county officer. The appointment has always been regarded as one of State matter, rather than that of county. It is a State appointment, and the omission of the venue would not be a fatal defect in the jurat. It cannot matter to the party to be affected by such certificate from what particular county the notary public was appointed.

In legal phraseology "venue" means the county where a cause is to be tried, and originally a venue was employed to indicate the county from which the jury was to come.

The necessity of stating a venue at all is reluctantly confessed by the authorities. *Bean v. Ayers,* 67 Me. 487; *Briggs v. Bank,* 5 Mass. 95. In process or pleading, the objection under the strict rules of the common law, and perhaps under our statute, to the want of venue might be taken advantage of by demurrer. It may also be true that a certificate made by a justice of the peace would be void if it omitted the venue, were no venue stated at all in the instrument. But the question here involved is not to be governed by the reasons which would be applicable in such cases.

Claim is also made by appellant in his brief that the act under which the lien is claimed is unconstitutional

and void. That question was settled by this Court in *Craddock v. Dwight*, 85 Mich. 587, and the cases there cited.

Judgment affirmed, with costs.

The other Justices concurred.

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LOTTA LOMBAR v. THE VILLAGE OF EAST TAWAS.

Municipal corporations—Liability for defective sidewalks—Evidence.

1. In a negligence case for injuries sustained by reason of a defective sidewalk, it is proper for the plaintiff to produce and identify the defective plank, and to show that it was taken from the walk at the place where the plaintiff claimed to have been injured.
2. Plaintiff in this class of cases should be required to show the nature of the defect at the time of and before the accident, and when this is done, and liability is disclosed, it is unnecessary to go further, and if not done it is error to predicate the existence of an actionable defect upon the fact of repairs subsequent to the accident. *Iron Works v. Kimball Township*, 52 Mich. 146, 149. But where there is abundant proof of the existence of the defect prior to the accident, the admission of testimony showing such repairs is error without prejudice.
3. Evidence that others had stepped into the same hole in the walk before the time of plaintiff's injury is competent as bearing upon the existence and character of the defect complained of.
4. The statute gives to villages control of sidewalks, of their grade, width, material, and manner of construction. Owners of lots may be required to construct, maintain, and repair sidewalks in the streets adjacent to such lots; and, if an owner fails to

construct or repair, the village may do so at his expense, and assess the amount of such expense upon his lot.[1]

5. Land-owners may construct sidewalks in the absence of any direction by the village, subject, however, to such regulations regarding the same as may and should be prescribed by the village; and when so constructed the village must use reasonable care to prevent them from becoming dangerous, and cannot escape liability on the ground that it did not build the walk or direct its construction.[2]

6. The duty imposed upon cities and villages to keep their sidewalks in repair and reasonably safe for travel is an imperative one, and involves the duty of providing all that is necessary to that end, including not only the necessary ordinances regulating their construction, but a "full complement of officers and employés," as well as the necessary funds for that purpose.

7. On the incorporation of a village, and on assuming control over the corporate territory, it becomes its duty, in view of the statute, to take prompt measures for its observance, to supply the necessary employés, to remedy any existing defects by reason of any disconnected system, to supply the necessary regulations, and to raise the necessary funds; and after having had 15 months within which to do this, and having failed, it cannot be allowed to plead its own negligence to defeat a recovery by a plaintiff who has been injured by reason of a defective walk.

Error to Iosco. (Simpson, J.) Argued April 17, 1891. Decided May 8, 1891.

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

Robert Hovenden (*Shepard & Lyon* and *O. E. M' Cutcheon*, of counsel), for appellant.

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[1] See *City of Detroit v. Chaffee*, 70 Mich. 80, where a land-owner, who neglected to build or repair a sidewalk in front of his premises pursuant to legal notice, is held liable to the city for any accident or injuries occurring by reason of such neglect.

[2] See *Southwell v. City of Detroit*, 74 Mich. 439; *Joslyn v. City of Detroit*, Id. 458; *City of Port Huron v. Jenkinson*, 77 Id. 414 (head-note 2); *Campbell v. City of Kalamazoo*, 80 Id. 656 (head-note 4); *O'Neil v. Village of West Branch*, 81 Id. 544 (head-note 3); *Fuller v. Mayor*, 82 Id. 481 (head-note 3); *Tice v. Bay City*, 84 Id. 461.

Geer & Williams, for plaintiff.

[The points of counsel are stated in the opinion, where, and in the foot-notes, reference is had to the authorities. —REPORTER.]

MCGRATH, J. Plaintiff recovered damages for injuries occasioned by a defective sidewalk, and defendant appeals.

Defendant was incorporated by an act of the Legislature, approved February 18, 1887, and the first election of officers was had on the second Monday of April, 1887. The first tax roll after the organization of the village was delivered into the hands of the collector in August, 1887. The plaintiff was injured June 8, 1888. The street had been a public highway for upwards of 10 years, and the sidewalk in question had been built for upwards of 6 years, but whether by the township authorities or by the abutting owner does not appear. The accident occurred in the evening, after dark.

Nine errors are assigned, the first four of which relate to the admission of testimony regarding the removal of the defective plank which caused plaintiff's fall, and the putting of another in its place. All of the witnesses testified that the accident occurred on the west side of Van Valkenburg street, between two trees in front of the residence of one Sawyer, and that there was but this one hole or defect in the walk, which had been there from one to six months. Plaintiff had located the place of the accident, and pointed it out to her sister, who testified that plaintiff had on the next evening after the accident pointed it out to witness; that witness visited the place a second time with one Edsall, to get the plank, and she and Edsall carried it away; that it had been taken out, and they found it beside the walk. The following colloquy then took place:

"*Q.* I ask you, the second time you was there, in what condition did you find the walk, as compared with the first time, at this particular place. (Objected to by defendant as incompetent and immaterial.)

"*By the Court:* Do you propose to show that this is the identical place?

"*By Mr. Geer:* I do.

"*The Court:* She can state it, with the understanding that you show that place the identical place. It comes in with that understanding.

"Whereupon the defendant's counsel excepted to the ruling of the court, and the witness answered: The second time I was there the walk was fixed. They had torn up the walk, and removed this plank, and put another in its place.

"Whereupon the attorney for the defendant said: I move that the answer of the witness be stricken out, as incompetent and immaterial.

"*By the Court:* It is permitted to stand, with the understanding that it shall be shown to be the identical place and spot where the injury was received.

"*Mr. Geer:* I only show it and it is only admitted upon the theory for the purpose of identifying this particular place, and the plank that came out of it. That is the object, and we don't do it for the purpose of showing negligence on the part of the defendant at all.

"*Q.* At the second time you was there, where was this board that you saw the first time you was there, with the hole in it?

"*A.* It was lying by the side of a pile of other boards.

"*Mr. Shepard:* I move that the testimony in relation to the location of the board be stricken out as incompetent.

"*The Court:* It is received, with the understanding that it be shown to be the identical board that had the hole in it. (Defendant's counsel excepted)."

The plank was then produced in court, and identified by the witness. Edsall testified that within a day or two after the accident he went with the last witness to the place where the accident was said to have occurred, and, after describing the place, he testified as follows:

"*Q.* After a time, did you observe that the plank had been removed, and another put in its place? (Objected to by defendant's counsel as incompetent and immaterial).

"*Mr. Geer:* We offer it only for the purpose of fixing the time and place.

"*Mr. Shepard:* The purpose of it is to get it before the jury, and use it in a manner that is incompetent.

"*The Court:* It is admitted for the purpose stated. (Defendant's counsel excepted).

"*Q.* Did you observe it after it had been removed?

"*A.* Yes, sir. May Lombar and I took the plank away the next day after it was removed from the sidewalk."

No testimony was offered tending to show who removed the defective plank, or who put the new plank in its place. The testimony as to the repair of the sidewalk did not tend to show either knowledge or negligence on the part of the village prior to the accident, for the fact of repair did not fix the time for which the defect existed. It did not tend to show defendant's recognition of the defect, for it was not shown that defendant made the repairs.

It has been held that the fact that repairs have been made by a municipality is a circumstance which, in connection with other circumstances, might properly be considered by the jury as tending to show that the walk removed was defective; but I cannot approve of this doctrine. Municipalities are not required to keep their sidewalks in a perfect condition. They are liable only where not reasonably safe. No liability attaches because of latent defects, unless the structure is of such a character that a failure to examine would in itself be negligence. The defect must be such as to suggest unsafety. The very step which results in injury may first disclose the unsafe condition. A slight elevation of one plank above another may not suggest danger. It may be reasonably

safe, yet it may cause an accident; and the accident may suggest the precaution of repair. To permit the fact of the precaution taken after the accident to be used as evidence of the existence of such a defect at the time of the accident as would make the municipality liable would be unjust. The plaintiff, in this class of cases, should be required to show the nature of the defect at the time of and before the accident. When this is done, and liability is disclosed, it is unnecessary to go further. When it is not done it is error to predicate the existence of an actionable defect upon the fact of repair.

In *Fulton Iron & Engine Works v. Kimball Tp.*, 52 Mich. 146, 149, Justice CAMPBELL says:

"The court admitted full testimony concerning the exact condition of the bridge at the time of and after the accident. Among this proof was testimony showing that chains and other appliances were fixed upon various parts of the bridge. Plaintiff then proposed to ask witnesses why these chains were used, but this was held irrelevant. This ruling was correct. The fact that after the accident precautions were taken does not indicate that any knowledge of the propriety of such precautions was had before the accident. Proof was not excluded of the real condition of the bridge, and the jury had means of understanding that and all its appearances."

It was entirely proper to produce and identify the plank in question, and to show that it was taken from the walk at the place where the plaintiff claimed to have been injured. Reference to the repair of the walk was perhaps inseparable from the proofs necessary to the identification of the plank, and to account for its presence at the side of the walk where it was found; but the attention of the witnesses was specially directed to the repair, and this, we think, was improper. In this instance, however, there was abundant proof of the prior existence of the defect in the walk. At least one other person had stepped into the hole some time before this, and several

witnesses testified to its existence. The error was therefore without injury or prejudice, and will not justify a reversal of the judgment.

The fifth error assigned is the admission of testimony that others had stepped into the same hole in the walk before the time of plaintiff's injury. Although there is a conflict of authority upon the question, yet, in my judgment, the testimony was admissible. The character of the walk in question was the subject of inquiry, to which attention was directed by the action, the pleadings, and the proofs. This testimony is clearly competent as bearing upon the existence and character of the defect complained of, and defendant should have been prepared to meet any proof aimed in that direction. Testimony of this character clearly tends to show the existence and nature of the defect in the walk. It may also tend to show constructive notice to defendant; and, where the accident results in death or great bodily injury, it may, by reason of its publicity, tend to show actual notice to the municipality. It is not competent to show the exercise of reasonable care by the plaintiff, and should not be admitted for that purpose; but when testimony is admissible for one purpose and inadmissible for another its improper application by the jury may and should be guarded against by proper requests limiting it to its legitimate purpose. Counsel for plaintiff, in offering the testimony, distinctly stated that he offered it for the purpose of showing the existence of the hole at that time; and for this purpose it was clearly admissible. From an examination of the cases it will be seen that the force of the argument against the admissibility of this class of testimony is materially lessened when the testimony is restricted to its legitimate purpose. The question has been very fully and ably discussed in the following cases: *Smith v. Township of Sherwood*, 62 Mich. 159, 165; *Dis-*

trict of Columbia v. Armes, 107 U. S. 519 (2 Sup. Ct. Rep. 840); *Chicago v. Powers,* 42 Ill. 169; *Delphi v. Lowery,* 74 Ind. 520; *Darling v. Westmoreland,* 52 N. H. 401; *Quinlan v. Utica,* 11 Hun, 217, 74 N. Y. 603; *House v. Metcalf,* 27 Conn. 631; *Topeka v. Sherwood,* 39 Kan. 690 (18 Pac. Rep. 933). Two of the cases cited by counsel for defendant in opposition to the doctrine of these cases are from the Iowa supreme court, but in a late opinion (June, 1890) Justice Granger of that court says:

"Plaintiff offered evidence to the effect that other parties had fallen into the same opening before the plaintiff, and that defendant Mansfield had been informed of the fact. The evidence was refused, and the refusal is made a ground of complaint. The ruling seems to be sustained in *Hudson v. Railway Co.,* 59 Iowa, 581 (13 N. W. Rep. 735). If it was an original question in this court, some of its members might incline to a different view." *Mathews v. City of Cedar Rapids,* 80 Iowa, 459 (45 N. W. Rep. 894).

The other assignments of error are as follows:

"6. The court erred in refusing to instruct the jury as requested by defendant in its ninth request, viz.:

"'This case should be considered differently from what a city or village would be considered that had been long in existence as an organized corporation, which has a full complement of officers and employés, and ample time to repair, construct new, and put into use its streets, cross-walks, and sidewalks, and defendant should not be held up to the same strict accountability and liability that a city or village would be which had been long in existence; and such a village might be held liable where a newly-organized one like defendant would not be. In this case, if the jury find that the time of its existence was too short to reasonably give its officers full time to make all needed repairs and improvements to provide for the safety of the traveling public, and they had done all that they reasonably could do, then the plaintiff cannot recover.'

"7. The court erred in refusing to instruct the jury as requested by defendant in its tenth request, as follows:

"'If the village had expended all the means at its command, or that it would be entitled to expend under its act of incorporation, in the building and repair of its highways, streets, sidewalks, cross-walks, and culverts, and no other money remained that it

could devote to the repair of the place where the injury was alleged to have occurred, then the plaintiff cannot recover in this case.'

"8. The court erred in refusing to charge the jury as requested by defendant in its eleventh request, viz.:

"'The corporation in this case had not been sufficiently long in existence to take advantage of the provisions of the act of June 27, 1887, in regard to streets and sidewalks, to raise an additional sum of five mills on the dollar to enable it to keep its streets, sidewalks, and cross-walks in good repair at all times.'

"9. The court erred in not charging the jury as requested by defendant in its thirteenth request, viz.:

"'In considering whether the defendant had knowledge, or in considering whether the defendant used reasonable diligence, the jury are entitled to take into account the fact that the construction of sidewalks theretofore made had been voluntary by individuals, and sidewalks had been built piecemeal and scattered in front of the property of individual residents in their own way and at their own pleasure, and no connected system having been followed, making an additional burden upon the incorporation to complete and perfect the system, and therefore more latitude should be extended to the village in and about bringing the streets and sidewalks into a proper condition that would be under other circumstances.'"

The defendant had been incorporated for 15 months. A tax for village purposes had been imposed and collected. The street commissioner testified as follows:

"*Q.* How much city money did you use in repairing city walks in front of any property owned by individuals, or did that $100 include that also?

"*A.* No, sir. Whenever I notified I don't remember of having any repairs in sidewalks made myself in that time.

"*Q.* Whatever you did, or any one under you, would be your own act?

"*A.* Yes, sir. * * * * * * * *

"*Q.* So you were not able to use any of the city money in making these repairs?

"*A.* No, sir. The people did it. I didn't have but very little trouble in that respect. The people were very willing to fix the sidewalks."

Hence the failure to cure this defect did not arise from lack of either time or means to make the repairs, but

solely because of the neglect of the street commissioner or other officer to notify the abutting owner. The statute gives to villages control of sidewalks, of their grade, width, material, and manner of construction. Owners of lots may be required to construct, maintain, and repair sidewalks in the streets adjacent to such lots; and, if an owner fails to construct or repair, the village may construct or repair at the expense of such owner, and assess the amount of such expense upon his lot. Owners, however, may construct walks in the absence of any direction by the village, subject, however, to such regulations regarding the same as may and should be prescribed by the village; and, when constructed, although by private persons, the village must use reasonable care to prevent them from becoming dangerous. The municipality cannot escape liability on the ground that it did not build the walk or direct its construction. *Champaign v. McInnis*, 26 Ill. App. 338; *Shannon v. Town of Tama City*, 74 Iowa, 22(36 N. W. Rep. 776).

The duty imposed upon cities and villages to keep their sidewalks in repair and reasonably safe for travel is an imperative one. It involves the duty of providing all that is necessary to that end, including not only the necessary ordinances regulating their construction, but a "full complement of officers and employés," as well as the necessary funds for that purpose. Coming into this territory, it was the defendant's duty, in view of this statute, to take prompt measures for its observance, to supply the necessary employés, to remedy any defects that existed by reason of any "disconnected system," to supply the necessary regulations, and to raise the necessary funds. The defendant had more than 15 months within which to do this, and, having failed, it cannot be allowed to plead its own neglect to defeat a recovery.

The facts did not warrant the giving of the instructions requested, and they were properly refused.

The judgment is affirmed, with costs of both courts to plaintiff.

The other Justices concurred.

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DAVID V. YEREX v. JOHN EINEDER.

Surface water—Adjoining proprietors.

A land-owner has no right, under any circumstances, to transfer his wet and untillable land to his neighbor by the digging of an artificial ditch, and carrying the water at once upon his neighbor's land, so that it will not overflow or percolate his own soil. *Gregory v. Bush*, 64 Mich. 42, 44.

Error to Lapeer. (Moore. J.) Argued April 17, 1891. Decided May 8, 1891.

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

Geer & Williams, for appellant.

W. W. Stickney, for defendant.

MORSE, J. The plaintiff owns the E ½ of the S. W. ¼ of section 22, township 8 N., of range 12 E., in Lapeer county. The defendant owns the W. ½ of the same quarter, same section, township, and range. It was claimed by plaintiff that the water from the lowlands of defendant—a marsh or swamp—was diverted from its natural flow, and carried upon the lands of plaintiff, to

his damage, by means of a ditch dug upon defendant's premises. The action was commenced in justice's court, where plaintiff had judgment. Upon appeal to the circuit court, verdict and judgment passed for the defendant. The plaintiff brings error.

The testimony showed that the swamp on defendant's land was a part or neck of a large swamp, which contained over 300 acres. The natural outlet of this swamp was into Little brook, and from thence into Mill creek, away from plaintiff's land. The testimony on the part of the plaintiff was to the effect that, although the neck of the swamp upon defendant's land came within about 20 rods of his premises, there was a ridge between such premises and the swamp, which in the absence of the ditch, prevented any water from the swamp overflowing, even in times of high water, upon plaintiff's land. After passing this ridge, the land of defendant sloped towards plaintiff's land, which, adjoining defendant's premises, was lower than the land of defendant. It was conclusively shown that there was never any natural water-course, with defined banks, running from the swamp to plaintiff's land, and that, when the ditch was first cut through this ridge, the defendant had trouble with the grantors of plaintiff, who claimed that the ditch damaged them. The ditch was cut through this ridge by the defendant, but did not extend upon plaintiff's premises, but stopped within a few rods of his line.

It was admitted by defendant that when plaintiff bought the premises he complained of the ditch, and it was agreed by them that the county surveyor should be employed to find out in which direction the water would naturally go, and defendant promised, if the surveyor found that the water naturally, by the levels taken, would run away from plaintiff's land, that he would fill up the ditch. The surveyor so found, and the defend-

ant filled up the ditch. But he afterwards opened it again, by plowing a furrow around the edge of the swamp, and then running a dead furrow at the edge of the swamp towards plaintiff's land. This furrow was deepened and widened by the action of the water, until it became a ditch, which it is admitted carried the water from the swamp upon the plaintiff's land so quickly that it did not soak or percolate into the soil of the lowland of defendant near the swamp, and by such ditch some acres of defendant's land were rendered tillable. There was no contradiction of the testimony of plaintiff that crops upon his land were damaged and partially destroyed by water flowing through this ditch from the swamp.

The defendant introduced testimony tending to show that, in a state of nature, the water from the neck of this swamp flowed upon plaintiff's land, especially in seasons of high water; that the defendant built a dam at the lowest place in the swamp, where this water ran towards plaintiff's land, which confined the waters more closely to the swamp; that the ditch did not quite come up to this dam, and that the water which ran into the ditch flowed around the dam, and thus reached the ditch; and that no more water went upon plaintiff's premises from the swamp, with the dam and ditch in existence, than flowed there before without them; and some of the witnesses testified that the quantity of water reaching plaintiff's land was less than it would have been had not the dam and ditch been constructed. But there was no testimony disputing the fact that this ditch collected the water, and precipitated it upon plaintiff in such a manner that it prevented a large amount of it from soaking into or spreading out over defendant's land, when without the ditch the water could not reach plaintiff's premises, except as it did so by spreading out and overflowing defendant's land, and until by such spreading and over-

flow it reached the land of plaintiff. In other words, it is practically undisputed in the record that the digging of this ditch carried the water from this swamp in a different and unusual manner from which it possibly could have reached it naturally, and that the water thus thrown upon it damaged his land, while it reclaimed some of defendant's.

The defendant testified that he made the ditch in the first place so that he would be enabled to work the rest of the place,—to cultivate it.

"Until I made the ditch, I could not work it. The ditch kept the water together, so that I could get a chance to work the rest of the land. * * * I couldn't work it till I cut the ditch, because it would overflow the whole place. * * * * * * * *

"*Q.* After that ditch was dug, wouldn't it take the water from the overflow of the swamp *at once* onto Yerex's land, and prevent it from overflowing on your land, and soaking him?

"*A.* Yes, sir.

"*Q.* And that was the object of digging the ditch, wasn't it, on your part.

"*A.* Yes; that was the object on my part."

Such being the record, it was error to permit the defendant to show that the digging of this ditch was an act of good husbandry. The defendant, as said in *Gregory v. Bush,* 64 Mich. 42, could not, "by artificial drains or ditches, collect the water of stagnant pools, sagholes, basins, or ponds upon his premises, and cast them in a body upon the proprietor below him, to his injury." And he could not reclaim his land by transferring the overflow from his land to that of plaintiff. "He cannot collect and concentrate such waters, and pour them through an artificial ditch, in unusual quantities upon his adjacent proprietor." Id. 44. What the defendant did,

by his own showing, was to transfer his wet and untillable land to his neighbor by the digging of an artificial ditch, and carrying the water at once upon plaintiff's land, so that it would not overflow or percolate his own soil. This he had no right to do under any circumstances, and whether or not it was good husbandry upon his part to do so was entirely immaterial. We are at a loss to understand how the jury, under the evidence and charge of the court, which was mainly correct, could have found for the defendant unless they were prejudiced by the admission of this testimony, which had no business in the case.

The court, we also think, should have given the plaintiff's second request, as follows:

"2. From the undisputed evidence in this case, the fact has been established that, by means of the dead furrow and ditch constructed by defendant, the water has been prevented from percolating through and settling in the lowlands of defendant next to the swamp, and has been caused to flow through the dead furrow and ditch onto plaintiff's lands in quantities at times greater than it would have flowed on plaintiff's lands if there were no ditch or dead furrow, and that said plaintiff was damaged thereby, and your verdict, therefore, will be for the plaintiff."

The judgment is reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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BRIDGET CLARK v. THE VILLAGE OF NORTH MUSKEGON.

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Writ of error—Final order—Demurrer.

An order sustaining a demurrer to a declaration, and directing final judgment for the defendant unless the plaintiff file an amended declaration within 20 days, is not a final order until after the expiration of the time allowed for such amendment.

Error to Muskegon. (Dickerman, J.) Argued April 22, 1891. Decided May 8, 1891.

Negligence case. Plaintiff brings error. Writ dismissed. The facts are stated in the opinion.

Turner, Turner & Turner, for appellant.

DeLong & O'Hara, for defendant.

CHAMPLIN, C. J. This action was commenced in the circuit court for the county of Muskegon by declaration for an injury to the plaintiff, caused by an alleged defective sidewalk in the defendant village.

The defendant appeared and demurred to the declaration, setting up 19 distinct grounds of demurrer. The plaintiff joined in demurrer, and the court, after hearing argument, sustained the demurrer, and ordered that—

"Upon payment by the plaintiff to defendant of the sum of ten dollars as an attorney fee within 20 days, the said plaintiff have leave to file an amended declaration in said cause, the defendant to plead thereto within the rules and practice of this court; otherwise it is ordered and adjudged by the court now here that the said plaintiff take nothing by her said declaration, and that the said defendant do recover against the said plaintiff its costs and charges by it about its defense in this behalf

expended to be taxed, and that the said defendant have execution therefor."

This order was entered on the 2d day of February, 1891. The plaintiff, without amending her declaration and without complying with the order in any respect, and before the expiration of the time allowed therefor, sued out a writ of error to this Court, and the defendant here insists that the order sustaining the defendant's demurrer is not a final order, until at least after the expiration of the 20 days, during all of which time the plaintiff was at liberty to amend her declaration. Its counsel cite in support of such proposition: Black, Judgm. § 29; *Elwell v. Johnson*, 74 N. Y. 80, and cases there cited.

We think that the order entered sustaining the demurrer cannot be considered a final order until after the time limited therein for the plaintiff to amend her declaration has expired. It was therefore not such a judgment of the court as is regarded final and reviewable in this Court.

It follows that the writ of error must be dismissed, with costs.

The other Justices concurred.

86 31
114 354

NANCY M. VORHEIS v. THE PEOPLE'S MUTUAL BENEFIT SOCIETY OF ELKHART, INDIANA.

Foreign corporation—Service of process.

The question in this case is whether there was any testimony before the trial court tending to show that the person upon whom the summons was served was the agent of the defendant, that issue having been tendered by a plea in abatement. And it is held that there was testimony tending to show that at the time of such service the person upon whom it was made was acting as defendant's agent in receiving pay for assessments, and giving the receipts of the company therefor, which receipts were not signed by her as agent, but were sent to her by the defendant, and were delivered by her; and that the weight and credence to be given to such testimony was for the circuit judge.

Error to Kalamazoo. (Buck, J.) Argued April 21, 1891. Decided May 8, 1891.

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

George H. Southworth, for appellant.

Osborn & Mills, for plaintiff.

MORSE, J. The only question involved in this case arises upon a plea of abatement.

The plaintiff is a resident of the county of Kalamazoo, and the defendant is a non-resident co-operative insurance organization, doing business in the city of Elkhart, in the state of Indiana, and not authorized to do business in the State of Michigan.

The plaintiff and Hattie E. Cook insured the life of their mother, Mary Kelley, an old lady 71 years of age, in the defendant company. The policy was issued July 10, 1888. Upon the death of Mary Kelley, proofs of death were made and forwarded to the defendant company, but payment of the policy was refused. Mrs. Cook assigned her interest in the policy to plaintiff, who thereupon commenced suit in the Kalamazoo circuit court by summons. The sheriff returned the summons as personally served,—

"By delivering same to Donna M. Eldred, one of the agents of said defendant at the city of Kalamazoo, in said county of Kalamazoo, by personally delivering to said Donna M. Eldred a true copy hereof, and exhibiting to her this original, under the seal of the court; she being the agent of said defendant, and doing its business as such at the city of Kalamazoo."

The defendant appeared specially by George H. Southworth, its attorney, and moved to set aside the service on the ground that said Donna M. Eldred was not the agent of the defendant. This motion was denied. After filing of declaration, defendant filed a plea of abatement, averring no proper service of writ of summons or declaration, on the ground that Donna M. Eldred was not the agent of the defendant company. Issue was joined on this plea, and hearing had thereon. Upon the testimony the court held that Donna M. Eldred was the duly-authorized agent of the company, and overruled the plea in abatement. Defendant comes to this Court upon bill of exceptions containing all the testimony taken upon such hearing, and alleging that there is no proof in the record tending to show that Donna M. Eldred was the agent of the defendant company.

We have carefully examined the testimony in the case,

and are satisfied that there was evidence tending to show that Donna M. Eldred was, at the time the service was made, acting as the agent of the defendant in receiving pay for assessments, and giving the receipts of the company for such payments. The receipts were not signed by her as agent, but they were sent to her by the company, and she delivered them. We do not care to discuss the details of the testimony, as the weight and credence to be given to the same was for the circuit judge. We are only concerned with the question whether there was any testimony upon which he was authorized to base his judgment. We think there was such testimony.

The judgment below overruling the plea in abatement is affirmed, with costs.

The other Justices concurred.

CYRUS I. COMPTON v. JEFFERSON WHITE AND FRANK CHURCH.

86 33
119 566

Deed—Delivery to infant.

The recording by a father of a warranty deed which he has executed to his minor children, with a reservation of a life-estate in the land for himself and their mother, is as effectual a delivery as could be made, and there could be no stronger evidence of his intention to convey the fee to the grantees.

Error to Jackson. (Peck, J.) Argued April 22, 1891. Decided May 8, 1891.

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

Barkworth & Cobb, for appellants.

Huggett & Smith, for plaintiff.

LONG, J. This is an action of ejectment to recover possession of the N. E. ¼ of the S. E. ¼ of section 19, township of Columbia, Jackson county. The plaintiff had verdict and judgment in the court below under the charge of the court. Defendants bring error.

It appears that the plaintiff's father, being seised of the lands in controversy, on September 24, 1836, made a deed of warranty to the plaintiff and a brother, Philander L. Compton, both then infants under the age of 21, reserving in the deed of conveyance a life-estate to himself and wife, as follows:

"Reserving, nevertheless, the sole use and possession and all the rights of and to said land during the natural lives of either of the said Philip R. and Sally Ann Compton, after which time, or the death of said Philip R. and Sally Ann, the said land or title thereto shall rest solely in said Philander L. and Cyrus I. Compton, with all the appurtenances, and all my right, title, interest, claim, and demand of, in, and to the premises."

The grantor, Philip R. Compton, father of the plaintiff, came to Michigan in 1836, leaving his family in the state of New York, where they were at the time this deed was given; it being executed in Jackson county, in this State. The grantor, upon the execution of the deed, placed the same for record in the office of the register of deeds of Jackson county, September 24, 1836. This was the only delivery of the deed. Shortly after the execution of the deed the grantor moved to the state of Illinois, and subsequently, to wit, July 25, 1844, conveyed the land in question by deed of warranty to one Marcus Bowen, from whom it comes by successive conveyances to the present defendant White (the other defendant being

White's tenant). Plaintiff's father, Philip R. Compton, died February 6, 1886, the mother of plaintiff having deceased December 6, 1877. On December 9, 1889, Philander L. Compton, by deed of quitclaim, conveyed his interest in the premises to the plaintiff. There is no question of adverse possession.

The plaintiff, in making his title, did not produce the original deed, but did produce a certified copy of the record of the deed, and gave evidence that his parents told him that the deed of the premises had been executed to him and his brother, Philander L. Compton, and left in the register's office of Jackson county. There is no evidence contained in the record as to whom the deed was delivered after registry.

The only question raised upon this record by the defendants is that there was no delivery to the plaintiff and his brother, Philander L., of the deed made by his father September 24, 1836; the claim being that the evidence failed to show an effective delivery or grant *in præsenti,* and that the court erred in not submitting the facts to the jury for their consideration. It is contended by the defendants that the reservation in the deed is not consistent with the intention to grant an estate *in præsenti,* when taken in connection with the circumstances of the record of the deed being directed by the grantor himself, the absence of the deed from the possession of the grantees, the subsequent deed of warranty to Marcus Bowen, and the entire absence of anything like an acceptance by the grantees; that the wording of the reservation and the circumstances are strong presumptions against an intention to deliver the deed for the purpose of creating a present estate, but are consonant with a revocable gift or contingent delivery, and that therefore the making and delivery of the deed to Marcus Bowen was an absolute revocation of the deed to these infants,

or at least a question of fact for the determination of the jury.

We cannot accept this doctrine. No more effectual delivery to an infant could be made, and no stronger evidence than the recording could be had that the father intended to convey an estate in fee to these infant children. And the reservation in the deed was simply a life-estate to the grantor and his wife, but by the same deed did the title in fee, subject to a life-estate, pass at once to the infant children. The doctrine is clearly laid down by Chief Justice Dillon in *Cecil v. Beaver*, 28 Iowa, 246, as follows:

"Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby. In such case, actual manual delivery and a formal acceptance are not necessary."

The defendant purchased with full notice of the title and ownership of the plaintiff, and the court was not in error in directing the verdict.

Judgment is affirmed, with costs.

The other Justices concurred.

EGBERT G. SOVEREIGN v. ALFRED MOSHER AND SPENCER O. FISHER.

Sale—Contract—Evidence—Scale-sheets—Set-off.

1. Where a logging contract provides that the logs shall be scaled by a competent scaler, to be mutually agreed upon by the parties, and the testimony is conflicting as to the making of such

agreement, evidence of other scales is admissible, and may be considered by the jury in case they find that a scaler was not agreed upon.

2. A scaler, in reliance upon measurements made by an assistant of the opposite ends of logs on a skid-way, which he called off, as also any apparent defects, measured the ends of the logs next to him; which scale is held to be incompetent evidence, in the absence of proof that the measurements were accurately made by the assistant, and the defects correctly reported.[1]

3. A purchaser of standing timber who had agreed to pay all taxes and assessments imposed upon the land from and after October 7, 1886, until the timber was removed, or until the expiration of the time limited for its removal, assigned the contract, and contracted to cut and deliver the timber to the assignees, who paid the taxes assessed on the land for 1886 and 1887, those for 1887 being paid before they became a lien upon the land, and before the removal of all of the timber or the expiration of the time limited for its removal; which payments are held a proper set-off in a suit by the assignor against the assignees upon the logging contract.

Error to Bay. (Cobb, J.) Argued April 17 and 21, 1891. Decided May 8, 1891.

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

Shepard & Lyon, for appellants, discuss the testimony fully, but cite no authorities, except *Seligman v. Ten Eyck Estate,* 60 Mich. 267, which they distinguish from this case.

Hatch & Cooley, for plaintiff, contended:

1. In support of the right to introduce other scales than that made by Alnoch, counsel cited *Peterson v. Anderson,* 44 Mich. 441; *Ortman v. Green,* 26 Id. 209; *Hopkins v. Sanford,* 41 Id. 243; *Lane v. Boom Co.,* 62 Id. 63; and, in support of the competency of the scale made by Reynolds, cited *Seligman v. Ten Eyck Estate,* 60 Mich. 267; *Jackson v. Evans,* 8 Id. 476, 482; *Lumber Co. v. Lumber Co.,* 79 Id. 307; *Robinson v. Mulder,* 81 Id. 75.

[1] See *Seligman v. Ten Eyck Estate,* 60 Mich. 268 (note 2).

GRANT, J. Plaintiff purchased of the Jackson, Lansing & Saginaw Railroad Company all the pine timber standing on certain lands described in the agreement. The only clause of this contract necessary to mention is that by which he agreed to pay and discharge all taxes and assessments imposed upon the land from and after October 7, 1886, until the timber was removed, or the time limited for removing it had expired. The contract was dated October 7, 1886, and two days thereafter plaintiff sold and assigned all his interest therein to the defendants. At the same time plaintiff and defendants entered into a written contract, by which he agreed to cut and deliver to the defendants the pine timber upon said lands at agreed prices. The only clause in this contract important to mention is that by which they agreed that the logs should be scaled by a competent scaler, to be mutually agreed upon by them.

1. One Alnoch did the scaling. The defendants' testimony tended to show that he was the scaler agreed upon. The plaintiff's testimony tended to show that he made objections to the employment of Mr. Alnoch, and refused to be bound by his scale unless it was satisfactory to him. Under the evidence this became a question of fact for the jury, and the court correctly charged the jury that, if he was the scaler agreed upon, his scale was binding, but, if not, then the scales made by others were competent. Proof, therefore, of other scales was properly admitted.

2. A witness by the name of Reynolds testified to the scale made by him and one O'Malley. He and O'Malley together made the scale in the following manner: The logs were piled upon skid-ways. Reynolds was at one end of the logs and O'Malley at the other, Reynolds taking the measurements at one end and O'Malley at the other. O'Malley called off to Reynolds the measurements he made, and any defects that were apparent to him. Reyn-

olds then made his measurements, relying upon the correctness of the measurements and defects stated by O'Malley. O'Malley was not produced as a witness, nor any reason given for his absence. The scale of Reynolds, under these circumstances, was incompetent. It was the duty of plaintiff to produce O'Malley as a witness if it were in his power to do so. It will not do to say that Reynolds' testimony was admissible for what it was worth. It was worthless unless O'Malley made accurate measurements, and correctly reported defects. This no one could testify to except O'Malley The admission of the testimony was error.

3. The circuit judge charged the jury to reject the taxes on the land for the year 1887 because they had not attached to the land at the time the defendants paid them, and that Sovereign was not bound to pay them. We think this was error. By the contract plaintiff was obligated to pay the taxes until the timber was removed or the contract terminated, neither of which had taken place. Defendants paid the taxes for the years 1886 and 1887. No objection appears to have been made to the payment by defendants of the tax of 1886, and to its being a proper offset against plaintiff's demand. The taxes of both years are upon the same basis.

We find no other error in the record, but for the errors above mentioned judgment is reversed, with costs, and a new trial ordered.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred.

MORSE, J., took no part in the decision.

86 40
108 654
109 386

GEORGE W. WISE v. THE OTTER CREEK LUMBER COMPANY.

Jury—Impaneling—Challenge to array.

1. How. Stat. §§ 7567, 7575, obviously intend—
   a—That a jury shall be obtained from the whole body of the county.
   b—That the names of those first placed in the boxes shall be exhausted before returning to the boxes the names of those previously drawn.
   The first of these requirements is as important as the second, but it was held in *People v. Coffman*, 59 Mich. 1, that the failure of a township to return a list of jurors is not a good ground for challenge even in a criminal case.[1]
2. Where in drawing a jury the names returned from a township are exhausted, the clerk should draw the jury for a second term during the same year from the remaining townships; but his failure so to do is not good ground for challenge to the array, as the rights of litigants can be fully protected by challenging the twice-drawn jurors on the ground that they have served as jurors within the previous year. How. Stat. § 7584.

Error to Benzie. (Aldrich, J.) Argued April 23, 1891. Decided May 8, 1891.

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

F. W. Cook, for appellant.

Covell & Russell (*Pratt & Davis,* of counsel), for plaintiff.

GRANT, J. This case was tried before the court with a jury, verdict and judgment rendered for plaintiff, and defendant appeals.

[1] See *Atkinson v. Morse*, 63 Mich. 276; *People v. Coughlin*, 67 Id. 466; *Hewitt v. Circuit Judge*, 71 Id. 287; *Robinson v. Mulder*, 81 Id. 75,—for a further discussion of this question.

The sole question arises upon a challenge to the array of the panel of jurors. The sole objection to the panel is—

"That the county clerk in drawing jurors for the August term, 1889, exhausted the names returned from the town of Lake (which had only two in the first place), but that sufficient names remained, returned from the remaining eleven towns, to form the jury for the January term, 1890; that in drawing the jury for the January term, 1890, the clerk, instead of omitting to draw any names returned from the town of Lake, and drawing the full twenty-four from the other towns, drew the two again from Lake township, in the same manner as he had for the August term, 1889, and that the two persons so drawn from the town of Lake were summoned as part of the panel for such January term, the term at which this case was tried, and that this jury was made up from this list so drawn."

The statute obviously intends—

1. That a jury shall be obtained from the whole body of the county.
2. That the names of those first placed in the boxes shall be exhausted before returning to the boxes the names of those previously drawn. How. Stat. §§ 7567, 7575.

The first of these requirements is certainly as important as the second, but this Court has decided that the failure of a township to return a list of jurors is not a good ground for challenge, even in a criminal case. *People v. Coffman*, 59 Mich. 1. We think the clerk should have drawn the jury from the 11 remaining townships. But we do not think this vitiated the panel. The statute contemplates that jurors may be drawn twice the same year. How. Stat. § 7575. The two jurors from the township of Lake were competent jurors. Should either party desire, he might challenge them on the ground that they had served as jurors within one year previous. How. Stat. § 7584. This, in our judgment, gives ample

protection to parties litigant, both in civil and criminal cases. The jury drawn in this case was chosen of the 22 drawn from the other townships. We see no possible way by which the rights of the defendant were or could be prejudiced.

Judgment affirmed, with costs.

The other Justices concurred.

JEDEDIAH STRONG v. JOHN N. EHLE AND EDDIE EHLE.

Mortgage foreclosure---Equitable title.

A father purchased 240 acres of land, and at his request it was stated in the deed, following the description, that the land was deeded to the father in trust for an infant son, naming him. The father made the down payment, and secured the balance of the purchase price by a mortgage on the land; after which he removed valuable timber, and at the time of the foreclosure of the mortgage was living on the land, of which he had had possession since the purchase. And in affirming an ordinary foreclosure decree, except as modified as to order of sale, the Court hold that no technicalities can be invoked in favor of the minor, who has no interest in the land except as a gift from his father, which must be subordinated to complainant's lien, which certainly attaches to the premises as a vendor's lien for the unpaid purchase money.

Appeal from Montcalm. (Smith, J.) Argued April 23, 1891. Decided May 8, 1891.

Bill to foreclose a mortgage. Defendant Eddie Ehle appeals. Decree modified and affirmed. The facts are stated in the opinion.

N. O. Griswold, for complainant.

A. C. Maxwell, for appellant.

MORSE, J. This is a bill filed for the foreclosure of a purchase-money mortgage.

The land involved embraces 240 acres on sections 8, 17, and 18 in the township of Evergreen, in the county of Montcalm. In February, 1886, the complainant, who was then the owner of the land, sold the same, as he supposed, to John N. Ehle, for the sum of $1,680. Ehle paid $560 down, and gave two notes of $560 each, due in 18 months and 3 years, respectively. To secure the payment of these notes the mortgage in suit was given. No payments of either principal or interest have ever been made on said notes and mortgage. When the deed was executed, at the request of John N. Ehle the following clause was inserted after the description of the premises:

"The above description of land is deeded to John N. Ehle, in trust for Eddie Ehle, a minor."

The complainant states in his bill that at the time he supposed that the legal title to the lands was by his deed vested in John N. Ehle, but that he has since been advised, and now believes, that the legal title, by operation of law on account of said trust clause, became vested at once in the said minor, Eddie Ehle. He also avers that at the time of making the deed the said John N. Ehle also supposed that the legal title was conveyed to him, and not to the defendant minor, Eddie Ehle. John N. Ehle states in his answer:

"That he only intended the mortgage for what it might prove to be worth as security, as he was acting solely upon that idea, and had no knowledge that it would bind said defendant Eddie Ehle, and did not intend that it should, unless the law would bind him, but desired that said Eddie Ehle should have all the benefit and advantage the law might give him in that respect; believing and

thinking that, if the complainant was a mind to take a mortgage from this defendant on lands belonging to said defendant Eddie Ehle, he might run his own risk as to the securities afforded, as said Eddie Ehle did not authorize this defendant so to do, and was then a minor."

He denies that the mortgage is a valid lien upon the lands, and avers that the payment of $560 was made with the money of Eddie Ehle. It will be seen by this answer that John N. Ehle admits in substance that he meant to commit a fraud upon the complainant when he gave this mortgage. For this reason, and for others found in his testimony, we are not disposed to place any reliance upon his statement, which is supported by no proof but his own, that the money paid down upon the purchase of the land was the money of the minor.

We are satisfied that the minor never gave any consideration for the purchase of this land, and has no interest therein except such as he may take from the deed itself. He has no equitable rights as against the complainant. The evidence shows that this land was what is commonly known as "stump land." The pine timber had been once lumbered off, but there was still standing and lying upon it much valuable pine timber, if it were taken off in season. John N. Ehle testifies that *he bought it* for the timber, and to make a farm of it. On the whole land, since he bought it, he has taken off 2,000,000 feet of lumber, and 3,500,000 of shingles.

No defense seems to have been made for the minor in the court below, but John N. Ehle defended on the ground that there was an outstanding lease or right of flowage of about 40 acres of the land, which Strong promised to have released in a few days, but which he did not do, thereby preventing Ehle from using the pine timber standing and lying upon such overflowed 40 acres, to his damage. He testified on the trial that he was paid in

the years 1887 and 1888 $1,000 for the flowage of said lands, or the damage resulting from such flowage, by the Grand Haven Lumber Company, who had a dam upon the creek below his premises; also that he is now living upon the land as a farm. Eddie Ehle, the minor, is his son. The testimony shows conclusively that he has had possession of these premises, and used them as his own, ever since the purchase, and that he, either for himself or his son, has made great profit from his purchase.

The defendant minor appeals from the decree below, which was an ordinary foreclosure decree in favor of complainant. We do not consider it necessary to determine whether or not the legal title in these lands vested in the minor by the deed. As before said, such minor has no equitable title as against the mortgage of the complainant, who at the least has a vendor's lien upon the premises for the unpaid balance of the purchase money. No technicalities can be invoked even in favor of the minor, as we are satisfied such minor has no interest in the land except as a gift from his father, which gift must be subordinated to complainant's lien.

As there are, however, four separate parcels of this land, we think the decree of the circuit court should be so modified as plainly to direct that the same be sold in parcels, and that the parcel upon which the dwelling-house is situated be offered last, and sold only in case the other parcels do not sell for enough to satisfy the decree and costs.

The decree, as thus modified, will be affirmed, with costs of both courts.

The other Justices concurred.

86 46
110 105

CHARLES F. HARRINGTON v. THE CITY OF PORT HURON.

Ejectment—Maintenance of sewer.

Ejectment will not lie in this State for anything that is not tangible or capable of being delivered to the plaintiff by the sheriff under the writ of possession, nor for a mere trespass, right of way, or easement.

So *held*, where a city constructed a sewer through land owned by the government without its consent, and, to protect the end at which sewerage was discharged into the river upon which the land fronted, erected a structure of masonry extending from the bank into the stream, and protected by a system of piling, which structure prevented the land being used for dockage purposes, for which it was valuable. The land was afterwards sold and patented, and a grantee of the patentee brought an action of ejectment against the city to recover the possession of the land, which was described by metes and bounds in his declaration. No other possession or claim of ownership by the city was shown upon the trial than as above stated. And in reversing a judgment in favor of the plaintiff the Court hold:

a—That upon the construction of the sewer it immediately belonged to the owner of the soil, and when the government conveyed the land the whole of the premises passed to its grantee.

b—That a writ of possession, under the judgment, would only put the plaintiff in possession of the land, which he could have had at any time without the aid of the court, and which land would be still incumbered by the sewer, through which the water would continue to be discharged.

c—That, if the city had obtained the right to construct the sewer across the land to discharge the water passing therein, it would have created an easement upon the land; and if it constructed it without authority, thus discharging the water upon and across the land, the act would be a trespass, but not an ouster of the plaintiff from the land.

d—That the plaintiff's title, as riparian owner, extends to the boundary line in the river, and gives him the right to erect docks and employ the land for any purpose not inconsistent with the rights of navigation; and if the city is in possession,

and sets up a claim of right to maintain the sewer in the river in front of the land, and to drive and maintain the piles there for its protection, ejectment will lie for the land so appropriated.

e—That the mere fact that the sewer has been used continuously to discharge water into the river, without any other acts or claims by the city, would not amount in law to keeping the plaintiff out of the possession of the premises.

Error to St. Clair. (Canfield, J.) Argued April 23, 1891. Decided May 8, 1891.

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

Frank T. Wolcott, for appellant.

A. E. Chadwick, of counsel, for appellant, contended:

1. The second count is wholly insufficient to admit of any evidence, or as the foundation of any judgment; citing How. Stat. § 7795; *Twogood v. Hoyt*, 42 Mich. 609; *White v. Hapeman*, 43 Id. 267.
2. A corporation cannot maintain ejectment for a mere easement; citing *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Bay County v. Bradley*, 39 Id. 163; *Taylor v. Gladwin*, 40 Id. 232; and, as a necessary corollary, it follows that if a municipal corporation cannot maintain ejectment for an easement because having no right or title to its exclusive possession, or of the land subject to it, the same reasons prohibit a like action against it.
3. The plaintiff is the undisputed legal owner and in possession of the whole tract of land so far as it is capable of possession, or as he chooses to exercise it; citing How. Stat. § 8701; and he cannot maintain ejectment; citing *Rea v. Rea*, 63 Mich. 257, 262; and if he seeks to recover a part only, he must describe the part from which he is ejected and excluded with certainty; citing *White v. Hapeman*, 43 Mich. 267; *King v. Merritt*, 67 Id. 195, 210.

Avery Bros., for plaintiff, contended:

1. How. Stat. § 7791, authorizes ejectment against any "person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein."
2. The city claimed the right to use this land as a street, and, acting under that claim, erected this brick and stone structure,

and has continued to maintain it, which acts of ouster are much more pronounced than those of the defendant in *Cole v. Wells*, 49 Mich. 450, where Wells strung a boom-pole along the front of Cole's premises, fastening it to piles before driven, and continued to maintain the boom as a storage for logs, and ejectment was held a proper remedy.

3. One who records an invalid tax title can be made defendant in ejectment, even though he has taken no steps to assert possession; citing *Heinmiller v. Hatheway*, 60 Mich. 391; *Anderson v. Courtright*, 47 Id. 161; *Hoyt v. Southard*, 58 Id. 434.

4. On the principle that the owner of the fee owns all above and below the surface, ejectment has been sustained for space above land covered by an overhanging roof; citing Tyler, Eject. 37; *Aiken v. Benedict*, 39 Barb. 400; *Hoffman v. Armstrong*, 48 N. Y. 201; *McCourt v. Eckstein*, 22 Wis. 155; and for a coal mine; citing Tyler, Eject. 41; Adams, Eject. 20; *Caldwell v. Fulton*, 31 Penn. St. 475 (72 Am. Dec. 760); and it lies in favor of the owner against one in possession and exercising acts in the nature of an easement, as where a railroad company laid its track over one's land; citing *Carpenter v. Railroad Co.*, 24 N. Y. 656; and where a city claimed the right to swing a bridge crossing a canal over the lands of plaintiff; citing *Lawe v. City of Kaukauna*, 70 Wis. 306; and the contention that mere prevention of beneficial use of the premises by the defendant is not enough to warrant ejectment is admirably answered by the reasoning in *Booming Co. v. Jarvis*, 30 Mich. 320.

CHAMPLIN, C. J. The plaintiff brought an action of ejectment against defendant by filing a declaration as commencement of suit, which contains two counts. The first count described the premises as follows:

"A tract of land bounded on the north-west by Pine Grove park, on the north-east by St. Clair river, and on the south by Lincoln avenue, excepting a strip of land across said premises seventy-five feet in width, occupied by the Port Huron & Northwestern Railway Company, being fifty feet in width on westerly side of the center line of the roadway of said company, and twenty-five feet on the easterly side thereof," which premises the plaintiff claimed in fee.

The second count describes the premises as follows:

"All that part of that piece of land bounded on the

north-west by Pine Grove park, on the north-east by St. Clair river, and on the south by Lincoln avenue, which is occupied by Superior-street sewer and Ontario-street sewer, and the outlet thereof;" and then the same exception as in the first count,—which premises the plaintiff claimed in fee.

A trial was had before a jury, and it appeared that this land described in the first count of plaintiff's declaration was formerly a part of the Ft. Gratiot military reservation; that on the 20th day of July, 1868, the Congress of the United States authorized the Secretary of War to sell portions of this reservation, including the tract in controversy, "at such times as he may deem most advantageous to the interests of the government." On March 18, 1870, before any sales had been made by the Secretary, a portion of the tract was granted to the city of Port Huron for park purposes, to be known as "Pine Grove Park." Some time during the season of 1870 the Secretary of War caused the remaining portion of the reservation to be platted, and public sale was made of a part thereof. The part unsold, which is in controversy here, was sold under authority of an act of Congress passed June 16, 1880, to the Port Huron & Northwestern Railway Company, and this company conveyed to the plaintiff in this suit such land by deed dated April 3, 1884. In this deed there was an erroneous description, which was corrected by a deed dated January 8, 1886.

In June, 1874, the city of Port Huron, by its common council, decided to construct a sewer from the St. Clair river westward, through and along Park place, to Ontario street, and during that year entered upon the premises and constructed the sewer. The authorities of the United States had prepared a map previously to that time, on which was designated a street across the land described

in the declaration, known as "Park Place;" but before the same was recorded or the property sold the authorities of the United States had ignored such street, and retained the premises as property belonging to the government. In 1875 or 1876 the city caused a sewer to be built along Superior street, which connected with the one through Park place. These sewers have always been maintained by the city as public sewers, and continue so to be. They are used by the inhabitants of the city for sewage purposes, and, among others, by the plaintiff in this suit, who was, as appears, one of the petitioners for the construction of the sewer in Superior street, which was built before he obtained title from the railway company. It further appears that at the outlet of the sewer, at its junction with the river, there is a structure of masonry several feet in height and 22 feet in width, extending outward from the bank into the stream, protected by a system of piling; and testimony was introduced tending to show that this structure prevents the land being used for any purposes requiring dockage, and that the land is so situated as to be valuable for a dock frontage. It was further shown upon the trial that the premises are uninclosed, and that there is nothing to prevent the plaintiff from taking possession peaceably of the land described in his declaration. The sewer in question was built several years before the railway company made its purchase in 1880, and while the land belonged to the general government; and some effort was made on the part of the defendant to show that permission was given the city by the officer in charge of Ft. Gratiot for it to construct the sewer across these premises, but we think that such testimony wholly failed to show such permission. On the contrary, it was shown that, during the time they were excavating for the sewer, the officers

in charge of the fort caused stakes to be set along the lines of this parcel of land to indicate that it belonged to the government.

It is a principle of law that where a person, without permission from the owner, knowingly enters upon his lands, and erects structures permanent in their character, annexed to the freehold, such structures belong to the owner of the soil to which they are annexed or upon which they are erected; and it follows that when the city erected this sewer across the lands of the government of the United States, without its consent or permission, such structure immediately belonged to the owner of the soil, and when the government conveyed such land to the railway company the whole of the premises passed to its grantee.

The testimony does not show that the city is in possession of any of the premises described in plaintiff's declaration, or that it assumes to exercise any act of control or ownership over it; the facts appearing that in 1874 it constructed a sewer across it, which is the outlet of two sewers, and has done nothing since upon the lands. But if the city did claim to own the sewer, and to have the right to discharge water through it, we do not think that the action of ejectment would lie, under the circumstances of this case. Ejectment will not lie in this State for anything that is not tangible or capable of being delivered to the plaintiff by the sheriff under the writ of possession. Here the judgment was rendered upon the verdict of the jury for the premises described in the first count of the plaintiff's declaration, such verdict having been directed by the trial court. A writ of possession, under such judgment, would only put the plaintiff in possession of what he could at any time have had without the aid of the court, and, when he was so put in possession of the land described in the first count

of his declaration, the sewer would still incumber the land, and the water continue to be discharged through this artificial conduit. Ejectment will not lie for a mere trespass to lands, nor for a mere right of way or an easement. *Turnpike Co. v. Smith,* 15 Barb. 355; *Judd v. Leonard,* 1 D. Chip. 204; *Clement v. Youngman,* 40 Penn. St. 341; *Caldwell v. Fulton,* 31 Id. 483; *Child v. Chappell,* 9 N. Y. 251.

If the corporation had obtained the right to construct the sewer across these lands to discharge the water passing therein, it would have created an easement upon the land. If the city constructed the sewer without authority, thus discharging the water upon and across the land, the act would be a trespass, but not an ouster of the plaintiff from the lands described. Expressed in simplest language, the city has constructed an artificial aqueduct across the lands belonging to plaintiff's grantor, through which it discharges water and sewage from two of the sewers laid in the streets of the city. There is no doubt that the plaintiff's title, as riparian owner, extends to the boundary line in the St. Clair river, and gives him the right to erect docks and employ the land for any purpose not inconsistent with the rights of navigation; and if the defendant in this case is in possession, and sets up a claim of right to maintain the sewer in the St. Clair river in front of his land, and to drive and maintain piles there for the purpose of protecting such sewer, we think ejectment would lie for the land so appropriated; but the facts in this case do not warrant this Court in finding that the city of Port Huron has laid any claim to the right to maintain the structure which it erected when it built the sewer, and we are of opinion that the court erred in directing a verdict for plaintiff under the first count of plaintiff's declaration.

The learned judge instructed the jury that—

"The act of the city in entering upon, the excavating the soil for this sewer, and constructing the same, was such an act as amounted to an assertion or claim of title on its part, and so the owner of the property may treat it as an act of disseisin or ouster; and, as the sewer has been used and maintained continuously to the present time, I think it a legal fact that plaintiff has been kept out of possession of the premises by the city."

We have already called attention to the fact that this sewer was constructed long before the plaintiff obtained his title from the railway company, and in fact before the railway company had obtained its title to the land in dispute, and if there was any ouster of the owner, or an act of disseisin, it occurred a long time prior to the conveyance to plaintiff's grantor. The government, in conveying to plaintiff's grantor, only conveyed all the right, title, and interest of the United States to the land in question, without any covenants of warranty whatever.

We shall not assume in this suit, at this time, to pass upon the question as to whether or not it was the intention of the government to recognize defendant's rights upon the premises; although it may be said that the government granted to the purchaser the full extent of its right, title, and interest in the premises. It is apparent, however, that whether the act of the city in constructing the sewer was a disseisin of the owner would depend very much upon the facts and circumstances under which the city entered upon the land and constructed the sewer. If at that time the city authorities supposed that there was a public street called "Park Place," in which they were constructing a sewer, it would not be such an assertion or claim of title on its part as would operate as a disseisin if it afterwards turned out that the city was mistaken as to the claim under which it entered. Neither would it be a disseisin if the city entered by the consent, express or implied, of the owner. The mere fact that

the sewer has been used continuously to the present time to discharge water into the St. Clair river, without any other acts or claims made by the defendant, would not amount in law to keeping the plaintiff out of possession of the premises.

We think that the plaintiff has mistaken his remedy, and that the judgment must be reversed, and a new trial granted.

McGRATH, LONG, and GRANT, JJ., concurred with CHAMPLIN, C. J.

MORSE, J. *(dissenting).* This judgment should be affirmed. The title of the premises in issue is indisputably in the plaintiff, and he is not in possession. The city of Port Huron is maintaining continuously from day to day and hour to hour a sewer upon his premises. The mouth of the sewer, where it empties into the St. Clair river, is constructed of stone, and protected by piles, constituting an obstruction to the erection of a dock, elevator, or building, and depriving plaintiff of all beneficial use of his water front. He has frequently applied to the municipal authorities in relation to this sewer, claiming it to be an obstruction to the exercise of his property rights in the land, and notified them that he was the owner of the premises; but they have always denied his title, and insisted on their right to maintain this sewer. It is true, under the authorities, that ejectment cannot be maintained for a mere trespass upon land, nor for a mere right of way or an easement; but that is not this case. This occupation of the city for the purposes of sewerage is not a mere temporary trespass, like one going onto the premises of another and doing damage and going away again, but it is a continuing trespass,—one that never ceases. The sewer remains there all the time, and is in use by the city

night and day. It amounts substantially to a constant occupation of the plaintiff's premises, and a possession which is sufficient to justify the remedy of ejectment.

Ejectment, under our statute, will lie against any—

"Person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein." How. Stat. § 7791.

In *Cole v. Wells*, 49 Mich. 450, the defendant fastened a boom-pole to piles driven in the Black river in front of plaintiff's land, and used the boom for the storage of logs, claiming the right to do so. It was held that ejectment could be maintained. There was nothing in that case to prevent the plaintiff from tearing away and removing this boom from his premises. He could have destroyed it, as he can destroy this sewer; but the law, in my opinion, does not force the plaintiff to destroy property to remove such an obstruction, or to get, as he probably would, into a war or conflict over the possession of the premises so occupied by another, in which conflict the superior force would prevail. He is entitled to the peaceful remedy of ejectment. Nor is he even compelled to resort to the inadequate and vexatious remedy of trespass,—a remedy which, in case of judgment in his favor, settles nothing as to his title to the land. *Keyser v. Sutherland*, 59 Mich. 455.

But it is said that there has been and is nothing in the way of his taking peaceful possession of the land. But this is no valid reason why he cannot bring ejectment under our statute. We have held repeatedly that the putting on the record of a tax deed to premises, and claiming title thereunder, would warrant an action of ejectment by the owner of the land out of possession against the holder of such tax title. *Heinmiller v. Hatheway*, 60 Mich. 391; *Anderson v. Courtright*, 47 Id. 161; *Hoyt v. Southard*, 58 Id. 434. Yet in such case there

would be nothing to prevent the owner obtaining peaceable possession of the premises in most cases, but it has never been claimed that the fact that such possession could be taken had anything to do with the right to bring ejectment. Possession in the defendant is not a necessary element in ejectment in this State. The remedy is aimed against the assertion of ownership of or an interest in the land as well as against an unlawful possession.

Nor are the cases cited by the Chief Justice in relation to easements or rights of way applicable here. The plaintiff is not bringing ejectment to recover a right of way or an easement, but to free his land of an unauthorized occupation under a claim of right by the city so to occupy it. As before shown, he is not obliged to invite trouble and conflict in an attempt to free his premises by removing the piles and tearing out the sewer. The action of trespass would not settle his title. He is not obliged to forbear his remedy in ejectment—the only proper action to declare and fix his title permanently—because the premises are not guarded against his peaceable entry upon them.

In 24 N. Y. 656 (*Carpenter v. Railroad Co.*), ejectment was brought against the defendant, and upheld, a majority of the court holding that the occupation was such that the action would lie. It was shown that the railroad company had laid a track and affixed it to the soil, but had never used it or connected it with its operating road. It justified the laying of the track under permission of the municipal authorities, claiming the ground to be a public street, and also raised the point that ejectment would not lie because of the character of its occupancy. The court held that the fee of the soil, if it was a street, was in the plaintiff, and he had a right of action against any person using it for any other than legitimate street

purposes, and that the defendant had sufficient occupancy to justify bringing ejectment. The court said:

"Ejectment will lie for anything attached to the soil of which the sheriff can deliver the possession."

But it is said that a writ of possession under a judgment in favor of the plaintiff will only put him in possession of what he could at any time have had without the aid of the court, and that the sewer would still incumber the land. So, also, a writ in the case of *Hoyt v. Southard,* 58 Mich. 434, would only have given the plaintiff, as far as the possession was concerned, what he could also have taken without suit. But something more is accomplished by the writ in both cases than the mere delivery of the possession. The possession is delivered symbolically, but with it goes the establishment of plaintiff's title, freed from the adverse claim of title by the defendant. In the case at bar, also, the sewer with its stonework and piles is delivered to the plaintiff as his own, to do with them as he sees fit, without fear of further litigation, or any other conflict. In no other way except by an action of ejectment can the plaintiff determine and adjudicate at law his title to this land, unless he shall do something which will authorize the city to bring ejectment against him; and it is very doubtful if he could do any act which would authorize the city to maintain ejectment against him, under the authorities.

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WILLIAM L. WEBBER v. IRA E. RANDALL (ORIGINAL BILL) AND IRA E. RANDALL v. WILLIAM L. WEBBER (CROSS-BILL).[1]

Equity practice—Appealable order.

1. It will be noticed that the decree in this case directs that a receiver be appointed to take the said cattle and their progeny, and cause the same to be put in proper condition for market, and to sell the same, and bring the proceeds into court, to abide the further order of the court concerning the same. This portion of the decree is in accordance with the prayer of complainant's bill, and therefore he is not in a position to appeal from it; while, on the other hand, the defendant, under the repeated rulings of this Court, could have regarded that portion of the decree as final, because it dispossesses him of the possession of the property, and he could have appealed, but he has not.
2. The further order, and that portion complained of by the appellant, requires an accounting to be had, and a sale of the cattle by the receiver, and directs that, when the cattle are sold, in case the amount realized from the sale shall be less than the value of the cattle at the time of the breach of the contract, together with the progeny, computed as therein directed, a personal decree shall pass against defendant for the deficiency, together with interest. There is nothing appearing upon the record by which this Court is authorized to say that it will injure the appellant in case this decree should be carried out as written, for it is among the possibilities that a computation of the amount due him, based upon this decree, may realize as much as he claims he would be entitled to under his construction of the contract; and until a final decree is made by the court fixing the amount of money which shall be due to him there is no final order or decree from which an appeal can be taken.

Appeal from Saginaw. (Edget, J.) Submitted on briefs April 24, 1891. Decided May 8, 1891.

[1] A rehearing was granted in this case at the June term, 1891.

Bill for relief from a contract on the ground of non-performance by the defendant, and for the appointment of a receiver. Complainant appeals. Appeal dismissed and record remanded. The facts are stated in the opinion.

James B. Peter (*Wisner & Draper*, of counsel), for complainant.

Russell C. Ostrander, for defendant.

CHAMPLIN, C. J. This is a bill and cross-bill. In the original bill the complainant, Webber, states that he entered into a contract with Randall, which recited that Randall was the owner of certain lands in Saginaw county, Mich., which he desired to stock with Holstein-Fresian cattle, and that, complainant being the owner of such cattle, the parties agreed together that complainant's cattle should be taken by Randall, and placed upon his farm in Saginaw county, fed and cared for at Randall's expense, and that the milk and butter from said cattle should be the property of Randall, to dispose of as he might elect, for the term of five years, at which time double the number of cattle, of like sex, age, and quality, were to be returned to Webber; and to that end it was agreed that the cattle which Webber turned over to Randall were of the ages described in said contract, and all registered in the Holstein-Fresian herd-book, or in the Holstein registry, as indicated; and that Webber retained as security the ownership of said cattle and the progeny thereof, except as otherwise provided. Randall further agreed that he would take such cattle on said farm, and care for them in a first-class manner, as such animals are cared for by good breeders; that he would himself become a member of the Holstein-Fresian Association, and cause all the progeny from said stock to be registered before the same

should arrive at the age of one year, except such bull calves as Randall might think best to dispose of without registry; that he would, at the end of said five years, return to said Webber, at East Saginaw, double the number of animals so received, of like ages, like sex, and like quality as he then received. It was further agreed that, for the purpose of valuing the animals, the bull which was turned over by Webber to Randall was worth the sum of $100; that all the cows above the age of one year were worth $150 each; and all the heifer calves under the age of one year were of the value of $90 each. It was further agreed that said Randall, at his option, might at any time within six months from the date of the contract pay to Webber in cash, or in property at cash prices, for the said cattle at the prices above named, with interest at the rate of six per cent. per annum, in which case the interest of said Webber in said cattle should cease, and Randall should become the absolute owner thereof; but in case Randall within six months did not make payment as aforesaid, then said option should cease. And it was further agreed that, in case any of the cattle should die after being taken by Randall, the loss should be Randall's, the title of Webber in said cattle continuing, as in case of a conditional sale, only as a security, and subject to the provisions of the agreement; and that whatever loss might be sustained from death or disease was the risk assumed and borne by Randall, and not by Webber; and Randall agreed with Webber that he would cause said cattle to be properly housed, sheltered, and cared for during the term; that he would take special pains to keep accurate record of their breeding, and that no impurity of blood should come to any of the progeny; that he would report to Webber from time to time, and as often as twice a year, the condition of the herd, with the names and

number of the progeny thereof, and, in case he did not arrange otherwise, he would at the close of said five years return double the number of cattle, as above stated. Randall further agreed that during the period he would not use any bull in said herd except with the advice and consent of said Webber, and that all advice or consent which might be given by either party should be expressed in writing and signed by the parties.

The agreement was dated on the 2d day of November, 1888, and was executed in duplicate.

The bill further states that Randall at that time claimed to be the owner of a farm of some 3,000 acres of land, embracing entire section 1, and the N. ½, and the E. ½ of the S. W. ¼, and the W. ½ of the S. E. ¼, and the N. E. ¼ of the S. E. ¼, of section 12, in township 10 N., range 3 E., and the S. ½ of section 36, in township 11 N., of range 3 E., and entire section 7, and entire section 18, and the N. W. ¼ of section 19, in township 10 N., of range 4 E., all in Saginaw county, Mich.; and that the farm which said agreement alluded to was the farm upon the lands above described as the lands which said Randall desired to stock with Holstein-Fresian cattle, and with reference to which the contract was made.

The bill further states that on or about the date of said contract Webber delivered to said Randall, under and in pursuance of said contract, the animals named therein, namely, 23 cows one year old and over, 16 females under one year old, and 1 bull, making a total of 40 head of cattle, which, at prices named in the contract, amounted to $4,990; and that Randall received the same, and placed them upon the farm mentioned above.

The bill then charges that Randall did not keep the terms of the contract as agreed to by him, but, on the contrary, said cattle were neglected, and were not

properly fed or housed, and they were neglected so much that they have greatly depreciated in value, and two of the cows, as complainant is informed and believes, have since died in consequence of such neglect and ill treatment; that Randall did not, as complainant is informed and believes, become a member of the Holstein-Fresian Association, and that he has not procured all the progeny of said cattle to be registered, as agreed; that he has not reported to complainant from time to time, and as often as once in six months, the condition of said cattle, and the names and number of those registered, as aforesaid; that afterwards Randall sold and disposed of said farm, and removed the cattle therefrom, or so many thereof as were still living, to a farm, said to be owned by him, of 200 acres, in the township of St. Charles, only a small part of which is cultivated, and which is not furnished with conveniences for housing and protecting said cattle; that he is informed and believes that said Randall has neglected to feed said cattle to such an extent that they have become greatly depreciated in value, and that really they have been starved to a point which is cruelty on the part of any one charged with the keeping of cattle, and that complainant is likely to loose his security by the depreciation in value of said cattle; that sufficient care has not been taken to preserve the purity of blood, which in a large measure constitutes the value of these cattle, so that they might be registered; and in many other respects said Randall has neglected and refused to perform his part of the agreement, and has incapacitated himself therefrom by the sale of said farm.

The complainant prays that, to the end that the said cattle may be properly cared for, and that the lien of complainant for the purchase price thereof may be enforced, a receiver may be appointed to take care of said

cattle, and to cause them to be properly fed and put in suitable condition for market, and then cause said cattle to be sold under the direction of the court, and the proceeds thereof be applied—

1. In paying the expenses of taking said cattle into possession, and feeding and caring for the same, and the expenses of the receiver; and—

2. To pay the balance over to the complainant to apply upon the indebtedness existing against said Randall by reason of the premises.

And that upon such sale complainant or any other person in interest in said suit may become the purchaser; and that it may be decreed that any deficiency that may exist may be paid by said Randall to the complainant, together with interest thereon; and for general relief. The bill of complaint was filed on the 10th day of May, 1890.

The defendant put in a general demurrer to the bill, which was overruled; and he then answered, admitting the copy of the contract attached to the complainant's bill of complaint; denying that the contract was made with reference to any particular farm; admitting the delivery of the 40 head of cattle; denying that the values, as put upon the cattle in said contract and in said bill of complaint, are, or were at the time of making said contract, true cash values; denying the several breaches of the contract therein alleged; and setting up substantive matter of defense.

He also filed a cross-bill, in which he sets up the making of the contract, and alleges that he entered upon the discharge of his duties under it immediately upon the delivery to him of the cattle, and has ever since in all respects carried out the undertaking on his part to be carried out, excepting only in matters more fully set out in his cross-bill. He then states that the proper care of said herd required that in summer one

man should devote the greater part of his time to them, and two men in winter, and that these men so in charge of them in summer and winter should have some knowledge of and experience in the care of blooded cattle; that it was further necessary and proper in the caring for said herd of cattle that considerable quantities of grain should be fed to them in certain seasons of the year when pasture is not good. He avers that he has employed such suitable and proper men, who have devoted a large part of their time to the care of said herd; that he has expended large sums for grain to be fed to said cattle, which was fed to them at times of the year when said cattle could not procure good pasture, and that such expense, as he estimates, is about $1,600, or $40 per head, per annum, and that it will increase as the herd increases in number; that since the herd came into his possession there have been born of said herd and added thereto 20 calves, 14 of which were male and 6 female; that for the first year the increase in said herd was 12; that for the remaining years for which said contract by its terms is to run he estimates the increase as follows: Second year, 20; third year, 40; fourth year, 60; fifth year, 80; this estimate being based upon the probability that one-half, at least, of the progeny will be females.

That he estimated, at the time of making the contract, that without any considerable misfortune he would have left upon its completion, according to its terms, and the delivery to said Webber of twice the number of cattle received from him, from 125 to 150 head of cattle remaining as his own property; that he estimated and believes that the value of the milk from said herd, annually, is equivalent to about one-fourth the cost of keeping the herd; that the selling value of registered Holstein cattle is considerably more than the selling value of unregistered Holstein cattle; that the male progeny of

said cattle, to be profitable, must be sold young, for breeding purposes, and must be registered before selling.

That at the time of and before making the contract he knew that he might become a member of the Holstein-Fresian Association of America; that the membership fee of said association is $100, but that as to the other regulations of said association and the by-laws thereof he was, at the time of making said contract, and for a considerable time thereafter, entirely ignorant; that article 4 of the by-laws of the association, as printed and circulated by said association, and as amended March 20, 1889, is entitled "Of the Herd-Book," and provides, in section 1 thereof, that said association, which is a corporation, shall publish the Holstein-Fresian Herd-Book; and complainant proceeds to set out particularly several sections of the articles of association, and, among other items, section 7 of said article, as follows: "All animals must be transferred to owners before their offspring are registered;" and section 10 provides that the registry of transfer of ownership of any animal registered in the herd-book will be made on application of the owner.

That by the terms of the contract between himself and Webber the title to the herd delivered to him by Webber, and all the progeny thereof, remained in said Webber, and that the herd-book of the association showed each and all of the cattle so delivered to be owned by said Webber; for which reason he asserts that he was unable to cause the progeny of said herd to be registered in his own name, but that the same must be registered in the name of Webber, and, recognizing this fact, the said progeny, which were four males, were registered in the name of said William L. Webber; and that he applied to Webber to transfer the ownership of said progeny and the certificates of registration to him, so that he might

sell and dispose of the bull calves, not only as their owner, but as their registered owner; and that Webber refused to transfer the same to him, but sent to him the certificates of registration without indorsement.

It is unnecessary at this time to pursue the allegations of the cross-bill further, as it is not in issue upon this hearing, the cross-bill having been dismissed by the court below, and the complainant in the cross-bill not having appealed.

Proofs were taken under the original and cross bills, and the same were brought on for hearing before the Honorable John A. Edget, Circuit Judge, who rendered a decree in said causes as follows:

"These causes having heretofore come on to be heard before the court on pleadings and proofs taken in open court, as in a suit at law, and the court, having considered the same, finds that the said contract mentioned in the pleadings between the parties, by which the said Randall received forty head of Holstein-Fresian cattle from the said Webber, to be kept and cared for upon his three thousand acre farm in Saginaw county, by its terms required the said Randall to keep said cattle upon his said farm in Saginaw county, and care for the same, during the entire term of five years mentioned in the said contract, that the security of the said Webber might not be imperiled or impaired; and finds that the said Randall, in March, 1890, sold the said farm, and shortly after delivered possession thereof, and moved the cattle from said farm to another farm in Saginaw county, which was not provided with the proper facilities for the care of said cattle, and thereafter removed the said cattle beyond the limits of Saginaw county into Ingham county. And, without reference to other questions raised by the pleadings, the court finds that the said Randall was thereby guilty of a breach of said contract, and put it out of his power to perform the same, and that said Webber is entitled to relief in a court of equity by reason thereof.

"It is further ordered, adjudged, and decreed that the

cross-bill of the said Randall be dismissed, with costs to be taxed; and that a receiver be appointed to take the said cattle and their progeny into possession, and cause the same to be put in proper condition for market, and sell the same, bringing the proceeds into court, to abide the further order of the court concerning the same.

"It is further ordered and decreed that the complainant, Webber, is entitled to have the value of the said cattle at the time of the breach of contract by said Randall occasioned by the sale and removal from the three thousand acre farm hereinbefore specified, together with the value of the progeny of said herd, or that would have been realized from said herd had they been properly kept and cared for as provided in the said contract, less a proper allowance for the keeping and care of the herd from the date said Randall took the same into his possession until the date of the breach of the contract, proper allowance being made in the accounting for milk and butter that should have been realized from said herd had they been properly cared for; and that, when said cattle are sold by the receiver, in case the amount realized from said sale shall be less than the value of the cattle at the time of the breach of the contract, together with the progeny, computed as aforesaid, a personal decree shall pass against said Randall for the deficiency, together with interest.

"It is further ordered that to enable the parties to take such further proofs as may be required to fix the measure of complainant's recovery, and also to be heard upon the appointment of a receiver, the cause stand over for further hearing until the 3d day of November, 1890, at eleven o'clock in the forenoon of that day, such proofs to be taken in open court; and that the parties may be at liberty to apply to the court as they may be advised."

After the entry of the decree the parties entered into a stipulation for the appointment of a receiver, and for the sale of the cattle, and that the money be brought into court, which contains the following clause:

"That either of the parties to this suit may purchase at said sale, if the highest bidder; and that an appeal to the Supreme Court by either party from the interlocutory decree heretofore entered shall not in any way be con-

strued to affect the power of the receiver to make such sale; that the sole object of this agreement is to save the expense of the care and maintenance of the cattle pending the controversy, and that the proceeds of the sale of said cattle shall take the place in court of the cattle themselves, and both parties be at liberty to proceed in the cause, by appeal or by motion for a rehearing or otherwise, in the same manner as though such cattle had not been sold, and as though this stipulation had not been made."

Upon this stipulation the circuit judge appointed a receiver, in which order it is stated—

"That an appeal to the Supreme Court of Michigan by either party from the interlocutory decree heretofore entered shall not in any way be construed to affect the power of said receiver to make said sale, and that both parties be at liberty to proceed in this cause, by appeal, by motion for rehearing, or otherwise, in the same manner as though said cattle had not been sold, and said stipulation and this order had not been made."

The complainant, William L. Webber, appealed from the decree, for the reason, as he alleges, that under the proofs and under the contract, correctly construed, the value of the cattle is fixed by the contract, and the decree should be final, and state the amount. He contends that the court below should have found, in addition to what he did find,—

1. That said Randall refused to become a member of the Holstein-Fresian Association, as he agreed in his contract.
2. That said Randall did not care for said cattle after he took them into his possession as such animals are cared for by good breeders.

That, if the court had so found, it would have been apparent that no rule of justice would be satisfied by giving said Webber the value of these cattle as of March, 1890, when they had so greatly depreciated under the

misuse, neglect, and inattention they had received. And he calls attention to the provision of the contract, the third clause of which provides:

"For the purpose of valuing the animals aforesaid, it is agreed that the bull is at this date worth the sum of one hundred dollars; that all the females above the age of one year are worth one hundred and fifty dollars each; and that all the females under the age of one year, in the above list, are of the value of ninety dollars each. But neither party hereto guarantees any future market, nor prices at the end of the five years; it being understood that at the expiration of the five years payment shall be made in kind, and by the delivery of double the number of like sex, ages, and quality as aforesaid."

He contends that this contract, dated November 2, 1888, is a sale of the cattle; that the value of the cattle sold is fixed absolutely in the contract by agreement; that Randall could pay for them in cash at those prices, with interest at 6 per cent., at any time within six months, and if he did not pay for them in cash within six months he was to pay for the cattle in kind by delivering double the number at the expiration of five years; that it was expressly provided that, in case any of the cattle should die after being taken by Randall, the loss should be his, and that the title of said Webber in said cattle continued only as in case of a conditional sale as security; and that whatever loss might be sustained in the herd "is the risk assumed and borne by said Randall, and not by said Webber." And he further claims that all the provisions of the agreement concerning the care which Randall should take of the cattle, and concerning the fact that they were to be registered, had relation—

1. To the security that said Webber retained for payment; and—

2. To insure that the cattle and their progeny at the end of five years should not be deteriorated.

That this was essentially a sale is apparent from the ages of the cattle at the time of the delivery and the ages of those that could be returned; that it was never expected by the parties that the same animals would ever be returned to Webber; and he calls attention to the fact that the bull was three years old when delivered, and at the end of five years he would be eight, and two three-year old bulls must be delivered in his place. Of the 39 females, but five of those delivered in 1888 could by any possibility be returned to said Webber as payment at the end of the five years; all the others would be too old.

The defendant, by his counsel, states in his brief that the rule announced by the court in his order is all wrong, and also the position taken by complainant is without foundation; that the complainant's case, as stated in the bill, is without equity; that the demurrer thereto should have been sustained; that in the opinion of the counsel the contract made by the parties will bear but one construction, which is that complainant owns the cattle, and that he cannot retain ownership and claim also that he has a mortgage; that he not only retains ownership by the terms of the contract, but the herd-book title is in him, and, as the proofs clearly show, until a transfer of ownership should be made defendant could not register either the male or female progeny of the herd; that without a new contract or agreement modifying or changing the one under consideration the defendant could neither realize from the sale of the registered males, nor could he by any possibility deliver at the end of the term a herd of registered cattle; that all these matters and others will be urged upon this Court

upon an appeal from the final determination of the lower court, unless that court changes its opinion.

He insists that the order and decree of the court below is not an appealable order; that it is not final, and that the rights of the parties cannot be determined upon this appeal; that the proofs should have been taken under the interlocutory decree, and then either party or both parties might have appealed to this Court, who would then have had all the proofs before it, and be enabled to render a decree settling all the rights of the parties.

He further insists that to decide the questions raised by complainant requires an examination of the whole record; that such examination will disclose no ground for equitable interference; and that the Court may and should so state and dismiss the bill, with costs.

It thus appears from the briefs of the solicitors for the respective parties that they both request this Court, if the order made is final and appealable, to enter into an examination of the merits of the controversy, and to give a construction to the contract, and to decide the rights of the parties under the contract upon the record now before the Court. This we should be willing to do if we were satisfied that the decree or order appealed from is a final order, but we are clearly of the opinion that it is not. The case comes within repeated rulings of this Court. *Caswell v. Comstock,* 6 Mich. 391; *Demaray v. Little,* 17 Id. 386; *Moore v. Olin,* 6 Id. 396; *Turner v. Chapman,* Id. 396; *Enos v. Sutherland,* 9 Id. 148; *Perkins v. Perkins,* 10 Id. 425.

In *Caswell v. Comstock,* cited above, the decree, after disposing of the rights of the parties, referred it to a commissioner to take proofs with reference to several points, among others, the amount due to defendant

from complainant under the contract, and this Court held:

"Such a decree is clearly interlocutory, and not final. No decree, we think, is final that directs a reference to a master or other officer to do what the court, but for its power to make such reference, would itself have to do before it could decide the case. Such references are made not in execution of the decree, but to relieve the court of what it would otherwise have to do itself. The acts and doings of the master in all such cases are in their nature judicial, and not ministerial, and to be effectual must be confirmed by the court, when they become the acts of the court itself."

It was further said that—

"A decree with such a reference can with no more propriety be called a final decree than a judgment at law with a reference to a clerk or a jury to assess damages can be called a final judgment."

And, as was said in *Kingsbury v. Kingsbury*, 20 Mich., at page 216,—

"No rights have yet been lost to the appellant, and until it is known what decree the circuit court will render upon the final hearing it cannot be known which party will have cause to be dissatisfied. When the decree is made, if it should be adverse to the appellant, he will be able to raise on appeal the same questions which would be open if this order were appealable."

It will be noticed that the decree in this case directs that a receiver be appointed to take the said cattle and their progeny, and cause the same to be put in proper condition for market, and to sell the same, and bring the proceeds into court, to abide the further order of the court concerning the same. This portion of the decree is in accordance with the prayer of complainant's bill, and therefore he is not in a position to appeal from it; while, on the other hand, the defendant, under the repeated rulings of this Court, could have regarded that

portion of the decree as final, because it dispossesses him of the possession of the property, and he could have appealed, but he has not.

The further order, and that portion complained of by the appellant, requires an accounting to be had and a sale of the cattle, and directs that, when the cattle are sold by the receiver, in case the amount realized from said sale shall be less than the value of said cattle at the time of the breach of the contract, together with the progeny, computed as therein directed, a personal decree shall pass against said Randall for the deficiency, together with interest. There is nothing appearing upon the record by which this Court is authorized to say it will injure the appellant in case this decree should be carried out as written, for it is among the possibilities that a computation of the amount due him, based upon this decree, may realize as much as he claims he would be entitled to under his construction of the contract; and until a final decree is made by the court fixing the amount of money which shall be due to him there is no final order or decree from which appeal can be taken.

The appeal will be dismissed, and the record remanded to the court below for further proceedings.

MORSE, MCGRATH, and GRANT, JJ., concurred. LONG, J., did not sit.

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99 190

PATRICK FINN v. THE VALLEY CITY STREET & CABLE RAILWAY COMPANY.

Negligence—Street railway—Question for jury.

1. Passengers upon street-cars are entitled to sufficient time in which to get off, and the duty of the carrier is not discharged until the passenger is free from the car.[1]
2. Where a plaintiff testifies that a street-car did actually move while he was attempting to alight, and that such movement threw him to the ground, causing the injury for which suit is brought, the question of the probability or possibility of the movement of the car is for the jury, and not for the court.

Error to Kent. (Burch, J.) Argued April 24, 1891. Decided May 8, 1891.

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

Eggleston & McBride, for appellant.

Thompson, Temple & McCormick and *Tateum & Blair,* for defendant.

MCGRATH, J. This is an action on the case for negligence. At the conclusion of the plaintiff's testimony the court directed a verdict for defendant, and plaintiff appeals.

The defendant operates a cable street railway on North Ionia street in the city of Grand Rapids. Plaintiff was a passenger, and, while alighting from the car, was by the movement of the car thrown down upon the ground and injured. At the time the train consisted of a grip-

[1] See *Upham v. Railway Co.,* 85 Mich. 12.

car and one coach. The terminus of the line is a few rods beyond Legrand street, and plaintiff's destination was Legrand street. The conductor occupied the front platform of the coach in which plaintiff rode. As the cars approached Legrand street plaintiff went out upon the front platform of the coach, and waited for the cars to be stopped, and, when stopped, he attempted to alight, and just at that moment the conductor disconnected the coach from the grip-car, turned off the brakes on the coach, and made a jump for the grip-car, which had started forward, whereupon the coach started in the opposite direction, taking plaintiff's feet from under him, and throwing him violently to the ground. Plaintiff was the only witness called as to how the accident occurred, and he does not explain what caused the movement of the coach, except as aforesaid. Counsel for defendant moved for a verdict for defendant, claiming that on a track perfectly level such a movement of the car was impossible, and the court directed a verdict as requested.

Passengers upon street-cars are entitled to sufficient time to get off, and the duty of the carrier is not discharged until the passenger is free from the car. Plaintiff had testified that the coach did actually move, and that such movement threw him to the ground. In view of this testimony, the question of the probability or possibility of the movement of the car was for the jury, and not for the court. It appeared that there was a very slight down grade in the direction in which the coach moved; and whether the sudden release of the brake or the conductor's jump from the coach to the grip-car, or both, caused the movement of the coach and the plaintiff's fall, should have been left to the determination of the jury. It was the duty of defendant not only to refrain from doing any act, under the circumstances, which would cause the coach to move, but to

take such precaution as would prevent it from moving while a passenger was in the act of alighting from the car.

The judgment will be reversed, and a new trial granted, with costs of this Court to plaintiff.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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FRANK E. CONGER v. THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Master and servant—Negligence—Fellow-servants—Directing verdict—Appeal.

1. Where the record does not purport to contain all or substantially all of the testimony taken on the trial, the Court will presume that the evidence introduced was sufficient to sustain the judgment; citing *McGraw v. Insurance Co.*, 54 Mich. 146; *Barnes v. Railway Co.*, Id. 243.

2. In this case the plaintiff was a brakeman upon a logging railroad train, and was injured by the falling of a log from the center car of the train, which threw the car from the track. He testified that the falling of the log was the cause of the accident, and that he did not know whether the log was released because one of the stakes loosed or not. And it is held that if such was the case, and if the stake came out because carelessly put in, that carelessness was directly chargeable to plaintiff, who placed most of the logs, or to one of his fellow-trainmen; and that if the log was thrown off by the jolting of the car over the rough road, as claimed, the jolting was, under the testimony, aggravated by the high rate of speed of the train, contrary to the rules of the defendant, of which plaintiff had notice, which negligence was that of plaintiff's fellow-servants, and chargeable to him; and that a verdict was properly directed for the defendant.

Error to Wayne. (Gartner, J.) Argued April 23 and 24, 1891. Decided May 8, 1891.

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

Haug & Yerkes, for appellant, contended:

1. Where the evidence tends to show negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, the question cannot be taken from the jury; citing *Flater v. Fey,* 70 Mich. 644; *Hunn v. Railroad Co.,* 78 Id. 513; *Adams v. Iron Cliffs Co.,* Id. 271; *Harrison v. Railroad Co.,* 79 Id. 409.[1]
2. The master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep the same in good repair; citing *Swoboda v. Ward,* 40 Mich. 420; *Mining Co. v. Kitts,* 42 Id. 39; *Parkhurst v. Johnson,* 50 Id. 70; *Ryan v. Bagaley,* Id. 179; *Huizega v. Lumber Co.,* 51 Id. 272; *Smith v. Car Works,* 60 Id. 502; *Marshall v. Furniture Co.,* 67 Id. 167; *Van Dusen v. Letellier,* 78 Id. 492.
3. Contributory negligence, to defeat a right of recovery, must be that of the injured party; citing *Hunn v. Railroad Co.,* 78 Mich. 513.

W. L. Webber, for defendant.

McGrath, J. This is an action for negligence. At the conclusion of the testimony the court directed a verdict for defendant, and plaintiff appeals.

Defendant was engaged in transporting logs from a lumber camp to its main line over a temporary branch or spur known as a "logging road," which was unballasted, as such roads usually are, and followed generally the lay of the land. Plaintiff had been breaking for four years. He had been over this road several times, and had worked upon other roads of like character. In going down a grade upon a train composed of 11 flat-cars with the

[1] See *Roux v. Blodgett & Davis Lumber Co.,* 85 Mich. 519.

engine, a log fell from the center car of the train, throwing the car from the track, wrecking the rear portion of the train, and injuring the plaintiff. Plaintiff claimed that the log was thrown from the car by the jolting of the car over the rough road, and the negligence charged was the failure of the defendant to maintain a safe roadbed. The logs were put upon the cars by the shippers, but placed in position by the trainmen, and plaintiff testified that he in person placed most of the logs. Plaintiff further testified that at the time of the accident the train was running at the rate of from 12 to 20 miles an hour; that the falling of the log was the cause of the accident; and that he did not know whether the log was released because one of the stakes loosed or not.

Defendant offered in evidence the following rules and regulations of the company, with which it appears plaintiff was familiar at the time of the accident:

"Conductors will see that all logs are loaded so as to ride safely. All logs that are liable to roll off in transit must be unloaded at starting point before train is moved."

"Delayed passenger trains may regain their card time when it can be done with perfect safety, but in no case must the speed of freight trains exceed 20 miles an hour, one mile in 3 minutes,—to regain lost time. The speed of loaded log trains on the main line must not exceed 12 miles per hour; when light, 15 miles per hour; and on branches 10 miles per hour, loaded or light."

In order to hold defendant liable there must be evidence tending to show negligence on its part as the proximate cause of the accident. The falling of the log caused the wrecking of the train. If one of the stakes came out, then clearly that released the log; and if the stake came out because carelessly put in, that carelessness was directly chargeable to plaintiff or to one of his

fellow-trainmen. Again, admitting that the log was thrown off by the jolting of the car over the rough road, it must be conceded that the jolting was aggravated by the high rate of speed of the train. The rules provided that the rate of speed of log trains on branch roads should not exceed 10 miles per hour, while this train was making from 12 to 20 miles per hour at the time of the accident. This negligence undoubtedly contributed to the wreck of the train, and, inasmuch as it was that of fellow-servants, it is chargeable to plaintiff, under the repeated rulings of this Court.[1]

The record in this case does not purport to contain all or substantially all of the testimony taken in the case. Sufficient does appear to support the judgment; but were it otherwise, we would presume that the evidence introduced was sufficient to sustain it. *McGraw v. Insurance Co.*, 54 Mich. 146; *Barnes v. Railway Co.*, Id. 243.

The judgment is affirmed, with costs to defendant.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. LONG, J., did not sit.

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87 612
87 620

MINERVA BIRD, ADMINISTRATRIX, ETC., v. THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Railroad companies—Accident at crossing—Contributory negligence.

A train standing upon a highway, with an engine attached, is of itself notice of danger; and, in the absence of a special assurance on the part of the railroad company to one desiring to

[1] See *Hunn v. Railroad Co.*, 78 Mich. 514 (head-note 8, and cases cited); *Hoar v. Merritt*, 62 Id. 386; *Peterson v. Railway Co.*, 67 Id. 102; *Hammond v. Railway Co.*, 83 Id. 334.

cross between two cars, over the couplings, that he may safely do so, so far as any movement of the train is concerned, he assumes all risks incident to such an attempt.

Error to Oakland. (Moore, J.) Argued April 24, 1891. Decided May 8, 1891.

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

Moore & Moore (*John Fitzpatrick*, of counsel), for appellant.

W. L. Webber, for defendant.

GRANT, J. The deceased was a school-teacher aged 27 years, and in the full enjoyment of all her faculties.

The defendant's road crosses a highway running through the village of Milford, the railroad running nearly north and south, and the highway running east and west. The depot stands west of the railroad, and near the intersection of the road and the highway. There were across this highway a main track and a side track. A freight train was standing on the side track across the highway, waiting for the arrival of a passenger train, upon the arrival of which, as was the well-known custom, it immediately pulled out. The deceased, living east of the crossing, intended to take passage upon the incoming train. Finding the freight train across the highway, she undertook to climb through between the cars. She had climbed upon the coupling of the draw-bars, and in jumping therefrom her dress caught upon the coupling-pin; she fell just as the train started, was drawn under the cars, and killed.

The only allegation of negligence against the defendant is that, contrary to the law, it had permitted this train to stand upon the highway more than five minutes; that

it had for a long time permitted its freight trains to stand there, obstructing the road for more than five minutes at a time; that people had been in the habit of crossing the street while trains were standing there, under and between its cars; and that its employés in charge of its freight trains had frequently assisted persons in so passing; and that, therefore, the defendant by this conduct had invited the public so to pass.

The testimony on the part of the plaintiff shows that deceased started from her residence for the depot as the incoming passenger train whistled for the station; that she walked fast towards the depot, and, seeing the freight train across the highway, she said to two friends, as she passed them, "Girls, what shall I do?" One of them replied, "Wait, and the train may pull away." But she replied, "I have got to make that train;" and she thereupon walked up to the train, and attempted to cross, with the result above stated.

The learned circuit judge instructed the jury that "for any person to undertake to pass between two cars over the couplings, when there was an engine attached to the train, and in danger of moving out immediately, was such an act as no person possessed of ordinary prudence would engage in;" and he added that it would be more hazardous for a woman, laboring under the disadvantage incident to her apparel; and instructed the jury to find a verdict for the defendant.

Under no view of the case can the defendant be held to have extended an invitation to the traveling public to cross under or between its cars, under these circumstances. A train standing upon a highway, with an engine attached, is of itself notice of danger; and, in the absence of a special assurance on the part of the defendant to one desiring to cross that he may safely do so, so

far as any movement of the train is concerned, he assumes all the risks. To attempt to cross, in the absence of such assurance, is gross negligence.

Judgment affirmed.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. LONG, J., did not sit.

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112 356

ARTHUR TREDWAY v. JOHN F. ANTISDEL.

Bills and notes—Action by surety—Evidence—Payment—Protest—Joint maker—Leading questions.

1. A judgment should not be reversed for allowing leading questions regarding matters not material to plaintiff's case, and which work no injury to the defendant.
2. In a suit upon a promissory note the defendant gave no notice of set-off, and on the trial his counsel stated to the court that he wished to show that the plaintiff had sent his check to the defendant for the difference between the amount due on the note and his indebtedness to the defendant, which proposed testimony is held properly rejected, the statement failing to show either payment or settlement, for which purpose it was alone admissible.
3. In a suit by an indorser to recover from the maker the amount which he had been obliged to pay on a note, the defendant sought to introduce in evidence the testimony of the plaintiff taken in another suit, in which he testified to mortgaging his property to raise money to pay the note in question, which he deposited to the credit of the firm of which he and the defendant were members, and immediately gave the firm check to pay the note; the claim being that the testimony tended to show that the note was paid from partnership funds. No other testimony was offered in support of such contention. And it is held that the court would not have been justified in admitting the testimony, and permitting the jury to find from it that the note was so paid.

4. An indorser of a promissory note before its delivery to the payee is an original promisor, and liable without protest. *Rothschild v. Grix*, 31 Mich. 150; *Wetherwax v. Paine*, 2 Id. 555.
5. A payor is liable to an indorser who pays the note, whether legally protested or not. *McClatchie v. Durham*, 44 Mich. 435.

Error to Bay. (Cobb, J.) Argued January 23, 1891. Decided May 15, 1891.

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

A. C. Maxwell, for appellant, contended:

1. The note was never protested so as to charge plaintiff as an indorser, and his pretended payment was a voluntary interference with the business of another, and he cannot recover the money so paid from defendant; citing Story, Prom. Notes, § 453; *Ex parte Wackerbath*, 5 Ves. 574; *Thornton v. Wynn*, 12 Wheat. 183.

Hoyt Post, for plaintiff.

GRANT, J. This suit was commenced December 11, 1888, by filing a declaration upon the common counts. Attached to the declaration was a notice that plaintiff would give in evidence a certain promissory note, a copy of which is as follows:

"5,000. BAY CITY, MICH., June 1, 1887.

"One year from date I promise to pay to the order of Mrs. Julia Pickering five thousand dollars, value received, at Sec. Nat. Bank, with interest at 7 per cent., semi-annually.

"J. F. ANTISDEL."

Defendant demanded a bill of particulars. The bill of particulars furnished was as follows:

"To amount paid by plaintiff June 13, 1888, for principal, interest, and protest fees, to take up the note of defendant, of which copy is annexed to the declaration in this case, and upon which plaintiff was liable as an indorser..... $5,188 80

"Interest on said $5,188.80 from June 13, 1888.

"To amount of plaintiff's note to J. M. Buckley, given January 5, 1887, at defendant's request, to take the place of and release defendant's mortgage to said Buckley for that amount, which arrangement was practically in effect, then and there, an advance by plaintiff to defendant of said amount to release said property, and on said note defendant has paid interest to January 5, 1888. Said note bore interest at seven per cent. per annum, and was payable one year after date..... 2,289 58

"Interest at seven per cent. on said $2,289.58 from January 5, 1888.

Total..... $7,478 38

"Add the interest as above specified."

Defendant pleaded the general issue, the plea being filed January 12, 1889. Accompanying the plea was an affidavit of merits to prevent an inquest.

The case was tried before a jury, May 7, 1890. Plaintiff was the only witness sworn in the case, and defendant offered no testimony except by way of cross-examination of plaintiff. At the close of the testimony the court instructed a verdict for plaintiff. The errors assigned, and the facts connected therewith necessary for a determination of the questions involved, will be considered separately.

1. Plaintiff, on direct examination, testified that he gave the note for $2,289 at the request of the defendant, to enable him, the defendant, to take up a second mortgage on the house and lot on Jefferson avenue, so as to enable him, defendant, to give another first mortgage upon them for $5,500, and that he had paid the note. Plaintiff was asked by his attorney the following question:

"And this house and lot upon which the mortgage existed was the personal property of Mr. Antisdel?"

Objection was made to this question as leading. Objection overruled, and exception taken. The error was

harmless. The inquiry was not material to the maintenance of plaintiff's case. Judgment should not be reversed by appellate court for allowing leading questions under such circumstances which work no prejudice to the party.

2. Defendant insists that he was prevented by the ruling of the court from showing that the Buckley note had been paid by applying it on the debt due from Tredway to the defendant of $3,000, and that Tredway had paid the balance of $700 by check to defendant; and, if this be so, the court committed an error which may properly be termed inexcusable. The circuit judge certainly knew that payment would be a complete defense. The following is what occurred upon the trial, and upon which the alleged error is based. Question by defendant's counsel:

"*Q.* About the month of June, 1888, some efforts were made to settle that note, wasn't there; some efforts were made by you to settle that $2,200 note?

"*A.* I don't know. I have no recollection of the dates.

"*Q.* Didn't you figure up the balance due on that note, and make to Mr. Antisdel and deliver or send to him a check for some $700, which, with that note, paid up the indebtedness from you to Antisdel?"

Plaintiff's counsel objected to this as immaterial and incompetent. The court sustained the objection, and defendant excepted. The cross-examination then continued:

"*Q.* Tell us what there was about the settlement of the amount due by that check."

Plaintiff's counsel entered the same objection as before. The court said:

"It strikes me as being so. The mere sending of a

check does not amount to a discharge if the check is returned."

Defendant's counsel then said:

"I wish to show that Mr. Antisdel and Mr. Tredway met; that they had some discussion about this $2,200 note; and that Mr. Tredway made out and sent his check for some $700 to Antisdel, which $700 was the difference between the amount due on the note and the sum of $3,000, which Tredway was owing Antisdel."

It appears that a chancery suit had been commenced by the defendant against Tredway, where it was claimed that defendant was a partner with plaintiff, and claiming a settlement of the partnership accounts. What the condition of that suit was at the time of this trial does not appear, but it does appear that testimony had been taken, and that plaintiff had testified in that suit. It is claimed by the plaintiff that the statement made by the circuit judge in regard to the return of the check was based upon the evidence in the chancery suit, but the record in that suit is not before us, and we cannot determine that question. It is evident that the judge based his statement upon some knowledge that the check was returned. The truth of this statement was not challenged by defendant's counsel, and it is very evident from the statement then made by him that he did not offer to show that the transaction amounted to a settlement or payment of this note, nor that the check was received by defendant in payment or settlement. Defendant had given no notice of set-off, and therefore this testimony was only admissible for the purpose of showing payment or settlement. The defendant was bound by the statement of his counsel, and, it failing to show either payment or settlement, the testimony offered was immaterial.

3. After the commencement of this suit defendant filed

a petition praying for an examination of the books of the firm of Arthur Tredway & Co. In this petition he stated that on the 12th day of April, 1889, in the chancery suit, plaintiff testified that, although the note of $5,000 was paid by a check signed in the name of Arthur Tredway & Co. on the Michigan Savings Bank of Detroit, and that although the money so paid was in the account of such partnership, yet that the same was not partnership money, but was his own individual funds.

Plaintiff, in his answer to this petition, set forth in full the testimony referred to in the petition, which is as follows:

"In answer to questions from Mr. Maxwell, who had put deponent on the stand as his own witness:

"*Q.* How was this $5,000 note held by Mr. Gale paid?

"*A.* That was paid by a note given to the Michigan Savings Bank.

"*Q.* You paid in the money or by check?

"*A.* I paid in by check.

"*Q.* Where was that check drawn?

"*A.* It was drawn on the Michigan Savings Bank.

"*Q.* Was that check drawn by you or by Tredway & Co.?

"*A.* Which?

"*Q.* That check.

"*A.* Tredway & Co. My personal account, as I stated yesterday, has always been kept with the firm's accounts.

"*Q.* Do you keep your account with the Michigan Savings Bank?

"*A.* Yes, sir.

"*On cross-examination by Mr. Post:*

"*Q.* This money that was obtained from the Michigan Savings Bank to pay the $5,000 Gale note, as it is called, about which you have just been questioned, was raised how?

"*A.* I gave them a mortgage on a house and lot on Trumbull avenue.

"*Q.* Your own individual property?

"*A.* My own individual property.

"*Q.* You gave that mortgage to the Michigan Savings Bank to raise the money to pay that note with?

"*A.* Yes, sir.

"*Re-direct:*

"*Q.* And then deposited the money in the bank, thus raised, to the credit of Arthur Tredway & Co., and then paid the note by check?

"*A.* Yes, sir.

"*Q.* You had deposits before in the same account, and also afterwards?

"*A.* I don't exactly understand.

"*Q.* You had deposits in the same bank before to the credit of Arthur Tredway & Co., and have also done so since?

"*A.* Oh, yes.

"*Re-cross:*

"*Q.* Your account with the Michigan Savings Bank has always been in the name of Arthur Tredway & Co., has it not, since you went there?

"*A.* Yes, sir.

"That the testimony as to how he kept his bank-account, as deponent said in one of said answers, 'As I stated yesterday,' is as follows:

"*Q.* Where did you keep your bank-account?

"*A.* At A. Ives & Sons' at that time.

"*Q.* Did you keep more than one account?

"*A.* No, sir.

"*Q.* So that your individual money and the firm money as well were deposited in the name of A. Tredway & Co. after that date?

"*A.* Yes, sir."

Upon the trial of this cause defendant offered to read this affidavit in evidence. This, under objection, was overruled, and defendant excepted. The claim made is that it tended to show that the $5,000 note was paid from partnership funds. I do not think that such an inference is to be drawn from the testimony. Plaintiff was the defendant's own witness in giving that testimony. This $5,000 note was not upon its face a partnership matter. Plaintiff testified that he mortgaged his own prop-

erty, and simply deposited the money received in the name of the partnership, and immediately gave the firm check to pay this note which the defendant had failed to pay, and on which plaintiff was liable as indorser or maker. Defendant offered no other testimony to show that this was paid from partnership funds. I do not think the court would have been justified in admitting this affidavit, and in permitting the jury to find from it that this note was paid with partnership funds.

4. This $5,000 note was indorsed as follows:

"A. R. Antisdel.
"Arthur Tredway.
"Mrs. Julia Pickering, per G. H. Gale.
"Mrs. Julia A. Pickering, by G. H. Gale.
"Indorsement guaranteed. G. H. Gale."

It is claimed that this was not protested so as to charge plaintiff as indorser; that no notice was ever served on or received by plaintiff that would hold him as indorser; and that, therefore, he had no right to pay it. Plaintiff did receive notice of protest, and considered himself liable, and paid the note. Plaintiff was under no legal obligation to the defendant to contest the validity of the protest. Plaintiff indorsed the note before its delivery to the payee. He was, therefore, an original promisor, and liable without protest. *Rothschild v. Grix*, 31 Mich. 150; *Wetherwax v. Paine*, 2 Id. 555. But, even if plaintiff were an indorser, and the notice of protest insufficient to hold him, the defendant cannot raise that question. He is not prejudiced thereby, and is liable to the plaintiff whether the protest was legal or not. *Stanley v. McElrath* (Cal.), 22 Pac. Rep. 673; *McClatchie v. Durham*, 44 Mich. 435.

5. Defendant offered in evidence a statement submitted by plaintiff to defendant in September, 1888, which is as follows:

STATEMENT.

ARTHUR TREDWAY & Co.

LIABILITIES.

Bills payable, open accounts and general liabilities Aug. 1, 1888		$43,070 61
ASSETS.		
Stock on hand as per inventory, Aug. 1, 1888, including furniture, fixtures, &c.	$20,189 39	
Book debts, including cash on hand, in bank, bills receivable, &c.	6,410 57	
Bad and doubtful debts, $8,128.59, say 20 per cent.	1,645 72	28,245 68
Deficit		$14,824 93
Due from J. F. Antisdel, ⅔	$9,883 28⅔	
Due from A. Tredway, ⅓	4,941 64⅓	14,824 93
Due from J. F. Antisdel, ⅔ deficit account of Arthur Tredway & Co.	9,883 28⅓	
Due for amount paid to Mrs. Buckley estate by Arthur Tredway	2,289 58	
Interest on same from Jan. 5, '88, to Aug. 1, '88	91 27	
Due from protested note paid by A. T.	5,188 80	
Interest on same from June 13, '88, to Aug. 1, '88	45 40	
	$17,498 33⅓	

It is claimed by defendant that upon the face of this statement it shows that the payments made upon these notes by plaintiff were considered partnership matters. I do not think this to be the natural inference from the statement. It is upon its face a statement showing the total amount claimed to be due from defendant to plaintiff upon the basis that there was a partnership between them, and in addition the amount of these notes. So far as the partnership statement is concerned, it ends with the item:

"Due from J. F. Antisdel, $\frac{2}{3}$ deficit account of Arthur Tredway & Co., $9,883.28$\frac{2}{3}$."

The other items are these two notes in controversy, with interest thereon, and show them to be due to plaintiff.

A reversal of this case means a decision that the circuit judge, who has occupied that high and responsible position for four years, and has been constantly engaged in the trial of causes, ruled out a defense of payment, settlement, and partnership. This would be a reflection upon his intelligence and knowledge of the law, which the record in this case does not warrant. It is elementary that either would have been a good defense. The learned counsel for defendant must have known that a *bona fide* defense on either of these points would have been received. It is evident that the defense was one of technicalities, and not of merits.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JAMES M. MUNRO v. ANNA L. EDWARDS.[1]

Statute of frauds—Contract for sale of lands—Specific performance.

1. The omission from a memorandum agreement for the sale of real estate, otherwise sufficient, of a provision for possession, is such a common incident of such a sale that it will not invalidate the agreement.
2. Where parties to an agreement have not expressly stipulated

[1] A rehearing was granted in this case, and it was re-argued and submitted July 2, 1891.

that performance at a particular time shall be an essential part of the agreement, and where from the nature and circumstances of the contract and the situation of the parties there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced, a court of equity, so far as performance at the time is concerned, will aid the party in default; citing *Bomier v. Caldwell*, 8 Mich. 463; *Morris v. Hoyt*, 11 Id. 9; *Richmond v. Robinson*, 12 Id. 193; *Converse v. Blumrich*, 14 Id. 109.

3. Courts have refused to enforce contracts which are unequal, where the consideration is inadequate, where the provisions are unreasonable, and where there are indications of overreaching or unfairness; citing *McMurtrie v. Bennette*, Har. Ch. 124; *Hawley v. Sheldon*, Id. 420; *Chambers v. Livermore*, 15 Mich. 381; *Maynard v. Brown*, 41 Id. 298; *McDonald v. Bewick*, 51 Id. 80; *Chapman v. Morgan*, 55 Id. 125; *Wardell v. Williams*, 62 Id. 50; *Hall v. Loomis*, 63 Id. 709.

4. An agreement, signed by the parties, by which one agrees to sell to the other a parcel of land fronting on Warren avenue, and being on the south-east corner of Crawford street, and having a frontage of 90 feet on Warren avenue, and running to the alley in the rear, and to furnish an abstract and a good and sufficient warranty deed, all for the sum of $5,150, payable $100 down, and $300 as soon as the abstract is completed, or within 14 days from the date of the contract, and $1,500 by the assumption by the vendee of a mortgage for that sum on the premises, which he agrees to assume, and the balance within six years, interest to be at six per cent. per annum, payable semi-annually, but containing no *express* agreement on the part of the vendee to pay or to buy, contains all of the essential elements of a contract, and its specific performance will be enforced in equity.

Appeal from Wayne. (Hosmer, J.) Argued February 12 and 13, 1891. Decided May 15, 1891.

Bill for specific performance of contract for sale of land. Complainant appeals. Decree reversed, and one entered in this Court for complainant. The facts are stated in the opinion.

Haug & Yerkes, for complainant.

Alex. D. Fowler, for defendant, contended:

1. It is not a matter of course to grant specific performance of a contract, but it is an exceptional and extraordinary remedy, as a party who complains of a breach of contract is supposed to have his remedy at law in the recovery of damages; citing *McMurtrie v. Bennette*, Har. Ch. 124; *Chambers v. Livermore*, 15 Mich. 388; *Buck v. Smith*, 29 Id. 166; *Rust v. Conrad*, 47 Id. 454; *Chapman v. Morgan*, 55 Id. 125; *Hall v. Loomis*, 63 Id. 711.
2. The contract must be complete and mutual, and the tie reciprocal, or a court of equity will not enforce performance; citing above cases, and *Hawley v. Sheldon*, Har. Ch. 420; *Maynard v. Brown*, 41 Mich. 298; *McDonald v. Bewick*, 51 Id. 80; *Bourget v. Munroe*, 58 Id. 565; *Wardell v. Williams*, 62 Id. 50; *Harrington v. Holcomb*, 75 Id. 540.
3. The memorandum must show the whole terms of the contract, those that bind the purchaser as well as those that bind the vendor, viz., that he is to give a mortgage, etc.; citing *Hall v. Soule*, 11 Mich. 497; *Abell v. Munson*, 18 Id. 306; *Palmer v. Rolling Mill Co.*, 32 Id. 274; *McEwan v. Ortman*, 34 Id. 325; *Gault v. Stormont*, 51 Id. 638; *Wilkinson v. Heavenrich*, 58 Id. 577; *Wardell v. Williams*, 62 Id. 50; *Webster v. Brown*, 67 Id. 331; *Messmore v. Cunningham*, 78 Id. 623.

McGRATH, J. This is a bill to enforce specific performance of the following contract:

"Det., Dec. 7, 1889.

"Memorandum of agreement made this day between Mrs. Anna L. Edwards, of the first part, and Jas. M. Munro, party of the second part, witnesseth:

"That the party of the first part agrees to sell to the party of the second part that parcel of land fronting on Warren avenue, corner of Crawford St., being on the south-east corner of said streets. The party of the first part agrees to furnish an abstract and a good and sufficient warranty deed, all for the sum of fifty-one hundred and fifty dollars ($5,150); one hundred to be paid down, and three hundred as soon as the abstract is completed, or within fourteen days from the above date.

"Party of the second part agrees to assume the mortgage of $1,500 that is now on the place. The interest to be at six per cent. per annum, payable semi-annually. Balance to be paid within six years. Said lot has a frontage of ninety feet on Warren avenue, and runs to the

alley in the rear. The $1,500 mortgage to be part of the $5,150.

"A. L. EDWARDS.
"JAS. M. MUNRO."

The complainant paid the $100 which was to be paid down at the time of the execution of the contract. Complainant insisted that, after the execution of the memorandum agreement, he called upon defendant a number of times with reference to the abstract; that within three or four days after December 7 she gave him an imperfect and partial abstract, and that afterwards, about December 13, she gave him an order upon the Michigan Savings Bank, which held the mortgage upon the property, upon which he obtained the abstract, and took it to Burton's abstract office, agreeably to an understanding between the parties, to have it brought down; that Burton alleged that the abstract was imperfect, and refused to bring it down to date; that he reported this fact to defendant, and she agreed to attend to it; that she neglected to do so; that he tried a number of times to see her, but failed, and on January 3 she refused to do anything further in the matter.

The defendant claimed that at the time of the execution of the agreement she told complainant the bank had the abstract; that complainant said that any abstract upon which a bank would loan money would be good enough for him; that she gave him an order for the abstract, and he agreed to have it brought down to date; and that she did not see complainant from the time she gave this order until January 3.

The defendant insists that complainant did not pay the $300 within the 14 days, and was therefore in default, and cannot compel performance. It is quite clear that under the agreement the defendant was to furnish the

abstract, and the $300 was not to be paid until the abstract was furnished and completed. The completion of the abstract was therefore a condition precedent to the payment of the $300. But 12 days elapsed after the 14 days had expired when the defendant undertook to repudiate the agreement.

Even though defendant's view as to what took place regarding the abstract be adopted as the correct one, we do not think that the defendant was entitled to repudiate her agreement. It has been held that where parties to an agreement have not expressly stipulated that performance at a particular time shall be an essential part of the agreement, and where from the nature and circumstances of the contract and the situation of the parties there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced, a court of equity, so far as performance at the time is concerned, will aid the party in default. *Bomier v. Caldwell,* 8 Mich. 463; *Morris v. Hoyt,* 11 Id. 9; *Richmond v. Robinson,* 12 Id. 193; *Converse v. Blumrich,* 14 Id. 109.

Defendant contended that the agreement is incomplete, and lacks mutuality; that complainant does not agree to buy the land, nor to pay the $300, nor to pay the balance, nor to secure the payment of the same by mortgage. The agreement here is signed by both parties, and while the party of the second part does not in express terms agree to pay or to buy, he does by implication agree to do both. The property is described with sufficient certainty, as is the incumbrance thereon. The purchase price is fixed with certainty. The party of the second part agrees to assume the mortgage as part of the purchase price, and the time for payment of the balance, the rate of interest, and the time for the payment thereof, is certain. It is true that no mortgage back is provided

for, but the complainant testifies that none was intended to be given, but the entire matter was to rest until the purchase price was fully paid, while the defendant insists that the deed was to pass, and a mortgage back was to be given. In either case the defendant is equally secure.

Courts have refused to enforce contracts which are unequal, where the consideration is inadequate, where the provisions are unreasonable, where there are indications of overreaching or unfairness.

In *McMurtrie v. Bennette*, Har. Ch. 124, the contract rested entirely in parol, and but four dollars was paid.

In *Hawley v. Sheldon*, Id 420, a proposition by letter had been made by defendant, but there was no acceptance by complainant.

In *Chambers v. Livermore*, 15 Mich. 381, defendants (who were old people) contracted with Chambers, August 12, 1865, to sell him their farm for $11,000, $1,000 to be paid before November 1, 1865, and balance in 10 years. The contract was signed by Chambers, but did not contain any agreement on his part to buy the land or pay the purchase price, or give any personal obligation with the mortgage.

In *Hall v. Loomis*, 63 Mich. 709, the contract on its face was for an exchange of properties of unequal value, upon which agreement was indorsed the following: "Received on the within agreement, $100." As a matter of fact, Mrs. Loomis was to receive $500 in cash in addition to the $100 already paid.

In *Maynard v. Brown*, 41 Mich. 298, the contract was so drawn that it was optional with complainant to retain the property or convey it.

In *McDonald v. Bewick*, 51 Mich. 80, the instrument sought to be enforced was a mere proposition to contract.

In *Chapman v. Morgan*, 55 Mich. 125, the complainant

paid $10 for the refusal until a given date of certain land, and the date expired before he exercised his option.

In *Wardell v. Williams*, 62 Mich. 50, the instrument sought to be enforced was signed by defendant only, and was a mere offer, which the Court held was not accepted.

In all of these cases the Court refused to enforce the contract, but there is no similarity between that class of cases, or any one of the class, and the case presented here for consideration. The instrument here presented contains all the essential elements of a contract. It was entered into by both parties, after a week's deliberation. There is no claim of undue advantage, or unfairness, or of inadequacy of consideration. There is nothing unusual about its terms, and nothing inequitable in its enforcement. The memorandum agreement contains no provision for possession, but this is such a common incident of the sale of real estate that its omission will not invalidate the agreement. The right to possession follows the payment of the $300.

The decree below will be reversed, and a decree entered here in accordance herewith, with costs of both courts to complainant.

MORSE and GRANT, JJ., concurred with MCGRATH, J.

CHAMPLIN, C. J. (*dissenting*). The contract which is sought to be specifically enforced by a decree of the court of chancery in this case, is one for the sale of lands, which the statute requires to be in writing, or some memorandum or agreement thereof made in writing, and signed by the person to be charged thereby. The rule is well settled in this State that such agreements so signed must contain all the essential elements of the contract, and that none of the essential elements of the agreement between the parties must be left to be supplied by parol

evidence. *Hall v. Soule,* 11 Mich. 494; *James v. Muir,* 33 Id. 223; *McElroy v. Buck,* 35 Id. 434; *Gault v. Stormont,* 51 Id. 636. The contract set out in the bill of complaint describes with sufficient particularity the property to be conveyed or sold and the consideration to be paid, but it does not contain the agreement relative to the time and terms of payment, nor the time when the deed therefor is to be executed, nor whether or not any security was to be executed upon the premises to secure the payment of the unpaid purchase money, nor in whose possession the premises are to remain during the six years, or until the balance of the puchase money is paid by the purchaser. The contract, as executed, certainly does not give to the purchaser any right of possession of the premises. Is it to be inferred that the purchaser, by paying the sum of $100 down and $300 when the abstract was completed and assuming the payment of a 1,500-dollar mortgage, was to have the possession of the premises? I think not, for the reason that there is no agreement on the part of the seller to part with the possession. It was held by this Court in *Druse v. Wheeler,* 22 Mich. 439, that—

"There is no right of possession secured under a contract for the sale or exchange of land, before conveyance, unless directly provided for. In many cases such provision is made, but it is not implied from the agreement to sell." See *Moyer v. Scott,* 30 Mich. 345; *Dwight v. Cutler,* 3 Id. 566; *Hogsett v. Ellis,* 17 Id. 351.

The agreement being silent as to possession, the defendant would be entitled thereto, and also entitled to the rents of the premises, and would necessarily be obliged to pay the taxes.

There is another point in the contract upon which the minds of the parties have not met, and that is as to the

time when the deed of the premises shall be executed, and also as to when the balance of $3,250 shall be paid. The contract reads: "The balance to be paid within six years," leaving no definite time within six years when the contract must be performed on the part of Munro. We may suppose that the purchaser has paid his $400 within the 14 days mentioned. Then, according to this contract, he would have a further margin of six years within which to comply with the other conditions of the agreement, without security, leaving the premises in the hands of the vendor to be kept in repair, to be looked after, to pay the taxes, and to run the risk of a variation as to the value of the property, and depriving her of the opportunity of making any advantageous sales in the mean time.

I think the contract falls within that line of cases which hold that it is too imperfect in its terms to be specifically performed.

LONG, J., did not sit.

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FRANCIS M. ATWOOD AND ELLEN ATWOOD v. GEORGE E. CANRIKE AND EUNICE CANRIKE.

Boundaries—Evidence—Deed—Surveys—Adverse possession.

1. An objection to a deed on the ground that it purports to convey 42 acres of land, described by metes and bounds, being more than the grantor is shown to have owned at the time of its execution, is untenable, it being admitted that the grantor then owned 40 acres of the land.
2. Where in describing land reference is had to a highway as one of the boundaries, the presumption is that the description

refers to the highway as it existed upon the ground at the time the deed was executed, and not to the line as shown by the record of its survey in the proper office.

3. In such a case the record is admissible, but becomes immaterial in the absence of proof that the road had been opened or was in use on the recorded line at the time the deed was made, or proof that no such highway as is referred to in the deed was then open or in use.

4. It is proper for a surveyor who testifies to running out lines for the purpose of settling a disputed boundary to present a plat of his survey, which is admissible in evidence, and, if inaccurate, such fact may be shown by the opposite party, and the question of its correctness is for the jury.

5. Adverse possession is evidenced by the manner of the holding of the occupant, and not by the opinion of the neighborhood.

So *held*, where a boundary line was established by the action of one of the land-owners in erecting a fence where he claimed it should run, which action was concurred in by the other, and adverse possession was thereafter maintained for the statutory period in reliance upon such action, which was sought to be defeated by evidence that it was a matter of common repute in the neighborhood that the fence was not on the true line; the admission of which evidence is held to have been error.

Error to Branch. (Buck, J., presiding.) Argued April 15, 1891. Decided May 15, 1891.

Ejectment. Defendants bring error. Reversed. The facts are stated in the opinion.

H. H. Barlow, for appellants, contended:

1. The record of a road cannot be used to establish the existence of a road itself without prior evidence of its use; citing *Merrill v. Kalamazoo*, 35 Mich. 211.

2. Evidence that it was generally reputed in the neighborhood that the line was in dispute was inadmissible; citing 1 Whart. Ev. § 185 *et seq.*

Henry C. Loveridge (*Charles N. Legg*, of counsel), for plaintiffs, contended:

1. In support of admission of deed from Caroline Lusk of 42 acres, etc., counsel cited *Covert v. Morrison*, 49 Mich. 133.

2. "Maps and plats are admissible, when referred to in deeds, as original evidence, and they are also admissible to exhibit the present visible condition of the premises in controversy, and to explain, illustrate, and apply testimony. In actions of ejectment, and other actions relating to real estate, and in many other cases, maps are made for use at the trial, and are constantly used at the circuit, and, in most cases, are quite useful, if not indispensable, to enable courts and juries to comprehend readily the questions in dispute. In such cases, when proved to be correct by the surveyor or engineer by whom they are made, they are received in evidence, in connection with the testimony of witnesses, substantially as part of their testimony, and are clearly admissible as explanatory of such testimony. They are received for the consideration of the jury, so far as they are shown to be correct, in connection with other evidence, and to enable them to understand and apply such evidence, and not as independent evidence;" citing *Curtiss v. Ayrault*, 3 Hun, 490; *Johnston v. Jones*, 1 Black, 216.

3. In support of claim that reputation is admissible to prove private boundaries, counsel cited *Kinney v. Farnsworth*, 17 Conn. 355, 356; *Nieman v. Ward*, 1 Watts & S. 68; *Shepherd v. Thompson*, 4 N. H. 213; *Great Falls Co. v. Worster*, 15 Id. 412; *Smith v. Powers*, Id. 546, 564; *Jones v. Pashby*, 62 Mich. 622.

MORSE, J. This is an action of ejectment. The premises of the parties adjoin, and the boundary line between their respective lands is the dispute.

George Strong and wife were the common grantors of the premises owned by plaintiffs and defendants. The first deed was from Strong and wife to Caroline Lusk, dated November 16, 1844, conveying a piece of land situated in the township of Union, in Branch county, Mich., and bounded on the north by the county line between Branch and Calhoun counties, on the west by the west line of Union township, on the south by the center of the State road leading westerly from Union City, and on the east "by the north and south line far enough east to include 40 acres of land within said boundary; said land being the north-west quarter of section 6." This N.

W. ¼ was a fractional one, and the trouble has arisen from a dispute as to the location of the State road.

The deed to Caroline Lusk only called for 40 acres, but in 1865 she deeded to one John D. Merritt, bounding the premises conveyed as follows:

"Commencing at center of *highway* running from Union City to Sherwood, where it crosses the west line of Union township; running thence north, along the west line of said township, to the north line of the same; thence east, along the north line of said township, far enough to make 42 acres; thence south to the center of the highway; thence west, along the center of said highway, to the place of beginning."

Merritt conveyed the same description to Albert Losey, March 30, 1867; and Losey deeded to Elias Atwood, August 12, 1871, describing the premises as that part of the W. ½ of the N. W. ¼ of section 6, township of Union, lying north of the highway leading from Union City to Sherwood. The same description was conveyed by Elias Atwood to Francis M. Atwood, August 12, 1881. At the time Strong deeded to Caroline Lusk, he owned the whole of the N. W. ¼ of section 6, and Atwood now also owns the S. ½ of said quarter.

Defendants claimed under a deed from Strong dated November 14, 1849, conveying to Charles Wilkes the N. E. ¼ of the N. W. ¼ of section 6 (Union township), containing 40 acres of land, more or less, according to the United States survey. Wilkes deeded to Corbin, May 14, 1857; Corbin to Gould, August 3, 1874; Gould to McCreery, August 28, 1874; McCreery to George Canrike, May 2, 1889.

The defendants also claim the strip of land in controversy by adverse possession for over 20 years.

The deed from Caroline Lusk to Merritt was objected to on the ground that it purported to convey more land

than was shown in the grantor of such deed at the time it was made. This objection was not good. The deed, at the least, was evidence to show the conveyance of 40 acres, to which it is admitted Mrs. Lusk had good title at the time the deed was made.

The plaintiffs, to maintain their claim, offered the record of a State road known as the "Washtenaw Territorial Road," purporting to have been laid out and surveyed in June, 1834, and gave testimony tending to show that, taking the center line of this road, as surveyed and recorded, as the south boundary line of the lands described in the deed from Strong to Lusk, the boundary line between themselves and the defendant Canrike would be as claimed by them, and they would be entitled to recover. There was no testimony given showing that the line of the road as recorded was ever opened or traveled, and the defendants' counsel objected to the admission of the record upon this ground. It was also conceded on the trial that if the State road, when the deed from Strong to Lusk was made, ran where it now runs, the plaintiffs have their full 40 acres of land, and were not entitled to recover.

I am of the opinion that this record of the State road was admissible. But without proof that the line of the road, as shown by the record, had been opened or used at the time the deed was made, or proof that no road called a "State road" had been opened or used, from Union City westerly across this quarter section, the record would not be material, as the presumption would be, in case any road called a "State road" running from Union City westerly across the land was in use, that the description in the deed referred to the highway as it existed upon the ground, and not to the line in the record in the clerk's office. The testimony upon this matter was

not very certain or satisfactory, but we think there was enough to warrant the admission and retention of this record in the case.

The plat made by one Bennett, showing, among other things, the present location of the highway, and where it would have been located provided it had run upon the surveyed line, shown by the record in the clerk's office, was admissible in evidence. It is claimed that the plat was not accurate, and that imaginary lines were run upon it, and the jury were misled by it. But it was proper for Bennett, who was a surveyor, to give evidence that he had run out these lines, and to present a plat of his survey. If inaccurate, such inaccuracy could be shown by the defense, and the question of its correctness was for the jury.

The testimony of the defendant tended most strongly to show that he and his grantors had been in adverse and hostile possession of the disputed strip of land for over 15 years. In 1874, when Elias Atwood owned the land upon the west and McCreery upon the east, a survey was had, and Atwood himself built the fence where he wanted the line, not being satisfied with the line shown by such survey. Such survey brought the line nearly on the previous line between the lands before Elias Atwood purchased lands now owned by plaintiffs. This line, so established by Elias Atwood, has remained the division line between the premises without change thereafter. An orchard was set out upon the lands owned now by defendants, in 1870 or 1871, by Corbin, whose wife then owned them. The boundary line claimed by plaintiffs would take in two or three rows of these apple trees.

It is difficult to perceive how the jury, under the whole

evidence, could find against the claim of adverse possession upon the part of the defendants, as the charge of the court was a very fair one, and stated clearly the law as to adverse possession, unless they were influenced by testimony admitted, upon the cross-examination of defendants' witnesses, against objection, that it was a matter of common repute in the neighborhood that the fence was not on the true line. This testimony was erroneously admitted. Whether the fence was on the true line or not could make no difference in the right of the defendants to hold this strip by adverse possession.

It would appear from all the testimony that the line settled upon by Elias Atwood was substantially the old line existing when Corbin set out the orchard, in 1870 or 1871. If this line, so settled by Elias Atwood where he wanted it, with the concurrence of McCreery, as McCreery testifies, has ever since been maintained by McCreery and his grantees under a claim that it was the line, and the possession of the land under such claim has been open, notorious, continuous, hostile, and adverse, as against the plaintiffs and their grantors, the fact that it was a matter of common repute in the neighborhood that the fence was not on the true line was entirely immaterial. The boundary line in such a case is not established by common repute, but by the action of the land-owners between whose lands the boundary is sought to be established. Nor would this common repute have any bearing upon the character of the occupancy of the parties, as affecting the question of adverse possession. The adverse possession is evidenced by the manner of the holding of the occupant, and not by the opinion of the neighborhood.

The judgment is reversed, and a new trial granted, with costs of this Court to the defendants.

McGRATH, LONG, and GRANT, JJ., concurred with MORSE, J.

CHAMPLIN, C. J. I concur in the result, upon the ground that the line was agreed upon between the owners.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY v. CHARLES H. McCANN ET AL.

Fixtures—Landlord and tenant—Lien for rent—Execution sale.

Complainant, as lessor of a mining lease, filed a bill to enjoin the removal by the defendants of an engine and boiler and their attachments, purchased by them at a sale under an execution issued on a judgment against the assignee of the lessee, from the engine and boiler house, in which the property was set in masonry and firmly attached to the land, claiming that it became a fixture by such annexation, and passed to complainant on the termination of the lease. The lease provided for the surrender of the leased premises at the expiration of the term or other termination of the lease, "with all the stopes, supports, shafts, and other improvements and erections that may be thereon, engines, boilers, machinery, tools, implements, and other movable personal chattels excepted," and gave the lessor a lien upon all ores that should be mined, and all improvements and fixtures, and upon all machinery, implements, and personal chattels of the lessee that should be on the premises, as security for rent, etc., which lien might be enforced against such property in like manner as liens conferred by chattel mortgage. And in affirming a decree dismissing complainant's bill the Court hold:

a—The parties having agreed to treat the engine, boiler, and their attachments as personal property, as shown by the lease, the manner of their annexation to the soil or to the buildings erected thereon becomes immaterial; citing *Manwaring v. Jenison*, 61 Mich. 117; *Booth v. Oliver*, 67 Id. 664.

b—No steps having been taken to reduce the property to possession prior to the levy, the lien, being unrecorded, was worthless as against the defendants; the case being ruled by *Booth v. Oliver*, 67 Mich. 664.

Appeal from Gogebic. (Daboll, J., presiding.) Argued April 23, 1891. Decided May 15, 1891.

Bill to restrain the removal of certain mining machinery attached to leased premises. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Ball & Hanscom, for complainant.

Hayden & Young, for defendants.

MORSE, J. The complainant is the owner in fee of a certain parcel of land in Gogebic county, upon which is a mining location, containing buildings, machinery, etc., for the purpose of mining iron ore. This mine was formerly known as the "First National Iron Mine," and was equipped and worked as such.

The bill of complaint alleged that, among the buildings and fixtures on said mining location, and attached to the land, and a part thereof, and belonging to complainant, was an engine and boiler house, containing a boiler and engine and hoisting machinery, set in masonry and firmly attached to the land, which is a part of the mining plant belonging to complainant, and necessary for use in operating said mine; that the defendants were making preparations to enter upon the premises, to destroy the mason-work and other fastenings by which said machinery is fastened to the land, and threatened to detach said machinery from the land, and remove the same away by force. The bill prayed for an injunction to restrain such threatened action.

The defendants answered, practically admitting the

ownership of the land to be in complainant, but claiming that they were the owners of the machinery, and had a right to remove it.

Upon pleadings and proofs the complainant's bill was dismissed in the court below.

The proofs show that on the 20th day of July, 1886, the complainant executed a mining lease of the premises to one John E. Burton, "for the uses and purposes of exploring for, mining, taking out, and removing therefrom the merchantable iron ores which are or may be found therein," and giving the lessee the right to erect such buildings, machinery, and other improvements as should be necessary or convenient for the purposes aforesaid. The lease ran for 20 years from July 20, 1886, unless sooner terminated, and was upon the condition that payment should be made quarterly for all iron ore taken from said land by the lessee or his assignees at a rate depending upon the market value, or upon the price at which such ore should be sold. Such royalty was to be paid on the 20th of the months of January, April, July, and October for the ore removed during the three calendar months next preceding. The lessee also covenanted to pay as royalty on ores removed, or rent of premises, at least $9,000 in each and every year during the continuance of such lease. It provided for forfeiture and re-entry, "without further notice or demand," in case of breach of any covenants contained in the lease, and a continuance of such breach for 60 days.

August 20, 1886, Burton assigned said lease, together with all his rights thereunder, to the First National Iron Mining Company. This company took possession of the mine and the property connected therewith, and commenced mining, in the fall of 1886, soon after the assignment. While this company was in possession, and on the 8th day of February, 1888, attachments against

the First National Iron Mining Company were levied on the property in question in this suit as personal property. Judgments were obtained in these attachment suits, and the property, which had remained after levy of the attachments in the hands of the sheriff, was sold on execution to the defendants Bingham and Perrin, August 17, 1888. The defendants had commenced the removal of the property when this bill was filed, and were really in possession of it.

The defendants' claim that this property is personalty, and not realty, is based upon the following clauses in the lease:

1. "That at the end of said term, or other termination of this lease or demise, it will peaceably surrender said premises to said party of the first part, or those having its estate therein, with all the stopes, supports, shafts, and other improvements and erections that may be thereon, *engines, boilers, machinery, tools, implements, and other movable personal chattels excepted,* in good order and condition."

2. In providing for a lien, the lease stipulates that the party of the first part "shall at all times have, possess, and hold a lien upon all ores that shall be mined, and all improvements and fixtures that shall be on said premises, and upon all machinery, implements, and personal chattels of said party of the second part that shall be on said premises, as security for the payment of the rents, royalties, and taxes above mentioned, and any moneys that may be due or owing under this indenture."

We think this claim is correct. We are satisfied from these clauses and the lease, taken as a whole, that the intention of the parties to this lease was to make the engine and boiler and their attachments personal property. This being so, under repeated rulings of this Court it becomes entirely immaterial how they were fastened to the soil or to buildings, and the argument, based upon the manner of such fastening, in this case, can have no weight in determining their character as

personalty or realty. See *Manwaring v. Jenison*, 61 Mich. 117, and cases there cited at page 135.

The complainant also claims that the defendants have no title to or right to remove this property, for the following other reasons:

"1. Because it is shown that before the levy of the execution under which the defendants claim, or even the alleged levy of the attachment, the First National Iron Mining Company had sold the property to the Bessemer Consolidated Iron Company.

"2. Because, if the title to the property had not passed from the First National Iron Mining Company by such sale, it was tenant's fixtures, and movable only during the tenancy, and the tenancy had been terminated long before the attempted removal.

"3. Fixtures forming part of a mine belong to the estate, whether freehold or leasehold, and cannot be levied on, severed, and sold separately from the estate.

"4. Complainant had a lien on the fixtures for a large amount."

In answer to these reasons it may be said:

First. It is true that before the levying of the attachments the First National Iron Mining Company had conveyed, or undertook to convey, its interest in the mine, and the personal property attached, to the Bessemer Consolidated Iron Company, but it had not yet parted with its possession. The complainant, having no title to the property, can hardly ask for an injunction against its removal, when it has no privity with the Bessemer Company, or any rights growing out of the conveyance to that company. The defendants may have no title to the property as against the Bessemer Company, but the complainant is in no situation to litigate that matter in this suit, and has no concern with it.

Second. This property cannot be considered as trade fixtures, as by the express agreement of the parties it

was made personal property, with no agreement, either express or implied, that it should in any possible event be treated as trade fixtures. Being personal property, and treated in the lease the same as "other movable personal chattels," it never ceased to be anything but personalty, and its attachment to the buildings by masonry did not change its character. *Booth v. Oliver*, 67 Mich. 664, 669. It may here be noted that the same distinction between "improvements" and "machinery" is found in this lease as in the one considered in *Booth v. Oliver*.

This also meets the *third* claim of complainant.

Fourth. The claim under the lien in this case also falls within the ruling of this Court in *Booth v. Oliver*. There had been no steps taken before the levy to reduce this property to the possession of the complainant. The lien, although providing that it might be "enforced against such property in like manner as liens conferred by chattel mortgage are or may be enforced under the laws of the State of Michigan, or in any other suitable and lawful manner," was worthless, as against these defendants, for the reason that it was not recorded as a chattel mortgage, or in the proper place for the record of such an instrument. *Booth v. Oliver*, 67 Mich. 669.

The decree is affirmed, with costs.

The other Justices concurred.

William Gainor v. The Cheboygan River Boom Company.

Contract—Logs and logging—Damages.

1. Under a log-running contract between a boom company and a contractor, it was the duty of the company to run the logs down to the mouth of a river, emptying into a lake, where they were confined by means of a "trip boom," so called, and were boomed out by the contractor by running a "bag boom," so called, out into the lake, and opening the trip boom, and running out enough logs to fill the bag boom, which was tied up and towed across the lake, another bag boom being left at the mouth of the river to receive the logs from the trip boom. The contractor claimed that under the term "booming out" all he had to do was to swing the bag boom, open the trip boom, and keep men at the gap to run the logs out of the trip boom and pack them into the bag boom; while the boom company contended that it was his duty to go up the river far enough to get the logs required to fill the bag boom, and sought to recoup damages for his failure so to do. The meaning of the term "booming out," as used in the contract, was left for the jury to determine, who found in favor of the contractor, which finding is held to eliminate that claim of damage from the case, under the testimony.
2. Where a boom of logs broke and the logs were scattered in a lake in the fall of the year, and on the refusal of the contractor to pick them up and deliver them to the boom company it gathered up a small portion of the logs at an expense of 91 cents per thousand feet above the contract price for their towing and delivery, such excessive cost being caused by the lateness of the season and the inclemency of the weather, and the boom company fails to show any damage growing out of the delay in the delivery of the remainder of the logs, which was made by the contractor the following spring, its action in attempting to gather up the logs cannot be justified, nor can it recoup, as damages, the expense thereby incurred in a suit by the contractor upon the contract.

Error to Cheboygan. (Ramsdell, J.) Argued April 24, 1891. Decided May 15, 1891.

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

McKnight, Humphrey & Grant, for appellant, contended:

1. Parties in making a contract are presumed to contract with reference to the situation of the parties and the subject-matter, and in construing it these should be taken into account; citing *Mills v. Spencer,* 3 Mich. 127; *Spaulding v. Coon,* 50 Id. 622.
2. Upon plaintiff's neglect and refusal to pick up the logs that fall, it was unnecessary for defendant to wait longer for him to perform his contract, and particularly was this the case when logs were being injured by stones on the lake pounding into them, as shown by the testimony; citing *Hudson v. Feige,* 58 Mich. 151.
3. The duty to pick up the logs promptly was not cast upon plaintiff by law, but by his contract, and the lateness of the season or inclemency of the weather were not guarded against thereby; citing *Manufacturing Co. v. Dole,* 43 Mich. 372.

Oscar Adams (*George E. Frost,* of counsel), for plaintiff, contended:

1. The parties contracted in view of the exigencies that were liable to arise, and the plaintiff would be excused by any circumstances, arising without his fault or negligence, rendering performance impossible or grossly unreasonable; citing *Clark v. Moore,* 3 Mich. 55; *Cuddy v. Major,* 12 Id. 368; *Railroad Co. v. Burrows,* 33 Id. 6; *Manufacturing Co. v. Dole,* 43 Id. 370; *Wolfe v. Howes,* 20 N. Y. 197; *Dexter v. Norton,* 47 Id. 62.

MORSE, J. The plaintiff sued the defendant in the circuit court for Cheboygan county in *assumpsit* to recover an amount claimed to be due him for "booming out" of the Upper Black river, towing across Black lake, and driving down the Lower Black river, and delivering to defendant at a certain point, the logs in what was known as the "Upper Black River Drive." The work was performed under a written contract, and the plaintiff claimed.

that the balance due him was $686.84 and interest. He recovered judgment for $573.79.

The defendant claimed to recoup damages for failure to perform the contract in three particulars, stated in defendant's brief, in short, as follows:

"1. That under the contract plaintiff was to boom the logs out of the Upper Black river, which, as alleged in the notice, he wholly neglected, omitted, and refused to do, and claims damage therefor.

"2. That plaintiff by his agreement contracted to deliver all the logs to the defendant in the season of 1888, but that he negligently and carelessly allowed a boom of logs to be broken up on Black lake in October, 1888, and neglected, omitted, and entirely refused to pick them up during the season of 1888, and claims damages therefor.

"3. That plaintiff by his agreement was to deliver the logs at the McDonald bridge as fast as practicable during the season of 1888, but that he failed to do so, claims damages therefor, and that under its notice of recoupment it should have judgment in its favor."

The contract between the parties was as follows:

"This memorandum of agreement made and entered into this 27th day of March, A. D. 1888, by and between William Gainor, of Cheboygan county, Mich., party of the first part, and the Cheboygan River Boom Company, of the same place, parties of the second part, witnesseth:

"Said party of the first part, in consideration of the prices per thousand feet as hereinafter stated to him to be paid by said second parties as hereinafter expressed, hereby agrees to boom out of the Upper Black river, tow across Black lake, and run, drive, and deliver to below the McDonald bridge, in Lower Black river, all of the saw-logs or timber which said second parties shall have coming out of the Upper Black river; also to receive logs or timber at any other points on Black lake, tow the same to Lower Black river and run, drive, and deliver to below the aforesaid McDonald bridge, which said Boom Company may have to handle during the season of 1888.

"The party of the first part agrees to receive the logs

at the several places above mentioned as soon as the parties of the second part are ready to deliver them, and to prosecute the work and deliver the logs to below the McDonald bridge aforesaid as fast as practicable, to the end that the logs shall all be delivered below the aforesaid McDonald bridge as early in the summer of 1888 as the ordinary circumstances will admit. The party of the first part agrees to do said work in a good and workmanlike manner, and to promptly pick up and collect all logs which may go astray or be scattered on Black lake, to the end that all logs received from said second parties by said first party shall be by him delivered below the McDonald bridge, in Lower Black river.

"The price to be paid to the party of the first part by the parties of the second part per thousand feet board measure, for the booming out of Upper Black river, towing across Black lake, and running and delivering below the McDonald bridge as aforesaid, shall be as follows: For booming out of Upper Black river, towing across Black lake, and delivering below the McDonald bridge, in Lower Black river, all logs or timber coming out of the Upper Black river, 9 cents per thousand; from the Rainy River and head of Black lake to below the aforesaid bridge, 10 cents per thousand; from all other points on Black lake to below the aforesaid bridge, 9 cents per thousand.

"The parties of the second part agree to furnish booms and chains for towing across Black lake, and at all other points (except the logs coming out of Upper Black river) the logs shall be delivered to first party in booms.

"The party of the first part shall receive pay at the schedule rates per thousand for such quantity as the said Boom Company shall agree with the several owners of the logs, payments to be made from time to time as the work progresses, not to exceed seventy-five per cent. of the amount of work estimated to be done, and final payment to be made when the work is all completed, and the amount of logs handled ascertained.

"It is understood that the party of the first part shall tow the empty booms to the several points where the logs are received, at his own expense, and that the parties of the second part shall use due diligence in assorting the logs at the assorting gap in Lower Black river, but shall not be required to receive the logs faster than they can assort them."

In relation to the first claim of recoupment, the meaning of the term "booming out" was left to the jury to determine from the evidence introduced upon both sides. The logs in the Upper Black river were prevented from running out into the lake and scattering by means of a boom at the mouth of the river, called a "trip boom." It was virtually conceded upon the trial that it was the duty of defendant, whose men were driving the river above, to run the logs down into this trip boom. The plaintiff "boomed out" the logs by placing what is called a "bag boom" from the mouth of the river out into the lake. He would then open the trip boom, and run the logs out of it until the bag boom was filled. Then the bag boom would be tied, inclosing the logs thus run out of the trip boom, and towed across the lake to the head of the Lower Black river, and then emptied into that stream. While one bag boom was being towed across and emptied, another would be left at the mouth of the Upper river to receive the logs from the trip boom.

The plaintiff claimed that under the term "booming out" all he had to do was to swing the bag boom, open the trip boom, and keep men there, at the gap of the trip boom, to run the logs out of that boom and pack them in the bag boom. The defendant claimed that it was also his duty to go up the Upper river far enough to get the logs required to fill the bag boom, and that by his failure to do this he was responsible to it for the labor it was obliged to expend in doing such work at different times. The defendant gave evidence tending to show that plaintiff refused to do the work of "booming out," as defined and contended for by defendant, and neglected to put on sufficient men to do this work at the trip boom, and defendant was obliged to do the work at times, which work was worth from two to three cents per

thousand feet. The defendant claimed $524.70 for this work.

It is evident that the jury found with the plaintiff upon this contention as to the meaning of the term "booming out" as used in the contract, and this claim of damage is out of the case, and with it go also some of the allegations of error.

Under the second head it is admitted that about the 20th day of October, 1888, a boom of several hundred thousand feet of logs broke while at the mouth of the Upper river. There was a conflict in the evidence as to who was responsible for the breaking of this boom. The plaintiff did nothing towards picking these logs up that fall. He claims that Egbert Smith, the president of the defendant corporation, told him he might leave them in the lake until spring. Smith denies that he told him so, but says that he did tell him that, as far as Thompson Smith's Sons' logs were concerned, he might leave them, and, if he got permission from the owners of the other logs in the drive, he might leave them all. Plaintiff does not claim that he got permission from the other parties. Defendant claims that plaintiff was frequently requested and required to pick up these logs, but refused to do so, and that defendant commenced doing so on or about the 10th of November, 1888, and picked up 270,000 feet at an expense of $1 per thousand. The remainder were left in the lake, and picked up by plaintiff in the spring. In regard to this matter, the court charged the jury correctly that, if Egbert Smith told plaintiff he might leave the logs in the lake until spring, the defendant could not recover for the work done in picking them up in the fall; and also:

"As to the gathering up the broken boom of logs which became scattered on Black lake, you are charged that if on the 10th day of November, and after that,

that being the time when defendant undertook to gather them up, if the season was too far advanced, and the weather too inclement, to make it reasonably safe and proper to do the work, then defendant was not justified in making the attempt at plaintiff's expense."

There was some evidence tending to show that the boom was broken and the logs scattered by the carelessness of defendant's men in interfering with it, without authority from plaintiff; but on the trial no question was raised on this account, and therefore no argument in favor of plaintiff based upon this evidence can be heard to sustain the correctness of this instruction. We think, however, under the circumstances of the case, the charge was not erroneous. The testimony shows that, owing to the lateness of the season and the inclemency of the weather, the defendant was unable to pick up but a small portion of the logs, and those at an expense of one dollar per thousand feet, when the contract price of booming out, towing across, and running down the Lower river to the bridge, was only nine cents per thousand feet. It does not seem to us that there are any facts of damage to the defendant, in case the logs were left in the lake until spring, shown in the record which would justify the defendant in making this expense. No evidence was given showing that the defendant suffered any damage at all from or on account of the logs that were left in the lake and taken out in the spring by plaintiff. It was shown that logs would be damaged by pounding against the shore and filling with gravel, but it was not shown that defendant received any less from the owners of these logs because they were not picked up and run out in the fall.

As to the third head of damage the court charged the jury as follows:

"That by the practical construction of the contract,

given to it by the parties themselves, there was no absolute limitation as to the time within which the work should be done, and plaintiff was entitled to a reasonable time within which to complete the work."

This charge must be considered as relating to the logs left in Black lake from the broken boom, and not picked up in the fall, as all the other logs were delivered in 1888. It is insisted by the defendant's counsel that this charge, in effect, practically took away from the consideration of the jury the testimony of the defendant that none of its officers in any way consented to these logs remaining scattered in the lake during the winter, and instructed them as a matter of law that the delivery need not have been made in the season of 1888, as specified by the contract. The explanation of the meaning of this particular instruction by plaintiff's counsel is that the contract was made in March, 1888; that the contract was to deliver the logs on the defendant's sorting ground below McDonald's bridge as early in the *summer of 1888* as was practicable; that the words "summer of 1888" did not mean *season* of 1888; that the parties evidently intended but one drive at the time the contract was made.

The testimony shows that the first drive, a big one of 20 million feet, come along in the spring, and was all delivered within the time stipulated. About two months afterwards, after the *summer* months of June, July, and August had passed, another drive came down of six or seven million feet, which could not be delivered in the summer. Consequently by taking this drive into the contract the parties practically agreed that the plaintiff was only required to deliver them below the bridge "as fast as practicable, and as the ordinary circumstances would permit."

We do not think it necessary to discuss or determine

what the court meant by this instruction. Whether it was right or wrong, it could not have harmed defendant, in our opinion. As before said, no damage was shown because of these logs not being delivered until spring, and we can find nothing in the contract authorizing the defendant to pick up these logs after the 10th of November, when they could not be picked up without involving an expense of one dollar per thousand, and to charge the plaintiff for it. It must be considered that the defendant, under the testimony and the circumstances of the case, was not entitled to receive any damages for the neglect of the plaintiff to pick up these logs in the fall.

Error is claimed in the giving of the following request:

"If you find from the evidence that plaintiff kept the space in the Lower river filled as rapidly as defendant passed the logs through the sorting gap and gave him space, that is all that could be required of plaintiff, and defendant would not be justified in interfering with the work."

This instruction was correct. The contract expressly provides that plaintiff shall not pass the logs in the Lower river faster than the defendant can assort them. Defendant claims that it was the duty of plaintiff to tow booms out in the lake and hold them there, so as to expedite the work of defendant's men in getting the logs down the Upper river. We find nothing in the contract imposing this duty upon plaintiff; and, besides, there is no showing that any logs were left in the Upper river, because of the failure of plaintiff to take the logs away from the trip boom more rapidly than he did, and therefore no damage.

Some errors are alleged in regard to the admission and rejection of testimony upon the trial, but we are not able to find any. The case was fairly tried, and the

charge of the court was as favorable to the defendant as the law would permit.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and GRANT, JJ., concurred. LONG, J., did not sit.

MAGGIE E. WEST AND MARY WEST v. WILLIAM A. MAHANEY AND ANDREW G. BYERS, AND SAME v. BELLA MAHANEY AND WILLIAM A. MAHANEY.

[Two cases.]

Reformation of deed—Mistake.

Where a grantee contracts for and supposes that he is purchasing half of a lot of a specified depth, and that a fractional lot in the rear is separate and distinct from the land so purchased, and the deed describes the land as half of the lot, without specifying its depth, and on a survey being made some two or three years afterwards, during which time the grantors have occupied the fractional lot, it is discovered for the first time that the land as conveyed covers said fractional lot, equity will correct the mistake, and reform the deed so as to carry out the agreement of the parties.

Appeals from Saginaw. (Gage, J.) Submitted on briefs May 5, 1891. Decided May 15, 1891.

Bills to reform deeds. Defendants appeal. Affirmed. The facts are stated in the opinion.

Harris & Kendrick, for complainants, contended:

1. The mistake in question is one of fact, and not of law; citing *McCasland v. Insurance Co.*, 108 Ind. 130.
2. It is clear from the proofs that the land in question was not within the understanding of the parties contracting, and this brings the circumstances within the case of *Damm v. Moon*, 48 Mich. 510; and see *Scadin v. Sherwood*, 67 Id. 230.
3. This case is ruled by *Conlin v. Masecar*, 80 Mich. 139.

Tarsney & Weadock, for defendants, cited no authorities.

MORSE, J. The proofs in these two cases were taken together, and in the court below and here have been heard as one.

The bills were filed to correct and reform certain deeds of conveyance. At the time the deeds were made the complainant Maggie E. West was the owner in fee of lot 5, in block 23, of Glasby, Gallagher & Little's addition to the city of East Saginaw. John and Mary West, the father and mother of Maggie E. West's husband, had a life-lease of the property. The old people lived on lot 6 of the same block, and used the back part of lot No. 5 for a garden. Lot 6 was east of lot 5. On the west of lot 5 lived a Mr. Hulsizer, who owned lot 4 of block 23. Lot 4 extended north from Millard street, on which all of these lots fronted, 132 feet. Lots 5 and 6 ran back further than lot 4, to the section line on the north. The Wests testified that they supposed lot 5 extended no further north than lot 4; and it is established by the evidence that there was an old fence running part way across lot 5, on a line with the north boundary line fence of Hulsizer, which last-named fence was the northern boundary of lot 4. William C. West, the husband of Maggie E. West, testifies that he made the bargain with William A. Mahaney to sell him the west half of lot 5, as he supposed it was bounded on the north, to wit, by this fence and a row of currant bushes in line with Hul-

sizer's boundary line on lot 4 that he pointed out the supposed boundary to Mahaney, who fully understood it. The deed of these premises was executed by John and Mary West and Maggie E. West to Bella Mahaney, the wife of William A. Mahaney, and was so drawn as to convey to her the whole west half of lot 5. The land north of the fence the Wests supposed to be a fractional lot, and not a part of lot 5, and they did not intend to convey it by this deed, and claim that it was a mistake of the parties in so conveying it. This deed was made April 28, 1887. Afterwards the defendant Byers bargained for the east half of the lot with the same supposed northern boundary. This deed, by the same mistake, executed on the 11th day of May, 1887, conveyed the whole east half of lot 5. Before the commencement of these suits Byers deeded his purchase to the defendant William A. Mahaney.

These bills were filed to correct these mistakes, and to reform the deeds, so that they would convey a depth of but 132 feet north from Millard street, which would place the northern boundary where the parties supposed it to be when the deeds were made. John West was a party complainant when the bills were filed, but died before decree in the lower court.

Upon the proofs taken and hearing had, the circuit court for the county of Saginaw, in chancery, made decree in favor of the complainants in both cases, from which the defendants appeal.

Although some defense is attempted to be made by the Mahaneys, the proofs are overwhelmingly in favor of the complainants. Mr. William A. Mahaney, who did all the business in his wife's purchase, himself testifies that William C. West, who was acting for his wife and father and mother, told him, before the deed was made, that there was a "small fraction" back of the lot that did

not belong to it, although he denies that the fence or currant bushes were pointed out as the north boundary line of his purchase. And he also testifies that a few days after the making of the deed West came to him, and showed him where the boundary line was.

"He says, 'Your lot don't run only to those currant bushes.' He says, 'This piece of property down here is a fractional piece, that don't belong to your lot at all.' I says, 'All right, if it don't belong to my lot I don't want it.'"

For two or three years after the elder West used it for a garden, and had the fruit upon the currant bushes and some fruit-trees upon it.

Mahaney admits that he did not suppose that it belonged to him until, upon getting a surveyor there to run out his line in building a division fence between lots 5 and 6, he found that his deeds called also for this land, before that time supposed to belong to a fractional lot, and not to lot 5. He was much surprised when the discovery was made, and at first hesitated about taking it, but finally made up his mind to take it because it was deeded to him. Upon the trial he seemed to rest his case upon his testimony that he told West, in Tarsney & Weadock's office, at the time the deed was drawn, when West said that there was a fractional lot at the end of the land he had bought, that he wanted half the lot, whatever it was. But it is evident from all the testimony that Mahaney supposed that he was buying half of a lot 66 feet wide and 132 feet deep; that all the parties acted upon this supposition for two or three years, until a surveyor discovered that there was no fractional lot back of lot 5, and that lot 5 included the land supposed to be a fractional lot, and which had ever since the sale been in the possession and use of the complainants. The other half of the lot is governed by the same circumstances and

facts, as Byers bought, as all supposed, the same depth of lot as Mahaney did, and recognized the possession of the Wests as lawful until the discovery of the surveyor.

The decree in each case must be affirmed, with costs.

The other Justices concurred.

THE PEOPLE v. HENRY LITTLE.

86 125
112 372
112 376

Municipal ordinances—Fast driving—Ambulance.

1. The public interests do not demand that, in order to afford prompt relief to one person requiring the use of a city ambulance, other persons may be run down and injured by the fast and reckless rate of speed of the ambulance in going to the assistance of such person.
2. An ambulance is within the terms and scope of a city ordinance prohibiting the driving of any horse, carriage, sleigh, or other vehicle through any street or avenue in the city at a faster rate than six miles per hour, and the effect of such an ordinance is not modified by a subsequent ordinance giving to every ambulance or other vehicle used for the transportation of sick and wounded persons and animals the right of way over all other vehicles upon every public street.

Certiorari to recorder's court of Detroit to review proceedings resulting in the conviction of respondent for violating a municipal ordinance prohibiting driving at a greater speed than six miles an hour. (Chambers, J.) Argued May 6, 1891. Decided May 15, 1891. Conviction affirmed. The facts are stated in the opinion.

James H. McMillan, for respondent, contended:

1. In the case of *Napman v. People*, 19 Mich. 355, this Court decided that the ordinances of the city of Detroit stand on a

similar footing with statutes, and that they are matters of judicial notice; and, in view of this decision, if the Court has not passed directly upon the question of the right of fire apparatus to go at a rate of speed greater than six miles an hour, it has certainly, in the case of *Coots v. City of Detroit*, 75 Mich. 628, taken judicial notice of the necessity for a high rate of speed.

2. In support of the proposition that the right of way ordinance modifies the one against fast driving, counsel cited *Dewey v. Manufacturing Co.*, 42 Mich. 402.

Charles W. Casgrain and *Charles S. McDonald*, for the people, contended:

1. A street sprinkler has been declared a "public vehicle," within the terms of an ordinance imposing a license upon public vehicles using streets for trade or traffic; citing *St. Louis v. Woodruff*, 71 Mo. 92; and a bicycle was held to be a "carriage," within a statute forbidding fast driving, in *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

CHAMPLIN, C. J. The charter of the city of Detroit confers upon the common council of the city authority "to prohibit and prevent racing or fast and dangerous driving and riding" within the city limits. Acting in pursuance of this authority, the common council, on July 1, 1890, duly enacted and published the following ordinance:

"No person shall ride or drive any horse, carriage, sleigh, or other vehicle through any street or avenue in this city at a faster rate than six miles per hour. Such person shall slacken the speed of said horse over any crossing, cross-walk, or intersecting street of said city when any person or persons are upon the same, whenever requested to do so by the police officer who may be in charge of said street, crossing, or cross-walk: *Provided*, that this section shall not apply to the driving of cutters and sleighs in a southerly direction through Cass avenue north of Ledyard street, between the hours of two and five in the afternoon of any day except Sunday."

Another section of the same ordinance provided that any person who violated its provisions should be punished

by a fine not exceeding $100 and costs of prosecution, and that the offender might be imprisoned in the Detroit House of Correction until the payment thereof, provided such imprisonment should not exceed six months.

The common council, in 1890, also duly enacted another ordinance, section 2 of which reads as follows:

"Every ambulance or other vehicle used for the transportation of sick and wounded persons and animals shall be entitled to the right of way over all other vehicles upon every public street, highway, and place. No person shall willfully interfere with or retard or obstruct or impede the progress of any such ambulance or vehicle thereon, or shall willfully injure the same, or willfully drive any vehicle in collision therewith."

On December 6, 1890, at about 3 o'clock in the afternoon, Henry Little drove a horse attached to the Grace Hospital ambulance up Woodward avenue, one of the main thoroughfares in the city of Detroit, at a speed of 12 miles an hour. In doing so the ambulance collided with a vehicle, throwing the driver out and injuring him. He was complained of in the recorder's court for a violation of the ordinance prohibiting driving at a greater rate of speed than six miles an hour, and was convicted and fined. The case is brought to this Court by *certiorari*, and the questions raised by the record are:

1. Is it a reasonable construction of the ordinance against fast driving to include ambulances within its scope?
2. If it is, then is not the effect of the ordinance modified by the later ordinance, giving to ambulances the right of way?

The first question should be answered in the affirmative. The ambulance is within its terms, and there exists no reason why it should not be included in its scope.

It is claimed by counsel for respondent that—

"Experience has shown that in every large city the con-

ditions are such that accidents frequently occur of such a nature that the immediate attendance of a surgeon is a matter of the utmost necessity, when a minute one way or the other may mean life or death to the injured person. And it is this experience that has led the charitable institutions of Detroit to organize their ambulance services. There are of necessity few of these ambulance stations in proportion to the territory which they are called upon to cover, and, if the right to respond as rapidly as possible to emergency calls be denied them, a large part, if not the whole, of their usefulness is taken away."

This argument ought not to prevail against the ordinance, which was enacted to guard against accidents very liable to occur frequently from fast driving through the streets of a city. Respondent in his affidavit for *certiorari* claims that he had a right to drive 12 miles an hour, and that he was only driving at that rate. That it is reckless to drive at such rate of speed through the streets of a city where many people are passing in carriages, and crossing the streets upon foot, is self-evident. It jeopardizes human life. Men, women, and children may be run down, and injured or killed by such vehicles driven at such high rate of speed. It would be bad policy for a city to authorize a rate of speed which would be so liable to cause accidents, for the sake of affording more prompt relief to some one injured by an accident. The public interests do not demand that, in order to afford prompt relief to one person requiring the use of an ambulance, other persons may be run down and injured by the fast and reckless rate of speed of the ambulance in going to the assistance of the person injured. The whole matter was left by the statute in the control of the common council; and, looking to the safety of people in the use of the streets, they have seen fit to prohibit driving at a faster rate of speed than six miles an hour.

In considering the claim made by the respondent it is

proper to note that the ordinance which gives to ambulances the right of way over other vehicles recognizes this right in the transportation of persons *and animals*, and, if the argument for great haste and speed drawn from emergency is to be given any force, it would apply equally well to an aubulance answering a call for a sick or injured dog as for a person. It can hardly be supposed that the common council, in prohibiting driving at a speed exceeding six miles an hour, intended to except an ambulance going to the relief of an injured animal, or contemplated that such ambulance might drive through the streets of the city at the rate of twelve miles an hour.

The second question should be answered in the negative. The ordinance giving the right of way to ambulances transporting sick or injured persons or animals has no reference to the speed at which they may be transported, and much less to the speed at which the ambulance may be driven when not transporting such persons or animals. The ordinance under which respondent was convicted was a reasonable one, and includes within its letter and spirit the vehicle which respondent was so recklessly driving at the time alleged in the complaint.

The judgment is affirmed.

The other Justices concurred.

CORA A. BEGOLE v. CHARLES E. HERSHEY.

Equity—Bill to quiet title—Interest in subject-matter.

Complainant filed a bill to remove a cloud from her title to certain land, which she afterwards conveyed by warranty deed, the grantee retaining $50 of the purchase price, to be paid when complainant cleared the title. The defendant answered upon the merits after the deed was recorded, and no question was raised as to the right of complainant to prosecute the suit after such conveyance until the hearing, upon which the right of complainant to the relief sought plainly appeared, and a decree was made accordingly; in affirming which it is held that the complainant had not parted with her whole interest in the subject-matter of the suit, and that, the defense being entirely technical, equity is best subserved by such affirmance.

Appeal from Shiawassee. (Newton, J.) Argued May 6, 1891. Decided May 15, 1891.

Bill to remove cloud from title. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Davis & Nichols, for complainant.

Watson & Chapman, for defendant, contended:

1. Complainant put herself out of court by parting with her title to the premises which form the subject-matter of the suit, and defendant had a right to object that the party in interest was not before the court; citing *Wallace v. Dunning,* Walk. Ch. 416, and cases cited; *Webster v. Hitchcock,* 11 Mich. 56; *Cooper v. Bigly,* 13 Id. 478, 479; *Perkins v. Perkins,* 16 Id. 167; *Brewer v. Dodge,* 28 Id. 360; and such disability need not be brought to the notice of the court by plea.

MORSE, J. The only defense relied upon in this Court to the claim of complainant for relief is that since the commencement of this suit, and before the hearing in the court below, she had conveyed the premises by warranty

deed to a third person, and that thereby the suit was abated as far as she was concerned; that, having no further interest in the land which formed the subject-matter of the suit, she could proceed no further, although her assignee might by a proper showing file a bill in the nature of a supplemental bill to set up the change of title, and to obtain the same relief which could have been had under the original bill.

The bill was filed to remove a cloud from the title to certain premises described in the bill of which complainant, at the time of filing such bill, was the owner and in possession. The court below granted her the relief prayed for, and upon the merits her right to such relief was plain and indisputable. The circuit judge held that, upon the evidence, she had not parted *with all her interest* in the subject-matter of the suit; that the evidence—

"Cogently shows that the defendant had no claim or interest in the land, either legal or equitable; and that his claim is baseless. To turn her out of court, and pay costs of suit, and compel her to file a new bill against her vendor and defendant to recover the unpaid purchase money, in equity, seems repugnant to justice. I am of opinion that complainant had left in her sufficient interest in the subject-matter of the suit to entitle her to relief as prayed."

We agree with the learned circuit judge. It appears from the testimony that during the pendency of this suit, and before the hearing, the complainant deeded the premises to one George Sprinkle. The bill was filed February 26, 1890. The deed to Sprinkle was made March 1, 1890, and recorded March 4, 1890. After the recording of such deed the defendant answered upon the merits. The question as to the want of interest in the complainant was not raised in any way or brought to the attention of the court until upon the hearing, when it

was shown by the proofs. The complainant sold the land for $1,300, but received only $1,250, $50 being retained, and not to be paid to her until "she cleared the title."

Under the circumstances, we think that the cases cited by defendant's counsel do not apply. Complainant has not parted with her whole interest in the subject-matter of the suit. She is still interested in it, and inasmuch as this matter of defense, which is entirely technical, was not raised by plea or brought to the notice of the court until it appeared in proof upon the hearing, equity will be best subserved by the affirmance of the decree. The defendant, having no rights in the premises, loses nothing by this action. In fact, further cost and expense may be saved to him, unless he should do what he ought to have done in the first place, to wit, remove the cloud by his own voluntary release, as we should not grant him costs in case of the dismissal of complainant's bill for the reason here urged by him.

The decree is affirmed, with costs.

The other Justices concurred.

The People v. Calvin Hall.

Criminal law—Larceny—Admissions of counsel—Charge to jury.

A respondent cannot be convicted of larceny upon the admissions of his counsel, and it is error in such a case to instruct the jury either that the respondent took the property with felonious intent, or that the jury must find him guilty of the offense charged.

Error to Tuscola. (Beach, J.) Submitted on briefs May 6, 1891. Decided May 15, 1891.

Information for larceny. Conviction reversed. The facts are stated in the opinion.

L. H. Corcoran, for respondent.

A. A. Ellis, Attorney General, for the people.

McGRATH, J. Defendant was tried and convicted of stealing a given number of sheep, of the value of $27. His plea was not guilty. The owner testified to the loss of the sheep, and a butcher and one of the men in his employ testified to the purchase of the same number and description of sheep from defendant, and to the presence of a metal ear-tab, which was identified by the owner. No other testimony was offered as to the taking, and defendant offered no testimony. The court instructed the jury as to the taking as follows:

"It is admitted that he is guilty of the theft of those animals; that is, so far as the question of theft is concerned, that is disposed of, practically, because the counsel admits that there is no defense to be made upon that question. Mr. Hall actually took those sheep with felonious and larcenous intent. * * * The only remaining question is the value of this property. In returning your verdict of guilty, you will return what you assess the value of this property to be."

Error is assigned upon this instruction.

A conviction in a criminal case, involving the question of intent, cannot be predicated upon the admissions of counsel, and it is error in such case to instruct the jury either that the defendant took the property with felonious intent, or that the jury must find the defendant guilty of the offense charged. In this case the Court did both. The rule laid down in *People v. Neumann*, 85 Mich. 98, is limited to cases "where there is no question of

intent." It is unnecessary to notice the other assignments of error.

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

The other Justices concurred.

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THE PEOPLE v. JAMES H. MOORE.

Criminal law—Objections to testimony—Appeal.

An exception in a criminal case, based on an objection to testimony for which no reasons are given, and the ground of which is not reasonably apparent, will not be considered; citing *Morrissey v. People*, 11 Mich. 327; *Gilbert v. Kennedy*, 22 Id. 117; *Comstock v. Smith*, 26 Id. 306; *Ward v. Ward*, 37 Id. 254; *Stevens v. Hope*, 52 Id. 65.

Error to Kent. (Burch, J.) Submitted on briefs May 6, 1891. Decided May 15, 1891.

Information for rape. Conviction affirmed. The facts necessary to a decision of the case are stated in the opinion.

Eggleston & McBride, for respondent.

A. A. Ellis, Attorney General, for the people.

GRANT, J. The respondent was convicted of the crime of rape.

The sole allegation of error is that the court erred in permitting a witness to answer certain questions. When the testimony was offered the attorney for the respondent simply said, "Objected to," without giving any reason

whatever for his objection, nor was the ground of his objection reasonably apparent. The exception cannot therefore be considered. *Ward v. Ward,* 37 Mich. 254; *Morrissey v. People,* 11 Id. 327; *Stevens v. Hope,* 52 Id. 65; *Gilbert v. Kennedy,* 22 Id. 117; *Comstock v. Smith,* 26 Id. 306.

The conviction and sentence are affirmed.

The other Justices concurred.

HUGH J. MCHUGH v. ELIAS H. GAULT ET AL.

Constitutional law—Mechanic's lien—Bond for release.

Act No. 216, Laws of 1885, amendatory of the mechanics' lien law, as a whole, is not repugnant to the Constitution, and section three of the act, providing for the vacating of such lien upon executing the bond therein described, is valid.

Error to Kalamazoo. (Buck, J.) Argued May 7, 1891. Decided May 15, 1891.

Debt. Plaintiff brings error. Reversed. The facts necessary to a decision of the case are stated in the opinion.

Oscar T. Tuthill, for appellant.

Hampden Kelsey, for defendants.

CHAMPLIN, C. J. The record in this case raises only a single question, and that is whether the circuit judge erred in rejecting the bond offered in evidence upon the ground that Act No. 216, Laws of 1885, is unconstitutional and void.

The court erred in so holding. We are not called upon to pass our opinion upon every section and clause of the act of 1885, but only to state that the act, as a whole, is not repugnant to the Constitution, and that the section under which the bond in this case was executed is valid.

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

The other Justices concurred.

SIGMUND SIMON AND ISAAC MENDELSON v. ADOLPH SEMPLINER.

Justice of the peace—Adjournment of cause.

After a mutual agreement for the adjournment of a case in justice's court to a specified day and hour, the plaintiffs' attorney obtained the consent of the attorneys for defendant by telephone to the extension of the time of adjournment for one day, which fact plaintiffs' attorney communicated to the justice before the expiration of the hour allowed for the appearance of a defendant, and in the afternoon of the same day a clerk of the defendant's attorneys, who had appeared with the defendant when the agreement for the adjournment was first made, appeared before the justice, and stated that the case was adjourned to the latter date; whereupon the justice changed his minutes of the adjournment accordingly. The same clerk appeared before the justice on the day and hour to which the case was first agreed to be adjourned for the purpose of adjourning it as per the telephonic agreement, and was informed that such adjournment had been made. The plaintiffs appeared pursuant to said adjournment, and the defendant did not appear, and judgment was rendered in favor of the plaintiffs, which the circuit judge reversed on special appeal, which latter judgment is reversed, and a trial ordered upon the general appeal, the Court holding:

a—That the justice acted upon the consent of both parties in adjourning the case to the latter date, and would have been justified in so doing had the consent been in writing; citing *Parmalee v. Loomis*, 24 Mich. 242.

b—That consent given individually by the respective parties to the justice, and where there is no dispute as to the fact of consent, is as efficacious to waive irregularity as if it were in writing.

c—The defendant's attorneys are not in a situation to question the authority of their clerk to consent to the latter adjournment.

Error to Bay. (Cobb, J.) Submitted on briefs May 8, 1891. Decided May 15, 1891.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Lee E. Joslyn, for appellants.

Shepard & Lyon, for defendant.

CHAMPLIN, C. J. There is but one question to be decided in this case, viz.: Did the justice of the peace, who rendered a judgment for plaintiffs, lose jurisdiction by not proceeding at the time to which the cause had been adjourned by mutual consent,—March 12, 1890?

The return day of the summons was March 6, 1890, at 9 o'clock A. M. The plaintiffs appeared by their attorney, who duly proved his authority. The defendant appeared in person and by Albert H. Briggs, clerk for Shepard & Lyon, who were the attorneys for the defendant. It was then mutually agreed that the cause should stand adjourned until the 12th day of March, 1890, at 1 o'clock P. M., and the parties dispersed. A short time afterwards, and before 10 o'clock, the plaintiffs' attorney found that he would be unable to attend on the 12th at 1 P. M., and by telephone obtained consent of defendant's attorneys to have the cause adjourned to the 13th, at 1 P. M., and so

informed the justice before 10 o'clock A. M. In the afternoon of March 6 the said Briggs appeared before the justice, and stated to him that said cause was adjourned to March 13, at 1 P. M.; and thereafter the justice changed his minutes of the adjournment from the 12th day of March, 1890, at 1 P. M., to the 13th day of March, 1890, at 1 P. M. On March 12, 1890, Briggs appeared before the justice at 1 P. M. for the purpose of adjourning the cause until 1 o'clock the next day, but the justice informed him that it had already been adjourned until that time. On March 13 at 1 P. M., the plaintiffs appeared, and the defendant did not, and, after holding court open one hour, and defendant not appearing, the trial proceeded *ex parte*, and resulted in the judgment appealed from by special appeal. The circuit judge held the judgment void, and reversed it.

There is no dispute about the facts. The justice acted upon the consent of both parties in adjourning the case to the 13th at 1 P. M. Had the consent been in writing, the justice would have been authorized to place the time of adjournment at the hour agreed upon. *Parmalee v. Loomis*, 24 Mich. 242. But consent given individually by the respective parties to the justice, and where there is no dispute as to the fact of consent, is as efficacious to waive irregularity as if it were in writing.

Some question is made by counsel for defendant as to the authority of Mr. Briggs to consent to the adjournment to the 13th; but we think the defendant's attorneys are not in a position to rely upon such objection. Mr. Briggs was a clerk in their office, and represented them without question at the time of the appearance and adjournment on the 6th. He also, as appears from his affidavit made upon the special appeal, appeared before the justice on the 12th for the purpose of adjourning the case to the 13th, as had been already arranged for; and

he says that on the 13th he went to the office of the justice, not intending to take any advantage of the irregularity in the adjournment, and arrived there a few moments late, and after judgment had been taken. There is nothing in the affidavit of defendant or of Briggs setting up any want of authority of Briggs to consent to the adjournment on the part of the defendant to March 13. This is a stronger case for plaintiff than the case of *Patterson v. McRea*, 29 Mich. 258. Under the facts of this case the defendant is not entitled to complain.

The judgment of the circuit court is reversed, and the cause upon the general appeal must proceed to trial under the rules and practice of the circuit court.

The other Justices concurred.

JERRY MADDEN AND TIMOTHY CULLMAN v. MINNIE M. LEMKE.

Sale—Construction of contract.

Plaintiffs sold defendant a quantity of cedar posts, and agreed to deliver them free on board the cars at the place of shipment, as wanted. The posts were to be subject to inspection by a person appointed by the defendant at the time and place of loading, whose inspection was to be final, and were to paid for upon such delivery and acceptance as fast as each five cars were loaded, at an agreed price per post. The defendant agreed to commence shipping the posts on or about May 1, and to tally up and pay for and receive on the ground where they lay any posts remaining unshipped on July 15 following, on or before which date the plaintiffs were to deliver the posts. Defendant failed to inspect or take any of the posts, and plaintiffs sold them for less than the contract price, and brought this action to recover the difference. The jury rendered

a verdict in their favor, and also found specially that the defendant did not go to the place of shipment on July 15 to receive, tally, and pay for the posts, nor did plaintiffs have any one there to deliver and receive payment for the posts, which were not there in a condition to be counted by the defendant. The trial court set aside the general verdict, and directed the entry of a verdict of no cause of action, which latter verdict is set aside, and the court is directed to enter judgment on the original verdict; the Court holding that the agreement of the defendant as to shipment, inspection, and payment was a condition precedent to her agreement to tally up and pay for and receive the unshipped posts on July 15, and having failed to make any shipments by that date, on which the contract was to be fully completed, defendant was bound to tally up all the posts where they lay, and receive and pay for them on July 15, the evidence showing that it was through her fault that the posts were not then in a condition to be counted, and that defendant's agent did not go to the place of shipment on that day intending to receive, pay for, and tally the posts.

Error to Menominee. (Stone, J.) Argued April 10, 1891. Decided May 21, 1891.

Assumpsit. Plaintiffs bring error. Reversed, and circuit court directed to enter judgment for plaintiffs for $1,200. The facts are stated in the opinion.

W. H. Phillips, for appellants.

Sawyer & Waite, for defendant.

LONG, J. Plaintiffs contracted in writing with defendant to sell her about 85,000 cedar posts, on April 16, 1889. The posts were then at a place called Defiance or Trombley, a siding on the Chicago & Northwestern Railway north of Escanaba, this State. Defendant lived at Menominee. The contract provided that defendant was to receive the posts free on board cars at Defiance, and subject to her own inspection, and the shipping was to commence on or about May 1, to be paid for as fast as five cars were loaded. The contract further provided that

"said Lemke agrees to tally up and pay for and receive on the ground where they lay any posts remaining unshipped the 15th day of July, 1889." The price to be paid is set forth in the contract.

Defendant did not commence shipping about May 1, and failed to inspect or take any of the posts. Plaintiffs finally sold the posts for from one to two and one-half cents per post less than the contract price. The present action is brought to recover for this loss. The jury returned a verdict for the plaintiffs for the sum of $1,200. They also, at the request of the defendant's counsel, returned the following special findings:

"1. Did Lemke go to Defiance, July 15, 1889, to receive, tally, and pay for posts?

"*A.* No.

"2. Did plaintiffs have anybody at Defiance, July 15, 1889, to deliver and receive payment for the posts?

"*A.* No.

"3. Were the posts in condition to be counted by defendant, July 15, 1889?

"*A.* No."

Afterwards the trial court set aside the general verdict, and ordered verdict entered for the defendant of no cause of action. Judgment was entered upon this verdict, and plaintiffs bring error.

The errors assigned which we shall discuss relate to the setting aside of the verdict rendered for plaintiffs, and entering verdict and judgment in favor of defendant.

It appears that at the time the contract was entered into the posts were piled in large piles on each side of the spur track at this station, and in such condition that they could not be readily inspected and counted, and that to count and inspect them it would be necessary to move them. The contention of the defendant is that it was not intended by the contract to bind defendant to ship any posts before July 15, 1889, unless she could dispose

of them, and thus avoid handling them unnecessarily. The spur track was not completed at the time the contract was made, but was completed on May 6, so that the shipping might have commenced on that date.

The contract does not bear the construction contended for by the defendant. It was plainly the intention of the parties that the defendant should commence shipping the posts as soon as the spur track was completed, so that they could be handled. They were, by the terms of the contract, to be inspected by a person appointed by defendant at the time and place of loading, and to be paid for in five car lots. These were conditions precedent to the agreement of the defendant to tally up and pay for and receive on the ground where they lay any posts remaining unshipped on July 15, 1889. It is quite evident, as contended by counsel for plaintiffs, that, had defendant shipped a portion of the posts, they would have been sorted and tallied into the cars, and consequently the piles would have been broken, and the posts remaining unshipped in a shape to have been tallied on the ground where they lay. The defendant having failed to ship any of the posts before July 15, 1889, the date on which the contract was to be fully completed, she was bound by the terms of the contract to tally up all the posts on the ground where they lay, and receive and pay for them. This is the plain meaning of the contract.

The third finding of the jury, that the posts were not in a condition to be counted on July 15, 1889, was not a fact to be weighed against the general verdict in favor of the plaintiffs. That they were not in a condition to be counted was her fault. Her husband, who was acting as her agent, and who made the contract for and in her behalf, and who attended to all her business, was constantly importuned by plaintiffs to commence shipping.

Mr. Madden, one of the plaintiffs, saw Mr. Lemke on May 8, and told him they were ready to ship. He saw him again on May 20, and about July 1, each time urging him to commence to ship, and stating to him that plaintiffs' creditors were pressing them. Mr. Madden also told him that he had a chance to sell 50,000 of the posts to other parties, but was assured by Lemke that he would take them all; that he had sold them, and must have them to fill his contract. After the contract expired, and on July 17, Mr. Madden saw him again, and insisted that he take the posts. Lemke said he could not take them then, but thought he could before the end of the season. Mr. Madden then offered to sort the posts where they lay on the ground, so that they could be inspected, if Lemke would advance money enough on the contract to pay for assorting, though by the terms of the contract the plaintiffs were not to assort, except into the cars all that were shipped prior to July 15, 1889. Lemke said he would do this if plaintiffs would take his note, which Mr. Madden declined. Mr. Lemke admits that he was advised by Madden that the posts were ready for shipment, as claimed by Madden, and the only excuse he gives for not shipping is that the market was flat, and he could not sell.

The jury in the first finding say that Lemke did not go to Defiance, July 15, 1889, to receive, tally, and pay for the posts. This finding, under the evidence given by Mr. Lemke, probably is that Mr. Lemke did not go there intending to tally and take the posts, and there was evidence in the case fully supporting this finding. Mr. Lemke testifies that he went there on that day for the purpose of receiving and paying for the posts; that when he reached there he saw a large pile of posts, and inquired of some men there if they were Madden & Cullman's posts, and was told that they were; that neither of the

plaintiffs were there, and the posts were piled so high it was impossible for any one to count them. He does not claim that he had any cars there for shipment of the posts, and he never made any effort to take or count or tally a single post. His whole conduct in the matter was such that the jury were justified in finding that when he went there, on the 15th of July, he did not go to receive, tally, and pay for the posts.

The further finding of the jury, that plaintiffs had no one there at Defiance on July 15, 1889, to deliver and receive pay for the posts, is wholly immaterial. The defendant was in fault from the beginning in not shipping as provided by the contract, so that the posts remaining unshipped could have been counted and tallied upon the ground where they lay. Mr. Lemke knew the condition they were in, and, failing to make any shipments before that day, he was bound to tally and take them all on July 15. The court was therefore in error in setting aside the general verdict, and entering verdict for the defendant.

The verdict and judgment for the defendant will be set aside. The verdict rendered for the plaintiffs of $1,200 will stand, and the court below will be directed to enter judgment thereon in favor of plaintiffs for $1,200, with costs of that court. The plaintiffs will also recover the costs of this Court.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. GRANT, J., did not sit.

S P. HUTCHINSON v. AZARIEL SMITH; FREDERICK W. MEYERS, AND CHARLES W. LONG.

Attachment—Bond—Principal and agent—Evidence.

Where in a suit upon a bond given in an attachment suit in justice's court, to which the principal's name was signed by the attorney who commenced the suit, the principal denies its execution under oath, and the testimony tends to prove the agency of the attorney, and the ratification of his act in bringing the suit by the principal, the bond should be received in evidence, as also testimony showing the manner of its execution. *Palmer v. Seligman*, 77 Mich. 305.

Error to Lenawee. (Lane, J.) Argued April 16, 1891. Decided May 21, 1891.

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

S. P. Hutchinson, appellant, in *pro. per.*

Watts & Smith, for defendants.

MORSE, J. Hutchinson sued the defendants in the Lenawee circuit court upon a bond purporting to have been executed by Meyers as principal and Smith and Long as sureties, in an attachment suit in justice's court, wherein Meyers was plaintiff and Hutchinson defendant.

In this attachment suit Meyers obtained judgment before the justice for $21.80 damages and $6.15 costs, and $20.50 for costs of keeping attached animals. Upon *certiorari* to the circuit court this judgment was reversed and vacated, and a judgment entered in favor of Hutchinson for the sum of $64.63, and $21 costs. This judgment was founded on the fact that during the pendency

of the writ of *certiorari* in the circuit court, and before it was heard, execution was issued upon the justice's judgment, and the property levied upon by the attachment sold for $64.63. The amount so collected on this sale was the basis of this judgment.

In his declaration upon the bond given in the attachment suit the plaintiff in this suit avers that the property sold in the attachment suit was of the value of $320; that it was all sold, and he deprived of it, to his damage of $200; and that he paid out large sums of money for attorney's fees; and also alleging other damages.

Meyers filed an affidavit setting forth that he never signed, executed, or delivered the bond upon which the suit was brought.

Smith and Meyers filed a plea of the general issue, and gave notice that they would show, under such issue, that Smith at the time he signed the bond was informed by the defendant Long that Meyers had executed the same as principal, and requested and desired the said Smith to sign said bond as surety; that Smith, believing these statements of Long to be correct, and knowing Meyers to be a reputable man, and abundantly able and responsible financially, executed the bond, believing that he would be protected by Meyers; that they would further show that Meyers had not in fact signed the bond himself, nor at any time authorized any other person to sign or execute the bond in his behalf; and that said Meyers never authorized said Long or any other person to request the defendant Smith to sign or execute the same as surety for him.

Upon the trial the plaintiff first offered to introduce the files, and also the judgment entry, in the attachment suit of *Meyers v. Hutchinson*. This offer was rejected, on the ground that the same were immaterial. No exception

was taken to this ruling. Plaintiff then offered the bond. This was rejected on the ground that, the execution of the bond having been denied on oath by Meyers, the execution of it by him must be proven. No exception was taken. The files were then again offered to prove Long's agency. They were objected to, and ruled out as being incompetent. The plaintiff failed to except to this ruling. He then offered himself as a witness, and testified as follows:

"*Q.* You are the plaintiff in this suit.
"*A.* I am.
"*Q.* You met Mr. Meyers in Kalamazoo, did you?
"*A.* I did.
"*Q.* Did you have a conversation with him in regard to the original suit?
"*A.* I did; in his office.
"*Q.* State what conversation you had in regard to the matter.
"*A.* I was in Kalamazoo, and had a conversation with him in reference to the original suit. I dropped in to see him to effect a settlement before the suit was determined, and talked the matter over with him, and told him how the matter stood, and he said that he did not care to settle. I told him that I would settle there for less than a judgment,—for less than a judgment would cost him in the circuit court; and he says: 'Well, Mr. Hutchinson, I do not care to settle. We think we know how the matter stands. We employed Mr. Long to attend to our matters, and we will rest on his action.' Those are the very words he said to me. That was in the fall of 1888, along—I think it was—in October. I could give the exact date by referring to depositions I took at that time in Kalamazoo.
"*Q.* It was in 1888?
"*A.* In 1888. I called on Mr. Meyers on purpose for a settlement. He said that if I got any judgment against him he would pay it. What Mr. Long did was—
"*Mr. Smith:* We object to what you thought.
"No cross-examination."

The bond was then again offered in evidence, and rejected. The plaintiff thereupon rested his case, and

the circuit judge thereupon directed a verdict for defendants. The files which were offered in evidence and rejected would have shown that the defendant Long, purporting to act as the attorney of Meyers, made the affidavit in the attachment suit. The defendants' objection to the bond was that the defendant Meyers had denied its execution under oath. Exception was taken upon its second rejection.

The bond should have been admitted in evidence. The testimony of Hutchinson tended to prove the agency of the attorney, Long, who instituted the suit in which the bond was given, and also Meyers' ratification of Long's act in instituting the attachment suit. In all cases in attachment in justice's court the law requires the plaintiff to give a bond before the writ shall issue. Meyers recognized Long's agency in commencing the suit, and we think, if the testimony of Hutchinson is believed, there was testimony from which a jury might very properly infer a ratification of the acts of Long by Meyers in the institution of the attachment suit, including all he did in such suit. *Palmer v. Seligman*, 77 Mich. 305. Having given this testimony tending to show ratification, it was competent for the plaintiff to introduce the bond in evidence as testimony material to his case, and to supplement it by showing that Long signed Meyers' name to it. The court erred in rejecting the bond.

We think the files and judgment in the attachment suit were also admissible in evidence, but, as no exception was taken to the ruling of the court in this regard, the case is not reversed for this error.

The judgment below is reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

IN THE MATTER OF THE ASSIGNMENT OF THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY. APPEAL OF GEORGE T. SMITH FROM ORDER ADJUDGING HIM GUILTY OF CONTEMPT, ETC.

86	149
100	448
86	149
104	234
104	413

Assignment for benefit of creditors—Fraud—Estoppel—Appointment of receiver—Contempt proceedings.

1. The right of a creditor to complain of an assignment for the benefit of creditors in the execution of which there may have been fraud, and which may have been fraudulent as to creditors, may be lost by waiver or acquiescence. *Blake v. Hubbard*, 45 Mich. 4.

2. Where a creditor comes in under the assignment proceedings in such a way as to entitle himself to share in the dividends arising from the assets in the hands of the assignee, he waives all objection to his title to such assets.

   So *held*, where the president of a corporation, pursuant to a resolution of the board of directors, of which he was a member, executed an assignment of the corporate property for the benefit of creditors, which assignment he delivered to the assignees, who entered upon the discharge of the trust, after which he filed claims under the assignment proceedings as a creditor, and, after waiting for nearly a year,—during which time the assignees were closing out the estate, with his knowledge, and without objection on his part,—filed a bill to set aside the assignment because fraudulently made, and to restrain further proceedings thereunder; which action he is held to have estopped himself from taking.

3. Under the general supervisory powers of a court of chancery over assignment proceedings, it may proceed upon *petition* to the removal of the assignee, and may, in the *same proceeding*, appoint a receiver.

4. A finding in a proceeding for contempt under chapter 256, How. Stat., that the respondent has brought a suit against the receivers appointed upon the removal of assignees under an assignment for the benefit of creditors, and is prosecuting the same knowingly, and without leave of the court having control of the assignment, and that in so doing he has been and

is guilty of contempt of said court, and of its jurisdiction and authority, but which fails to find that such misconduct was calculated to or did defeat, impair, impede, or prejudice the rights or remedies of any party in said assignment proceeding, is sufficient to warrant an order restraining the further prosecution of said suit, and directing its discontinuance, but does not authorize the imposition of a fine, and imprisonment in default of its payment; but, on the failure of the respondent to comply with such order, he can, upon proper showing and finding of facts, be subjected to such penalties within the statute as the court may impose.[1]

Appeal from Wayne. (Hosmer, J.) Argued April 23, 1891. Decided May 21, 1891.

Contempt proceedings under How. Stat. chap. 256. Respondent appeals from order adjudging him guilty of contempt, which is modified and affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for appellant.

Thomas A. Wilson (*E. F. Conely* and *Orla B. Taylor*, of counsel), for receivers.

LONG, J. The George T. Smith Middlings Purifier Company was a manufacturing corporation organized under the laws of this State, and had up to January 14, 1890, and for some years preceding that date, been engaged in business at Jackson, in this State.

On the 14th day of January, 1890, said corporation made an assignment for the benefit of its creditors to Rufus H. Emerson and Zenas C. Eldred. The assignees filed a bond, a list of creditors of said corporation, and

[1] For cases involving contempt proceedings, see *Scott v. Layng*, 59 Mich. 43; *Silver Plate Co. v. Schimmel*, Id. 524; *Chapel v. Hull*, 60 Id. 168 (head-note 4); *Railroad Co. v. Circuit Judge*, Id. 232; *Scott v. Circuit Judge*, 62 Id. 532; *Bagley & Co. v. Scudder*, 66 Id. 97; *Potts v. Potts*, 68 Id. 492; *Langdon v. Circuit Judges*, 76 Id. 358; *Latimer v. Barmore*, 81 Id. 592; *In re Wood*, 82 Id. 75; *Smith v. Circuit Judge*, 84 Id. 564.

an inventory of the property assigned, in the office of the county clerk of Jackson county. The matter of said assignment was removed from the circuit court for the county of Jackson to the circuit court for the county of Wayne, in chancery, and now remains in the court last named.[1]

Subsequent to such removal, Edmund W. Kittredge and Joseph Wilby applied by petition to the Wayne circuit court, in chancery, for the removal of said assignees, and the appointment of receivers of the property of said corporation in their stead. To this petition Rufus H. Emerson and Zenas C. Eldred made answer, and, upon the matter being presented to the circuit court for Wayne county, on the 24th day of April, 1890, the court made an order reciting that the said Emerson and Eldred assented to being removed as assignees of said corporation, and by the terms of said order said Emerson and Eldred were appointed receivers of all the lands, tenements, goods, property, and choses in action belonging to said George T. Smith Middlings Purifier Company, with all the powers of receivers in such cases, as well as all the rights and powers conferred upon them by the deed of assignment, and the statutes regulating assignments, and requiring them to give a bond of $500,000 for the faithful performance of their trust. This order appointing Emerson and Eldred receivers authorized them to make sale of the lands and property of said corporation in the manner therein specified.

On the 31st day of December, A. D. 1890, George T. Smith, as president and one of the stockholders of said George T. Smith Middlings Purifier Company, filed his bill of complaint in the circuit court for the county of Jackson, in chancery, against Rufus H. Emerson and

[1] See *Kittridge v. Circuit Judge*, 80 Mich. 200.

Zenas C. Eldred, in which Mr. Smith alleges, substantially, that the said Emerson and Eldred were claiming to be receivers of the George T. Smith Middlings Purifier Company, and were proceeding to sell the property, lands, and tenements belonging to said George T. Smith Middlings Purifier Company, and would sell the same on the 2d of January, 1891, unless restrained by an injunction, for which he prayed. Smith alleged that the said Emerson and Eldred were not receivers of said corporation; that the alleged assignment of the George T. Smith Middlings Purifier Company was wholly void, for the reason that it was not authorized by the stockholders of said corporation, and that such sale would create a cloud on the title to the land of said corporation; and in the bill so filed, Smith alleged that he filed said bill as one of the stockholders of the corporation, for the reason that the board of directors of the corporation pretended to be laboring under the erroneous impression that said Emerson and Eldred were legally appointed receivers. Thereupon Emerson and Eldred filed their petition in the Wayne circuit court, in chancery, in which they claimed to recite the history of the assignment matter, and in which petition they alleged that Smith did not obtain permission of the Wayne circuit court, in chancery, to file said bill, and prayed for an injunction to restrain the prosecution of said suit, and that appellant be punished for contempt for having filed said bill of complaint without permission. To the petition, so filed by Emerson and Eldred, Smith filed his answer, setting forth substantially the history of the litigation, and some of the reasons upon which he based his action for filing his bill of complaint, and in which answer he gave his reasons why he should not be punished for contempt.

The matter came on to be heard on the 19th day of January, A. D. 1891, before Hon. George S. Hosmer,

one of the circuit judges for Wayne county, who adjudged and found Smith guilty of contempt for bringing said suit without first having obtained leave of the circuit court for the county of Wayne, in chancery, and ordered Smith to discontinue said suit within 15 days from the date of said order, and pay in to the register of said court the sum of $250, and, in default of the payment of such fine, that he be committed to the county jail for the county of Wayne, for the period of 90 days from the date of said order, unless such fine was sooner paid. After the rendition of said order adjudging Smith guilty of contempt, Smith sought by *mandamus* to have said order set aside as illegal, which this Court refused to grant. *Smith v. Wayne Circuit Judge*, 84 Mich. 564. Subsequent to the refusal of this Court to consider the question of the legality of said order upon *mandamus*, this appeal was taken from the order of contempt.

In the matter of the *mandamus* proceedings it was held that this Court would not inquire into the validity of the assignment on *mandamus*. It was there said that—

> "The forum in which the relator must question the validity of the assignment, if at all, is the court having control and jurisdiction of said matter, and it would be contrary to every principle of law to permit him to attack it elsewhere."

The proposition of law is not disputed which requires that where a receiver has been legally appointed, and has duly qualified, and is acting as such, before suits are instituted against him as such receiver permission of the court must be first obtained. While this is admitted, it is also contended that, where persons not legally appointed receivers are claiming to be and acting as such, there is no law which requires as a condition precedent, the permission of any court to authorize necessary suits to prevent such unauthorized persons from interfering with,

handling, or disposing of property in which they have no legal interest or right; and that if such suit is so instituted in good faith, even though it should ultimately turn out that the receiver was lawfully appointed, the person bringing such suit should not be punished for contempt. It is also contended that Emerson and Eldred were not legally appointed receivers in the matter of the assignment, and that no one is under any obligation to treat them as legally appointed receivers or officers of the court; but that any one having an interest in the subject-matter of the assignment may pursue his own course as to the form, method, and tribunal in which he may bring suit against them, without first having asked permission from the court so to do.

It is claimed by the defendant that the board of directors of the Smith Middlings Purifier Company had no authority from the corporation to direct the assignment to be made, and that the court below was in error in not permitting the defendant to introduce evidence to substantiate the allegation in the answer that the board of directors were guilty of conspiracy and fraud in making the assignment in the matter of the Smith Middlings Purifier Company.

It is further contended that the receivers were not legally appointed by the court, for the reason that such appointment was made upon petition, and not by bill, filed in the proper court, carrying with it the usual subpoena, making all necessary parties parties thereto, either as complainant or defendant; that, by the filing of the petition for the appointment of receivers, every stockholder of the corporation, and every officer thereof, and all the creditors of the assigned company, and every claimant against the assignor, were left out of the proceeding, and no one of them had a voice in the removal of Emerson and Eldred as assignees, and their appoint-

ment as receivers; and that, therefore, the defendant had the right to file his bill in the circuit court for Jackson county without asking leave of the circuit court for the county of Wayne.

It appears that, at the time the assignment was made by the Smith Middlings Purifier Company, George T. Smith, the defendant here, was a member of the board of directors and the president of the company, and that he made and executed said assignment as president of the company, and delivered the same to the assignees, Emerson and Eldred; that they accepted the same, and entered upon the discharge of the trust thereby created; and that they took an inventory of the property, and gave the requisite bond under the statute; that afterwards the matter of the assignment was duly removed from the county of Jackson, where the assignment was made, to the county of Wayne, where it has since been pending; that on the 24th day of April, 1890, Emerson and Eldred were removed as assignees upon the petition of Edmund W. Kittredge and Joseph Wilby, creditors of the Smith Middlings Purifier Company, and that they were thereupon appointed receivers upon the same petition filed for their removal as assignees, and that they entered upon the discharge of that trust immediately thereafter, and have since continued in the discharge of the trust thereby created.

It appears further that on the 12th day of April, 1890, George T. Smith, the defendant in the present case, filed a claim in said matter against the Smith Middlings Purifier Company for $393,166.66, which was verified by his oath; that on the 14th day of April, 1890, a claim for $266,000 was filed in behalf of the Consolidated Middlings Purifier Company, which was also verified by Smith as president and treasurer thereof; that on the last-named date he also filed a claim as sole heir of Henry L. Smith,

for $697.40, which was also verified by his oath; that after the filing of said claims Emerson and Eldred caused notice of contest of each to be served, as provided by the statute regulating assignments, all of which were undisposed of at the time of the filing of said petition.

Since the appointment of the receivers they have been carrying on the business carried on by the assignor before said assignment, under the direction of the circuit court for the county of Wayne, in chancery, and by like authority have sold real estate of said assignor, which sales have been confirmed by the court, and they have also been collecting and adjusting the debts and obligations due the assignor, all of which was known to George T. Smith. On November 24, 1890, an order was made in such matter authorizing the receivers to sell certain real estate, consisting of the shops of the assignor, for not less than $65,000, and on the 2d day of January, 1891, said property was sold in pursuance of said order for that amount.

The assignment was made under the provisions of chapter 303, How. Stat., entitled "Voluntary Assignments for the Benefit of Creditors," and conveyed to the assignees all of the estate and property of the assignor not exempt from execution, unless there was fraud in the matter of the assignment, or in the execution of said trust, and the title still rests in them, and they can only be divested of their office upon failure to comply with the provisions of that chapter, or having failed or neglected to promptly and faithfully execute said trust within the meaning of section 6 of that act. It is not claimed that Emerson and Eldred have failed to comply with the provisions of the act, or that they are neglecting to execute the trust. The only ground of complaint relating to the matter of the assignment is that there was conspiracy and fraud in procuring the assignment to be made.

We need not consider upon this record the question of the conspiracy and fraud in making the assignment, for the reason that George T. Smith, the defendant, is not now in a position to question the validity of that proceeding. He was one of the board of directors of the assignor, its president, and, as such, executed the assignment which he now attempts to set aside upon the ground of conspiracy and fraud. If this were not sufficient to estop him from making this claim, his action after the assignment was made, in filing claims in the matter of the assignment, would certainly have this effect. It appears from the record that the resolution was adopted by the board of directors, directing the assignment to be made, and directing the president and secretary or either of them to execute the same in the name of the company, and, in pursuance of this resolution of the board, George T. Smith, acting as president of the company, did make and execute it. Though there may have been fraud in its execution, and it may have been fraudulent as to creditors, such an assignment is not so absolutely void that the creditors' right to complain of it may not be lost by waiver or acquiescence. *Blake v. Hubbard*, 45 Mich. 4. Smith not only executed the assignment, and delivered it to the assignees, and filed claims therein as a creditor, but has waited for nearly a year, knowing of the proceedings taken by the assignees and receivers in the settlement of the estate, and of the conduct of the business affairs of the corporation, and the orders of the court made therein, and until the filing of his bill in the Jackson circuit court in December, 1890, has never, so far as appears from this record, objected to any of the proceedings taken therein. It would be contrary to every rule of equity to permit Smith now to attack the assignees in their office, and upon his bill to set aside the assignment and the appointment of Emerson and Eldred as receivers. It is

well settled that, where one comes in under the assignment proceedings in such a way as to entitle himself to share in the dividends arising from the assets in the hands of the assignees, he waives all objection to the title of the assignees to such assets. *Littlejohn v. Turner,* 73 Wis. 121 (40 N. W. Rep. 625); *Copper Co. v. Babbitt,* 74 N. Y. 395; *Cavanagh v. Morrow,* 67 How. Pr. 242; *May v. Wannemacher,* 111 Mass. 202; *Pierce v. O'Brien,* 129 Id. 314; *Jones v. Tilton,* 139 Id. 418 (1 N. E. Rep. 741); Burrill, Assignm. (5th ed.) 438, 465, 466.

In *Frelinghuysen v. Nugent,* 36 Fed. Rep. 229, it was held by Mr. Justice Bradley that—

"The creditors who have voluntarily presented their claims before an assignee, without questioning the validity of the assignment, are thereafter estopped from disputing its validity."

This seems to be the general rule, and it must be held that George T. Smith is not now in a position to attack these proceedings.

We cannot assent to the position taken by defendant's counsel, that the court had no authority to appoint Emerson and Eldred as receivers, because the circumstances did not authorize the appointment under How. Stat. § 8744, and because no bill was filed in conformity with said section, and claiming that the court had no power to appoint under the petition.

The matter of this assignment was before this Court in *Kittredge v. Circuit Judge,* 80 Mich. 200, on application for *mandamus* to compel its removal to the Wayne circuit. After referring to various sections of the assignment law, Chief Justice CHAMPLIN, speaking for the Court, said:

"From these provisions it is gathered that it was the intention of the Legislature to place common-law assignments fully under the control and supervision of the cir-

cuit courts, in chancery. From the time of the filing of the assignment in the office of the clerk of the court it may be said to be a proceeding pending in that court for all the purposes of the act. The authority of the court to exercise its supervisory powers is called into being whenever the court is applied to by any one authorized by the act to invoke such powers, and then the power of the court, which was before dormant, is called into activity, and its jurisdiction fully attaches to the assignment, and all matters connected therewith. It is then a civil proceeding pending in the circuit court, and is subject to be transferred under the statute first above referred to."

It appears that Kittredge and Wilby filed a petition as creditors, asking the removal of Emerson and Eldred as assignees, and praying for the appointment of receivers. When this petition was filed, it called into activity the supervisory powers of the court, and its jurisdiction fully attached to the assignment, and all matters connected therewith, among which was the appointment of the receivers for the protection of the assets of the assignor in the interest of the creditors. At the time the appointment of the receivers was made, the property and assets of the corporation were in the hands of the assignees, who were subject under the statute to the supervisory powers of the court. Section 8749, How. Stat., gives the circuit court in chancery supervisory control over all matters arising under such assignment proceedings, except as otherwise provided in the act. The section referred to by counsel for the defendant provides that any person interested may file a bill for the enforcement of the trust. Sections 8739 and 8741 of the act were amended by Act No. 215, Laws of 1889 (3 How. Stat. pp. 3786, 3787). Section 8739, as amended, provides for proceedings by petition for the removal of the assignee, and was intended to facilitate proceedings in assignment cases.

We think, under the general supervisory powers of a court of chancery over such matters, the court could pro-

ceed upon petition to the removal of the assignees, and in the same proceeding, for the interest of the creditors, could appoint receivers. Section 6624, How. Stat., provides that each circuit court shall have the power to appoint receivers in all cases pending in chancery, when such appointment is allowed by law, as well in vacation as during the session of the court; and by the next section it is provided that such application for appointment may be made to the circuit judge at chambers, and shall be heard under such regulations as may be by general or special rules prescribed.

But the rights of the parties need not rest alone on the construction of this statute and the power of the court in the premises. George T. Smith rested on his rights, if he could assert such rights, from April 24, 1890, to December 31, 1890, before any action was taken by him to set aside the proceedings for the appointment of receivers. In the mean time the receivers had proceeded with the settlement of affairs of the corporation; sold real estate; defended suits brought against them; and to hold now that they were improperly appointed would involve rights of other creditors, and jeopardize claims which have been settled by such litigation. George T. Smith knew of these proceedings, and has, we think, rested upon his rights, if he had any such rights, an unreasonable length of time before attempting to assert them. He could not, for eight months, stand by in the face of such litigation by other parties in the matter of this estate, see their rights litigated and settled by the courts, after himself making the assignment and filing claims as a creditor therein, and then come into a court of equity and ask its aid to set aside all these proceedings, and set aside sales made by the receivers, and thus jeopardize the claims of other creditors. What is reasonable time must depend upon the circumstances surround-

ing the case. Did it not appear that Smith must have been cognizant of all that was going on in the matter of the estate, and knew that rights of other creditors were being litigated and settled, upon the supposition that the receivers were properly and lawfully appointed, perhaps waiting the eight months, when no other rights had grown up in the mean time, would not have been unreasonable; but he had filed claims with Emerson and Eldred as assignees to the amount of over $600,000, and immediately thereafter these parties were removed and appointed as receivers. They had entered a contest as to his claims, and these cases were then pending, and yet he waited until the last of December before asking the removal of the receivers. He is now estopped from setting up this claim, as well as the claim that there was fraud in the matter of the assignment.

The question of the right of the court, under the facts found, to impose the fine and imprisonment, yet remains to be disposed of. Chapter 256, How. Stat., relates to proceedings as for contempts to enforce civil remedies, and to protect the rights of parties in civil actions. Section 20 of that chapter (section 7276) provides that—

"If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that the misconduct was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of any party in a cause or matter depending in such court, it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require."

The finding of the court recites that—

"The respondent brought his suit against the said receivers, and is prosecuting the same knowingly, and without leave of this court, and that in so doing the said George T. Smith has been and is guilty of a contempt of this court, and of its jurisdiction and authority."

There is no such finding, as required by the statute above cited,—

"That the misconduct was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of any party in a cause or matter depending in such court."

The facts and circumstances shown upon the record are sufficient to warrant the order that the respondent be restrained from further prosecuting this suit in the Jackson circuit court, in chancery, and that he discontinue the suit, and discharge the *lis pendens;* but there is no such finding as would authorize the court to impose the fine, and imprisonment in default of the payment of the fine. If the respondent does not comply with the order of the court in discharging the suit, he could then, upon proper showing, be subjected, if the proper facts are found, to such penalties within the statute as the court might impose. As the facts found do not warrant that part of the order imposing fine and imprisonment, it must be set aside; the decree in other respects to stand and be enforced.

Claim is made that the defendant should be punished with costs as for a vexatious appeal. We do not think the questions raised so easy of solution that it can be said the appeal was taken for vexation and delay, and shall not award costs for such purpose.

The decree, as modified in accordance with these views, will be affirmed. No costs will be awarded to either party.

The other Justices concurred.

WILLIAM L. COOK v. CALVIN STAFFORD, EXECUTOR, ETC., ET AL.

Specific performance—Laches.

1. Delay, or even great delay, to assert or to take steps to enforce a vendee's rights under a contract for the conveyance of land, is not always a reason for courts of equity to refuse specific performance of the agreement. Each case must depend upon its own circumstances, and the court must be influenced and controlled by those equitable principles which, while doing justice to one, will not do injustice to others.
2. On May 9, 1853, complainant's father executed a bond conditioned for the conveyance to the complainant of a parcel of land therein described in consideration of his labor from that date until November 1, 1853, which labor was performed. Both parties exercised acts of ownership over the land, and the father paid the taxes from 1844 to the time of his death, in 1889, and cut large quantities of fire-wood from the premises, which he sold and received the avails of such sales. In 1857 he purchased a large farm, on which was a hotel, and secured the payment of the purchase price by executing a mortgage upon the land described in the bond and upon other land, with the knowledge of the complainant, who moved into the hotel, and assisted in paying off the mortgage, and received a deed from the father of a part of the farm so purchased. He never requested his father to deed him the land described in the bond, and after waiting for 36 years filed a bill to enforce the specific performance of the agreement, when his father and all other witnesses having any knowledge of the facts were dead; which delay is held fatal, and the bill is dismissed.

Appeal from Saginaw. (Edget, J.) Argued May 5, 1891. Decided May 21, 1891.

Bill to compel specific performance of a bond conditioned to convey real estate. Complainant appeals. Bill dismissed. The facts are stated in the opinion.

Tennant & Tennant (*L. C. Holden,* of counsel), for complainant.

William G. Gage, for defendants.

CHAMPLIN, C. J. The bill of complaint in this case is filed to compel the specific performance of a bond conditioned to convey certain real estate. It was executed in the year 1853 by Lilly Cook, of whose last will Calvin Stafford is executor, and was conditioned to convey the land therein described to his son William L. Cook, who is the complainant above named.

The agreement, at the time it was executed, was valid, and the consideration named therein has been performed.

The testimony as to possession was conflicting. Both the father and son exercised acts of ownership over it at different times. Each tilled the land, such as was tillable, and raised crops upon it, which they harvested. There was no fence between the land and adjoining land owned by the father, they being separated by Cass river, which offered no obstacle to cattle passing from one side of the river to the other. The cattle of both father and son grazed upon the land now claimed by the son, promiscuously. The father kept the road fences in repair, and always paid the taxes from 1844 to the time of his death, which occurred June 13, 1889. He also cut large quantities of fire-wood on the premises, and sold the wood at Saginaw. Some of this wood was hauled to market and sold by the son of William Cook, and the proceeds turned over to Lilly Cook. It does not appear that William Cook ever in the life-time of his father requested him to execute a deed of the land described in the bond he held, or ever objected to the exercise of the acts of ownership over the land. On the contrary, it appears that in 1857 Lilly Cook purchased a large farm from the Fraser estate, upon a part of which was a hotel, and secured payment

by executing a mortgage of the land in dispute with other land. This was done with the knowledge of William Cook. It seems that some new arrangement must have been entered into at this time between the father and son, for we find that the son removed into the Fraser hotel, and assisted in paying off the mortgage, and after that was discharged the father conveyed a part of the Fraser farm to William, and afterwards another part to another son, and a part he kept himself. What that arrangement was it is not now possible to prove. The complainant is not a competent witness to testify to it. The brother, to whom a portion of the Fraser farm was conveyed, is dead. The complainant has delayed claiming or enforcing his rights until after Lilly Cook's death, and there does not appear to be any living witness to prove what the arrangement entered into in 1857 was.

The circuit court dismissed the bill of complaint upon the ground of the laches of the complainant in not asserting his rights earlier, but without prejudice to any legal claim he may have against the estate of Lilly Cook. We do not see what legal claim William Cook can have against the estate of Lilly Cook for not conveying the land in accordance with the terms of the bond. Any legal claim would certainly be barred by the statute of limitations.

We are also of opinion that the bill should be dismissed because of the delay of complainant to assert or take steps to enforce his rights under the contract. Delay, or even great delay, is not always a reason for courts of equity to refuse to enforce a written contract specifically. Each case must depend upon its own circumstances, and the court must be influenced and controlled by those equitable principles which, while doing justice to one, will not do an injustice to others. Here no sufficient reason is shown for the delay. Complainant has suffered 36

years to pass without asking for a performance of the contract, and until after the lips of the other party to the contract are closed by death, and he can no longer tell why it has not been performed. Courts of equity have frequently refused relief under such circumstances, and in many cases where the delay has been much less than in this case. *Combs v. Scott,* 76 Wis. 662 (45 N. W. Rep. 532); *Anthony v. Leftwich,* 3 Rand. (Va.) 238; *Williams v. Williams,* 50 Wis. 311 (6 N. W. Rep. 814); Pom. Spec. Perf. §§ 407, 408, and cases cited; Fry, Spec. Perf. §§ 1072, 1078, 1079.

The bill of complaint must be dismissed, with costs of both courts.

The other Justices concurred.

JOSIAH ETHERIDGE v. CHAUNCEY W. WISNER.

86 166
a121 147

86 166
127 169

Mortgage—Deed absolute on its face.

1. "A party seeking to modify the operation of the instrument, and prove himself entitled, against the terms of his own deed, to an equity of redemption, is not only bound to make out that the transaction was, in truth and justice, nothing more than the giving of security, but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind." *Tilden v. Streeter,* 45 Mich. 540.
2. In this case it is held, from a careful reading of the record, that the complainant has *wholly* failed to establish an agreement between himself and defendant that the deed of March 6, 1878, was to be held or treated as a security, and that the evidence to the contrary is overwhelming.

Appeal from Saginaw. (Gage and Edget, JJ.) Argued May 5, 1891. Decided May 21, 1891.

Bill to declare a deed to have been given as security, and to redeem. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for complainant.

Wisner & Draper, for defendant.

LONG, J. The bill was filed in this cause in the circuit court for Saginaw county in chancery for the purpose of recovering title to certain lands in that county. Proofs were taken in open court before the two circuit judges of that circuit, who thereafter made a decree dismissing complainant's bill, with costs. Complainant appeals.

The facts are so fully stated in an opinion rendered by the circuit judge that we adopt that opinion as a statement of facts. It is as follows:

"The bill in this case is filed to obtain a conveyance from the defendant of a farm of 80 acres, in the township of Bridgeport, situated on the Genesee plank-road between Saginaw and Bridgeport.

"The claim of the complainant is that he conveyed this farm to the defendant by a deed absolute on its face, but that it was intended as security for certain moneys paid for and loaned to the complainant by the defendant, as he alleges; and he seeks to have the deed adjudged a mortgage, with the right of redemption.

"The property was conveyed in March, 1878, and this suit was brought in 1889, last year. For many years prior to March, 1878, the parties had been friends. The complainant had been engaged in the sale of liquors, and had amassed considerable property. He was, however, a man of limited information, but had some business ability. He had acquired the Eagle block, a brick store in East Saginaw, the farm in question, and a vacant lot on Cass street, in the same place.

"The defendant was a lawyer by profession, though not in active practice. He was a good business man, and the complainant had been in the habit of advising with him as to business matters, real-estate purchases, purchas-

ing business paper, etc. They were quite intimate in this way, and were personal friends.

"In the year 1876, before the complainant owned the farm in question, the complainant had some difficulty with his wife, that continued from the year 1876 until February, 1878, when it culminated in a separation. When the difficulty commenced, in 1876, complainant was living in town in a brick house, and in the year 1877 (about a year after the difficulty commenced) he bought the farm in question. During the time of the difficulty, and from its inception, the complainant advised with the defendant on the subject. When the difficulty culminated, the complainant concluded to leave Saginaw, and go to the West, and he desired to take $10,000 with him. He was owing upon the farm about $1,900, and desiring 'to settle,' as he terms it, with his wife, the services of the defendant were solicited to aid him in this, and also to aid him in the disposition of his property. The defendant, after several interviews, succeeded in making an arrangement with his wife by which she was to receive $1,500 in cash, and also such personal property as she might desire to select from the home, she having in previous interviews demanded a much larger sum. To carry out this arrangement, the complainant's wife executed a deed of her interest to defendant, and retained in her possession the deed until she should receive the stipulated sum and select the personal property. The money to pay her was obtained by discounting complainant's note at ten days, indorsed by the defendant. Efforts were then made to sell the Eagle block, by offering it to several persons at $8,000; and the farm was also offered to one or more parties, but without success. In the mean time defendant claims that the complainant importuned him to purchase the farm, which he declined to do, and the defendant is corroborated in his statement in this respect.

"After an inability to dispose of the property to others, as has been stated, the defendant claims that, after repeated solicitations, he made this arrangement with the complainant: That, if complainant would make out a deed of his property to him, his real estate, and some personal property that was upon the farm, and hold the deed until, by a sale of the farm or any of the property, he could realize sufficient money to pay complainant $10,000, he would take it, and also take care of the note of

$1,500 that had been discounted to pay the wife, and also the mortgages upon the farm. A deed of the property was accordingly made to the defendant on the 6th of March, 1878, with a consideration stated at $10,000.

"The proofs show that, subsequent to the date of this deed, the parties attempted to negotiate for the sale of the Eagle block, and that about the 25th of March the negotiations were successful, and the Eagle block was sold to Swett and Soyer, of East Saginaw, for $8,000, with the entire approval of the complainant, as he admits, the defendant and his wife making the conveyance to Swett and Soyer; and the deed given to defendant by complainant, which had heretofore remained in his possession, was given to the defendant and placed on record. The entire $8,000 was paid to complainant, Etheridge; the $1,500 note of complainant was taken up by a note of defendant, Wisner, and indorsed by the complainant, which defendant, Wisner, afterwards took up by his own note, without the complainant's indorsement, and afterwards paid that note. At the same time the defendant gave to the complainant his personal note, payable on demand, for $2,000, to make up the $10,000 desired by the complainant, and he subsequently paid also complainant's mortgage amounting to $2,000.

"The contention arises in this way: The defendant claims that the deed was intended as an absolute sale; while the complainant claims that it was intended, as far as the farm was concerned, as security for the $2,000 note payable on demand, which he expected to use to make up $10,000, also as security for the sums paid or to be paid by the defendant to his wife, and any sums the defendant might pay on the mortgages on the farm and the taxes.

"The defendant claims that the complainant was anxious to go west, and take with him $10,000, and made the arrangement as an absolute sale, and that there was no understanding or agreement in reference to a reconveyance of the property, nor was it intended as security.

"The complainant went west, and he returned in about two months, and he claims that he asked for a reconveyance of the property, and that the defendant told him that he had been put to a good deal of trouble, and he would require a bond of indemnity to protect him against any claims the complainant's wife might make. The complainant then says that he offered to allow him $2,000

for the trouble he had had and assistance he had rendered, but that he declined to reconvey. The complainant also claims that in 1884 he again requested a conveyance of the farm, and was refused.

"The defendant says that never from the time the conveyance was made until the beginning of this suit was any claim ever made by the complainant that he was entitled to a reconveyance, nor did he claim any interest in the property; that in 1884, after the complainant had lost some money in the West, he claimed he had sold the farm too cheap, and desired the defendant to convey him a house and lot in East Saginaw to assist him in business, which defendant declined to do.

"Upon a review of the evidence and an examination of the legal questions raised, we are of the opinion that this is not a case where the law in reference to dealings between an attorney and his client is applicable. The defendant, Wisner, was out of practice. He was a business man. His advice to the complainant was of a friendly character, upon subjects connected with business and social matters mainly. He was a confidential adviser, the complainant, Etheridge, having confidence in his superior information.

"It is well settled that a deed absolute on its face may by parol be shown to be a mortgage, and the parol understanding given effect.

"The complainant's case rests entirely on his own unsupported testimony, and we are not convinced by his testimony that the defendant understood the matter as he claims in his testimony the complainant understood it; but he is squarely contradicted by the defendant, and the defendant's view is supported by corroborating facts and circumstances.

"The year 1878 was a year of depression in real estate. Money was scarce, and was loaned at a high rate of interest. At such a time the complainant sought to dispose of his property, and convert it into money. He had paid $11,500 for the Eagle block, and he had bought the farm in a trade, paying $7,000 in money and the house in East Saginaw; and the farm, exclusive of the personal property, may be said to have cost him $10,000. The small parcel on Cass street was worth about $700 to $800. To convert this property into ready cash at such a time would necessarily require some sacrifice. The complainant evidently expected this, as he voluntarily

sold the Eagle block for $8,000, that cost him $11,500, although it was paying a good rental and was in a desirable location. He makes no question about the sale in this suit.

"The evidence in this case shows that the complainant paid a fancy price for the farm. The man of whom he bought it, Mr. Eggert, says so substantially. He says all he could make out of the farm was his living and $300 per year; that for farming it was worth only $75 per acre. Mr. J. P. Allison placed the value of the farm in 1878 at $5,000; Mr. Penoyer the same; Dr. Robinson, Mr. Phillips, Mr. Benjamin, and others place its value at varying figures; the highest being from $80 to $100 per acre, the lowest $75 per acre. The average of the testimony is that it was worth $6,000. It was not near enough to the city ever to become an addition to it. It was a piece of land that required the expenditure of a considerable sum of money in the way of drainage and outbuildings to make it effective as a farm.

"The defendant, then, received the conveyance of two pieces of property which may be said at the time to have been worth as follows: The farm, $6,000; the property on Cass street, $700. The complainant received $2,000, the note of defendant, which was paid; his mortgages were taken care of, to the extent of $2,000; and his wife was paid the sum of $1,542.

"There is some dispute as to the value of the personal property that went with the deed, but it would seem that it was old machinery upon the premises, and was worth perhaps $300, which defendant received. In addition there was other personal property, a span of horses, and a wagon, for which the defendant paid $300 in addition to the sum that was named. This was practically all cash received by the complainant. The property on Cass street was afterwards sold for $700 by the defendant, and it was about what it was worth at the sale. These figures would show that the defendant had paid for this property nearly its full value, if not about its full value, estimating the farm at the figures of Allison and Penoyer; and, estimating the farm at the figures placed by other parties, there was a margin, but not a very large one, in favor of the defendant. There was less sacrifice in the sale of the farm, considering its value and what it produced, considerably less, than in the sale of the Eagle block.

"The complainant in his testimony, while claiming that this deed was given as security, says that no time when he would return from the West was mentioned; that no time when he should redeem was mentioned between the parties; no rate of interest agreed upon; no provision made for working the farm or paying the taxes that might accrue; no talk or understanding about any improvements to be made upon the farm, or to what extent. In fact, the conversation which usually occurs between parties where there is a parol agreement in reference to an absolute deed, it would seem, from the complainant's own testimony, did not occur in this case. He simply expected that the defendant would pay the taxes, work the farm, and whenever he pleased, in one year or ten years, he might return, pay up, and receive a deed. His conversations previous to going away, and shortly after the sale, with several parties who testified in this case, show that he repeatedly stated that he had sold the farm to the defendant; that he was going west to seek his fortune; and gave the impression that he was not to return. The complainant offered no evidence of the value of the farm in 1878, in opposition to the testimony of the defendant.

"The complainant says that when he returned in July, 1878, and asked for a reconveyance, he made no inquiry as to the meaning or purport of a bond of indemnity; he consulted with no one as to his legal rights, but says the bond of indemnity troubled him, and, as the defendant was a lawyer, said 'he was afraid to tackle him.' The testimony shows that he lived at defendant's house as a guest, both before and after the alleged request; and he admits that he received after the request the full amount of the $2,000 demand note, as he says, reluctantly, while the evidence of those present at the payment would show that no objection to its receipt was made at the time.

"The testimony further shows that afterwards, and during the same year, the complainant purchased a farm of 13 acres and a hotel in the vicinity of the farm in question; and that he consulted with the defendant in regard to it, lived near him for several months, and saw him make valuable improvements upon the farm, without raising any question in regard to it; that he subsequently went west, and was unsuccessful, and the defendant loaned him money to assist him; and on his final return to Saginaw he engaged in business by borrowing $1,000 of

defendant, which he paid prior to bringing this suit.

"The complainant has waited many years before asserting a right to this property, and his laches in this respect do not entitle his case to a favorable consideration. The house upon the property in the mean time has been entirely remodeled. New buildings have been erected, and other valuable improvements have been made upon the property, and it is enhanced in value.

"We are of the view, however, that the complainant has failed to establish an agreement between himself and the defendant that the deed of March 6, 1878, was to be held or treated as security. And we are of the opinion that, as the complainant was then situated, he desired to sell his property absolutely, and secure for himself $10,000, have his wife paid, and his mortgage indebtedness besides, from the proceeds, and remove to the West to invest his money and seek a new home. To accomplish this, he made the conveyance of March 6, 1878, not intending or expecting at the time a reconveyance of it from the defendant, and not intending to redeem it, being entirely willing that his old-time friend should make something by the purchase, in view of the assistance he had rendered to him.

"The bill may be dismissed, with costs.

"By JUDGE EDGET.

"I sat with Judge Gage upon the hearing of this case, the submission of the testimony, and the argument, and I concur entirely in the general results to which he comes."

We have carefully read the record in this case, and fully concur with the learned circuit judges of the Saginaw circuit that the complainant has wholly failed to establish an agreement between himself and defendant that the deed of March 6, 1878, was to be held or treated as a security. The general rule is as stated by Mr. Justice GRAVES in *Tilden v. Streeter*, 45 Mich. 540, that—

"A party seeking to modify the operation of the instrument, and prove himself entitled, against the terms of his own deed, to an equity of redemption, is not only bound to make out that the transaction was, in truth and justice, nothing more than the giving of security,

but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind."

But we need not in the present case invoke that rule. The evidence is overwhelming to sustain the defendant in his contention. We are unable to discover in the record presented a single act of the defendant tending to show that he has not treated the complainant at all times in the most fair and equitable manner, and the complainant's conduct certainly does not show that he ever regarded the transaction as a mere security, whatever he may now testify that he said to the defendant to the contrary.

It is one thing to be acquitted of such a fraud as is charged against the defendant because the evidence has not sufficient weight to convince the reasonable mind, and quite another thing to be acquitted of the fraud because the evidence satisfies the mind beyond all doubt that the party charged is entirely innocent of the offense. We believe the defendant has been wrongfully charged, and that he is entitled upon this record to be fully acquitted of such offense, at least so far as our views, from a careful examination of the record, may acquit him of it.

The decree of the court below dismissing complainant's bill will be affirmed, with costs.

The other Justices concurred.

THE PEOPLE v. JOHN JOHNSON.

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Arrest—Breach of the peace—Presence of the officer.

1. In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Id. 299; *People v. Bartz*, 53 Id. 495; *Davis v. Burgess*, 54 Id. 514; *Robison v. Miner*, 68 Id. 549; *Ware v. Circuit Judge*, 75 Id. 492.
2. To be intoxicated and yelling on the public streets of a village, in such a manner as to disturb the good order and tranquillity of the village, is an act of open violence, and a breach of the peace, which, if committed in the *presence* of an officer, will justify him in arresting the guilty party without a warrant.
3. To authorize an arrest without a warrant, the offense must be committed in the *presence of the officer*, and the arrest must be made *immediately*.
4. A village marshal is not justified in making an arrest, without a warrant, of a party who has been guilty of a breach of the peace by shouting on the public streets while out of sight of the officer, who acts upon information received from a third person in making the arrest.

Exceptions before judgment from Mackinac. (Steere, J.) Argued May 6, 1891. Decided May 21, 1891.

Information for resisting an officer. Conviction set aside, and respondent discharged. The facts are stated in the opinion.

James J. Brown, for respondent.

A. A. Ellis, Attorney General, and *P. N. Packard*, Prosecuting Attorney, for the people.

[The points of counsel are stated in the opinion, where the authorities are cited.—REPORTER.]

CHAMPLIN, C. J. Main street, in the village of Naubinway, Mackinac county, runs east and west. A street runs north from Main street, upon which is located the house of one Bruce. Between 9 and 10 o'clock of the 28th day of December, 1890, as the respondent, John Johnson, and one McAlister were walking along Main street, Johnson "shouted" or "whooped" in a loud voice twice. The shout was heard by Frank Murry, who was marshal of the village, and who was at the time standing upon the door-step of Mr. Bruce's house. He started towards Main street, and proceeded down that street until he came to Johnson and McAlister, and asked, "Who done that hollering?" and McAlister replied that it was Johnson, and he then arrested him for it, and attempted to take him to the jail or lock-up. Johnson resisted, and Murry used his club, and sent for Deputy-Sheriff Lull, whereupon they handcuffed Johnson, and dragged him to the jail. It is not necessary in this action to describe or comment upon the conduct of Murry while taking his prisoner to the jail, and after they arrived there.

The prosecuting attorney filed an information against Johnson for resisting the officer, Frank Murry,—

"While in the lawful execution of the duties of his office in attempting to arrest him, the said John Johnson, for then and there being drunk, intoxicated, disorderly, and yelling, and disturbing the public peace, in the public streets of the village of Naubinway, in the presence of him, the said Frank Murry, he, the said Frank Murry, being then and there engaged in his lawful attempts to maintain, preserve, and keep the peace," etc.

Upon trial Johnson was convicted. There was a conflict of testimony as to what occurred at the time of the arrest, but in the rulings here made we have taken the testimony of the people as that upon which the conviction must stand if it can be supported. By Murry's tes-

timony he was over 150 feet away, and upon another street, when he heard the shout. There is no testimony showing that he was in sight of Johnson and McAlister, nor that he knew who it was who shouted, but he based his arrest upon the statement of McAlister that it was Johnson. There was not any riot, noise, or disturbance when he reached them. No other persons are shown to have been upon Main street when Murry first accosted Johnson and McAlister. He had no warrant for the arrest of either Johnson or McAlister.

Under the facts above stated two questions are raised:

1. Did Johnson, by the act of "shouting" or "whooping" in the public street of the village when on his way home, accompanied by McAlister, at the time of night stated, commit a breach of the peace?
2. If yes, was the offense committed in the presence of the officer, Murry?

1. We have had occasion to define the substance and nature of this offense in the following cases: *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Id. 299; *People v. Bartz*, 53 Id. 495; *Davis v. Burgess*, 54 Id. 514; *Robison v. Miner*, 68 Id. 549; *Ware v. Circuit Judge*, 75 Id. 492. In general terms the offense is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. Each case where the offense is charged must depend upon the time, place, and circumstances of the act.

The circuit judge instructed the jury that—

"To be intoxicated and yelling on the public streets of a village, in such a manner as to disturb the good order and tranquillity of that village, would be an act of open violence, and would be a breach of the peace, which, if committed in the presence of an officer, would justify him in making the arrest."

This was a correct statement of the law, and was applicable, under the testimony in this case. Hawley, Arrest, p. 38; *Moseley v. State* (Tex.), 4 S. W. Rep. 907; *State v. Lafferty*, 5 Har. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *State v. Freeman*, 86 N. C. 683; *City Council v. Payne*, 2 Nott & McC. 475; *State v. Bowen*, 17 S. C. 58.

2. Was the offense committed in the presence of the officer, Murry, so as to authorize him to make the arrest without a warrant? To restate the facts: Johnson was not in the view of the officer. He did not know who it was that raised the shout. He arrived at the place after the occurrence, and inquired, "Who done that hollering?" and was told by McAlister that it was Johnson, and he then arrested him. At that time Johnson was not engaged in making any noise or disturbance. At the time the officer heard the shout he was over 150 feet away, upon another street. It was not in his presence, and when he arrived there was perfect tranquillity. To authorize an arrest without a warrant, the offense must be committed in the presence of the officer, and the arrest must be made immediately. The officer did not act upon his own knowledge, but upon information he had gained by inquiries from McAlister. If he could make the arrest under such circumstances without a warrant, then there is no reason why he could not have made it the next day, or a week after, upon inquiry and information that Johnson was the person whom he heard shouting.

People v. Bartz, 53 Mich. 493, is cited as supporting the proposition that the offense was committed in the presence of Murry. The facts in that case were different from the facts in this. In that case the officer who made the arrest saw the flash made when the pistol was discharged, heard the report, and *saw* the respondent,

Bartz, and pursued and arrested him. Bartz had not been out of sight of the officer from the time he discharged the pistol until the officer overtook and arrested him.

It is claimed by counsel for the people that Johnson, being intoxicated in a public street, was liable to be arrested therefor without warrant, under Act No. 4, Laws of 1887 (3 How. Stat. § 9314 *i*), and section 2893, How. Stat. But this position is one taken in this Court for the first time. The case was tried below upon the charge and theory that Murry made the arrest for a breach of the peace. The officer made the arrest for that offense, as is apparent from his inquiry of Mr. McAlister. He did not inform Johnson that he arrested him for being intoxicated, and does not testify that he was intoxicated. McAlister is the only one who testified that Johnson was intoxicated, and that he was taking him home. The judge put the case to the jury upon the theory that the arrest was made for committing a breach of the peace, and the people will not be permitted, after trial and conviction of respondent upon that theory, to change ground, and claim that he was arrested for being intoxicated under the act cited.

The conviction must be set aside, and the prisoner discharged.

The other Justices concurred.

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THE PEOPLE v. JOHN P. HUGHES AND WILLIAM MCMANUS.

Criminal law—Liquor traffic—Minor in saloon—Acts of clerk or agent.

1. It was evidently the intention of the Legislature, by the provisions of section 14 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 7), to make the proprietor or keeper of a saloon liable for the acts of his clerk or agent in permitting any student in attendance at any public or private institution of learning in this State, or any minor, to play at cards, etc., in said saloon; but whether such proprietor or keeper can be made liable in a *criminal* prosecution for such act committed in his absence is not decided.
2. The omission of the words "clerk or agent" from section 15 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 8), which makes its unlawful for any person to allow any minor to visit or remain in any room where liquors are sold or kept for sale, unless accompanied by his or her father or other legal guardian, raises the presumption that the Legislature did not intend to make the proprietor of a saloon liable *criminally* for the act of his clerk or agent in violation of said section, committed in his absence, and without his knowledge or consent.
3. Section 24 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*e* 7), making persons engaged in liquor selling, whether as owner or as clerk, agent, servant, or employé, equally liable as principals for any violation of the provisions of the act, and making any principal liable for the acts of his clerk, servant, agent, or employé amounting to such violation, was intended to enlarge the liability of the proprietors of saloons so as to extend it to the acts of servants, clerks, agents, or employés in *civil*, but not in *criminal*, actions.

Exceptions before judgment from Genesee. (Newton, J.) Argued May 6, 1891. Decided May 21, 1891.

Information for a violation of section 15 of Act No. 313, Laws of 1887. Conviction set aside, and respondents discharged. The facts are stated in the opinion.

Durand & Carton, for respondents.

A. A. Ellis, Attorney General, and *John M. Russell*, Prosecuting Attorney, for the people.

LONG, J. The respondents in this case are the proprietors of a saloon and retail liquor store in the village of Mt. Morris, Genesee county, and they were engaged in that business on October 25, 1890.

On that day, while respondents were absent from their place of business, leaving the same in charge of their clerk, two boys named Egan, and who were minors, entered respondents' saloon, and remained there a short time playing pool.

Complaint was made against respondents, charging them with the violation of section 15, Act No. 313, Laws of 1887. They were arrested, and by the justice, upon examination, held for trial in the circuit court. In the circuit court an information was filed charging respondents with the violation of section 15, aboved referred to, and upon the trial before the jury they were convicted of the offense charged. There is no conflict of testimony. It appears, as above stated, that the respondents themselves were not present during the time the minors were there.

At the close of the testimony respondents' attorney requested the court to charge the jury as follows:

"If the jury find that the respondents were not in the saloon at the time the minors were in there, and had no knowledge of the presence of the minors in the saloon at the time they were there, then the respondents cannot be convicted of the offense charged, and you should acquit the respondents."

This request was refused. The court directed the jury as follows:

"Defendants' counsel claim, and request me to instruct you, that you cannot find them guilty unless they were

personally present at that time. That I cannot do, because the statute says:

"'It shall not be lawful for any person, by himself, his clerk, or agent, to permit any student in attendance at any public or private institution of learning in this State, or any minor, to play at cards, dice, billiards, or any game of chance.'

"A man engaged in that business is responsible to the extent of seeing that his place of business is closed; if he is not there himself, to give such instructions and directions as will protect the children of the community from being in a place prohibited by law."

The learned circuit judge had before that called the attention of the jury in his general charge to the fact that the information was drawn under section 15, and had directed them that it also had relation to the preceding section, or section 14, of the act. That section reads as stated by the trial court, while section 15 reads:

"It shall not be lawful for any person to allow any minor to visit or remain in any room where such liquors are sold or kept for sale, unless accompanied by his or her father or other legal guardian."

We think the trial court was in error in applying the provisions of section 14 to this case, under the claim made in the information. The information specifically describes the offense as coming within the provisions of section 15, and not within the provisions of section 14, in which information it is stated—

"That the said John P. Hughes and William McManus, being then and there engaged in the sale of and dealers in spirituous, brewed, fermented, and vinous liquors, did allow one Fred Egan, a minor under the age of 21, to wit, of the age of 17, years, to visit and remain in said saloon and room then and there under their control; the said Fred Egan not being then and there accompanied by his father or other legal guardian, and against the form of the statute," etc.

It will be seen that by the provisions of section 14 it is made unlawful for any person, by himself, his clerk,

or agent, to permit any minor to play at cards, dice, etc., in any building in which spirituous or intoxicating liquors are sold; while by the provisions of section 15 it is made unlawful for any person to allow any minor to visit or remain in a room where liquors are kept or sold, unless accompanied by his father, etc. It was evidently the intent of the Legislature, by the provisions of section 14, to make the proprietor or keeper liable for the acts of his clerk or agent or servant; but whether such proprietor or keeper could be made liable to a criminal prosecution for the violation of section 14 of this act, who was not present at the time the minors so played at cards, dice, billiards, etc., we do not decide. In section 15 the words "clerk or agent" do not occur. We must presume that the Legislature intentionally omitted them, and did not intend, by the language employed in this section, to make the proprietor of the saloon liable criminally for the act of the clerk or agent in permitting a minor to visit or remain in such room unaccompanied by his father, guardian, etc.

It is claimed, however, that section 24 of the act under which the information is filed enlarges the liability of the keeper of saloons and places where intoxicating liquors are sold, and that section 15 should be construed with reference to this section. Section 24 provides as follows:

"All persons engaged in the business of selling or keeping for sale any of the liquors mentioned in this act, whether as owner, or as clerk, agent, or servant or employé, shall be equally liable as principals for any violation of any of the provisions of this act; and any person or principal shall be liable for the acts of his clerk, servant, agent, or employé for any violation of the provisions of this act."

It is claimed by counsel for the people that it was the intent of the Legislature to enlarge the liability of the proprietors of saloons so as to extend it to the acts of

servants, clerks, agents, or employés. This is undoubtedly true, as affecting the liability of proprietors in civil actions; but we cannot accede to the proposition that it enlarges the liability of the proprietor in a prosecution in the nature of a criminal charge for the violation of the section, and subjecting the proprietor, upon conviction, to fine and imprisonment.

The learned counsel for the people also contend that the law, as construed by this Court in former decisions, seems to be aimed against saloons as a place, rather than against the proprietor or any other person as an individual, and say:

"If it was competent for the Legislature to enact a law making a saloon-keeper responsible if his saloon remained open upon certain days, whether he was present or had knowledge of the fact or not, it is competent for the same Legislature to make a saloon-keeper responsible for the acts of his agents while conducting his affairs in such saloon, whether he is present or not."

Construction has been given to the statutes by this Court in cases where saloons have been kept open in violation of law, and the respondents in such cases have been held properly convicted, though they were not present, and had no knowledge that the place so kept by them was being kept open contrary to the provisions of the statute. The decisions are based upon the ground that the saloon is so completely under the control and supervision of the proprietor that he should be held to strict compliance with the statute in this regard. In *People v. Robbins,* 70 Mich. 130, it was said that—

"It is a violation of the law to keep a saloon open on week-days after 9 o'clock, whether any liquor is sold therein or not."

The place named must be closed, and cannot, by the proprietor or any other person, be kept open for business purposes of any kind, and the proprietor has at all times

such care and supervision over it, whether he is present or absent from the place, that no person, even during his absence, can keep it open or enter therein.

In the present case the respondents had the right to keep the saloon open at the time when the offense is charged to have been committed, and under the statute sales made therein were not prohibited, except in certain specified cases, and to certain persons or class of persons, described in the statute. They had the right to carry on the business themselves, or to put it in charge of the clerk, agent, or servant, being responsible in civil damages for its unlawful conduct by such clerk, servant, or agent. If sales were unlawfully made by the persons in charge during the absence of the proprietors, and without their knowledge or consent, no conviction, under the criminal statutes, could have been sustained against such absent proprietors as for such unlawful sales. *People v. Welch*, 71 Mich. 548; *Faulks v. People*, 39 Id. 200.

There is no testimony in this record showing that the respondents had any knowledge that these minors were about to visit this saloon without the attendance of their father or legal guardian, or knowledge that they were there at any time during their absence. They may have directed the person whom they left in charge not to admit any minors or persons who had no right to be there, and to abstain from selling to persons whom the statute prohibited from receiving or being given intoxicating liquors of any kind, and without the knowledge that the offense was being committed, and contrary to their expressed direction, yet, under the ruling of the learned circuit judge, they would be held liable to the same measure of criminal responsibility as though they were present, and personally engaged in the violation of the law.

The statute cannot have this construction. If this

conviction could be sustained upon the ground claimed, it would be holding that permitting minors to visit and remain in saloons is a higher degree of crime than as though intoxicating liquors were actually sold to them.

The court below was clearly wrong in refusing defendants' request to charge. For this reason the conviction must be set aside, and the respondents discharged.

The other Justices concurred.

JOHN B. BRESSON v. AMOS S. MUSSELMAN, WILLIAM WIDDICOMB, AND WILLIAM S. DOWNEY.

Assignment for benefit of creditors—Bill of sale.

A bill of sale given in payment of *bona fide* indebtedness, and not purporting to cover nor in fact covering all of the debtor's property, cannot be tortured by any legal construction of the assignment statute into an assignment for the benefit of creditors, and thereby be declared void for an unlawful preference. *Sheldon v. Mann*, 85 Mich. 265.

So *held*, where a merchant gave a bill of sale to his brother of all of his property, except a city lot with a store and dwelling-house thereon, worth not to exceed $2,400 and mortgaged for $900, and which was occupied by the debtor as a homestead, in payment of a *bona fide* debt due to the vendee, who took possession of the property and continued the business.

Error to Kalamazoo. (Buck, J.) Argued May 7, 1891. Decided May 21, 1891.

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

Earle & Hyde, for appellants.

O. T. Tuthill, for plaintiff.

LONG, J. This is an action of replevin.

Defendants Musselman & Widdicomb are wholesale grocers of Grand Rapids, and had sold goods in the year 1890 to a retail grocer at Kalamazoo, named Henry J. Bresson, a brother of the plaintiff. June 14, 1890, Henry J. Bresson, then owing about $800 for goods which were put into his stock at Kalamazoo, transferred all his property, consisting of his stock of groceries, horse, wagon, etc., to his brother, the plaintiff, in payment of an alleged indebtedness of about $950. The transfer was by a bill of sale, and was absolute to convey the title of the entire property. The possession of the stock was at once turned over to the plaintiff, who continued the business in his own name. The sale by Henry J. Bresson to plaintiff covered all his property, except a city lot with a house and store thereon. Henry J. Bresson was then, and still is, a married man, and lived in the house on said lot. This real property was mortgaged at the time for $900, and was worth not to exceed $2,400; so that what Henry J. Bresson had left of his property, either real or personal, was this homestead, covered by a mortgage which exceeded the excess over $1,500, allowed by law as exemption.

Defendants Musselman & Widdicomb, on the 15th of August, 1890, were judgment creditors of Henry J. Bresson for $237.39. August 19, 1890, they sued out executions on their judgments, and placed them in the hands of defendant Downey, a constable of Kalamazoo, who on August 21, 1890, levied upon the stock of goods in question, which were then in the possession of plaintiff, and who claimed to own them under the sale from his brother. Afterwards plaintiff brought this suit in replevin against defendants, which, upon the trial in the Kalamazoo circuit

court, resulted in a verdict for the plaintiff, finding title of the goods in him, and an award of $10 damages for their detention. Judgment being entered upon this verdict, defendants bring error.

Defendants do not ask a reversal of the judgment because of anything happening at the trial in relation to the *bona fides* of plaintiff's claim, but insist that the circuit court erred in refusing to instruct the jury as requested by defendants' counsel in their first and second requests to charge, as follows:

"1. Under the undisputed evidence in the case, the transfer of the stock of goods in question from Henry J. Bresson to plaintiff was in payment of a debt, and was substantially all of Henry J. Bresson's property, who owed other creditors for debts incurred in the business in which said stock of goods was used, who were left unprovided for; and, therefore, the sale of said stock amounted to an assignment, preferring one creditor over another, and was therefore void, and your verdict should be for defendants.

"2. Under the undisputed evidence in the case, Henry J. Bresson by such sale surrendered the dominion of his business and property to the plaintiff, and went out of business, leaving other creditors unprovided for; and the sole consideration for the sale was the debt owing by Henry J. Bresson to plaintiff; and such transfer is in law an assignment with preference, and void under the statute."

This case, under its facts, is ruled by *Sheldon v. Mann*, 85 Mich. 265. The questions raised by counsel for defendants in this case are so fully considered in *Sheldon v. Mann, supra*, that it would be but a reiteration of the principles there stated to discuss them.

The judgment must be affirmed, with costs.

The other Justices concurred.

PATRICK O'CONNOR v. JAMES O'CONNOR AND CATHERINE O'CONNOR.

Assumpsit—Joint liability.

A son received $100 of the purchase price of a house and lot sold by his father, and the father delivered the balance of the money to his son's wife for safe-keeping, and, on their refusal to repay the money, sued them jointly to recover the same. And it is held that there is nothing in the record tending to show their *joint* liability.

Error to Wayne. (Brevoort, J.) Argued May 8, 1891. Decided May 21, 1891.

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

Edwin Henderson, for appellants.

James H. Pound, for plaintiff.

LONG, J. This is an action of *assumpsit,* brought in the Wayne circuit court, where plaintiff had verdict and judgment for the sum of $731.28. The plaintiff is the father of the defendant James O'Connor. The defendant Catherine O'Conner is the wife of the other defendant.

The claim on the trial in the court below was that the plaintiff sold a house and lot in October, 1889, for $1,050; that an incumbrance of $250 existed upon the property, after the payment of which there remained $800, which was counted out by the real-estate dealer who had conducted the negotiations in two separate amounts of $700 and $100, respectively; that defendant James O'Connor took the $100, while the plaintiff took the $700 and gave it to defendant Catherine O'Connor for safe-keeping;

that $85 of the $100 taken by James was subsequently turned over to the defendant Catherine, with the consent and approval of the plaintiff, to be safely kept with the remainder. Demand was made upon the parties for the repayment of this money, and, they neglecting to pay it, this action was brought against them jointly in *assumpsit*, and a recovery permitted for the full amount of the claim, less certain moneys which it was shown upon the trial had been paid to the plaintiff.

The testimony upon which the plaintiff was permitted to recover upon the theory of the joint indebtedness was that of Andrew O'Connor, one of plaintiff's sons, who testified substantially that, in order to ascertain the situation of his father's affairs, he went to the house of James, ostensibly to borrow some money of him, and inquire if James could let him have $150 or $200. The witness then testified as follows:

"I says, 'Jim, can you let me have $150 or $200 of that money?' He says, 'I have not got enough to go into business with.' I said, 'What did you do with that money of father's?' He says, 'I have not $400 of it.'"

At the close of the testimony counsel for defendants requested the court to charge the jury:

"If the jury find that the plaintiff delivered a certain sum to Catherine O'Connor for safe-keeping, and refused to and did not permit James O'Connor to have the custody of the sum, and that he gave another sum to James O'Connor, there would be no joint liability, and defendants are entitled to your verdict."

This was refused, and the court charged the jury as follows:

"The old gentleman says he would not trust his son; that he was not trustworthy. You remember the evidence of Andrew and Andrew's wife. Both went to see James and Catherine O'Connor in regard to the money. If you believe Andrew, gentlemen,—that he went there for the

purpose of borrowing $150 or $200, and asked James to loan him $150 or $200, and that James said to him, 'We haven't that much money to put into our business,' or words to that effect,—then, gentlemen, it would show that James must have put this money into his business; and if he did have the handling of it at all, or anything to do with it, or his wife turned it over to him, he is as much liable as his wife, and your verdict will be for such sum as you find for the plaintiff."

There was no testimony in behalf of the plaintiff showing that this $700, or any part of it, was ever given over to the custody of defendant James O'Connor. It is shown on the part of defendants by the testimony of Catherine O'Connor that she had control and custody of this money, and that it had never been turned over to James. Under these circumstances the court was clearly wrong in refusing to charge the jury as requested by defendants' counsel. There is nothing in the record showing or tending to show the joint liability of the defendants.

The judgment must be reversed, with costs, and a new trial ordered.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. GRANT, J., did not sit.

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THE CONRAD SEIPP BREWING COMPANY (A CORPORATION) v. EDWARD J. MCKITTRICK.

Bills and notes—Pleading—Assumpsit—Common counts.

1. In a suit by the payee in a *judgment* note, commenced by declaration, to which a copy of the note is annexed, with a notice that it constitutes the plaintiff's sole cause of action, the execution of the note need not be proved unless denied under oath.

2. In such a case the promise is to pay money, and its non-payment constitutes the sole breach, and a recovery may be had under the common counts, under which the contract is admissible in evidence.
3. The admission of "for value received" in a judgment note is *prima facie* sufficient to show that the promise contained in the note had an adequate consideration to support it.
4. An instrument in form a promissory note, but which autnorizes a confession of judgment for the amount due thereon, with costs and the usual attorney's fees, is not a promissory note, under the Michigan decisions; citing *Bank v. Purdy*, 56 Mich. 6; *Altman v. Rittershofer*, 68 Id. 287; *Altman v. Fowler*, 70 Id. 57; *Wright v. Traver*, 73 Id. 493; *Bank v. Wheeler*, 75 Id. 546.
5. In each of the cases above cited the suit was brought by an indorsee of the instrument, who failed to recover because it was not a promissory note negotiable under the law-merchant, and the declaration failed to allege title in the plaintiff by assignment, the indorsement on the back of the contract being held insufficient to transfer title, or to operate as an assignment of the contract.

Error to Kent. (Burch, J.) Argued May 13, 1891. Decided May 21, 1891.

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

FitzGerald & Barry, for appellant, contended:

1. How. Stat. § 7346, allows a plaintiff in an action on a bill of exchange or promissory note to declare on the money counts only, and give such bill or note in evidence thereunder in cases where a copy of the instrument has been served with the declaration, but this right does not extend to other written contracts for the payment of money; citing *Altman v. Fowler*, 70 Mich. 57, 59; *Mattison v. Marks*, 31 Id. 421, 422.
2. The paper is not a promissory note; citing the cases cited in the opinion.
3. The power of attorney clause could not be stricken out without making a material change in the instrument, as it was a contract to be performed in Illinois, by the laws of which state the validity of that clause, as well as of the entire contract, must be governed; citing Story, Conf. Laws, §§ 280, 281; *Andrews v. Pond*, 13 Pet. 65, 78; *Prenliss v. Savage*, 13 Mass.

20, 23; *Fanning v. Consequa*, 17 Johns. 511, 518; *Thayer v. Elliott*, 16 N. H. 102, 103; and by those laws the power, although part of the same instrument, is a valid part of the contract, the statute not requiring it to be evidenced by a separate instrument; citing Rev. Stat. Ill. p. 1107 (Cothran, Ann. Ed. 1880); Puter. Pl. & Pr. (6th ed.) 822.

4. Plaintiff cannot recover, under the common and money counts, on the promise to pay, and abandon the rest of the contract, but must count specially thereon; citing *Altman v. Fowler*, 70 Mich. 57, 59; *Mattison v. Marks*, 31 Id. 421, 422; *Lansing v. McKillip*, 3 Caines, 286, 287.

Elizabeth Eaglesfield (*E. H. Maher*, of counsel), for plaintiff, contended:

1. The warrant of attorney to confess judgment was wholly inoperative because not contained in a separate instrument; citing How. Stat. § 7662.
2. A promise may have the effect of a note as between the immediate parties to it, and lack the requisites of a negotiable promissory note by reason of additions, etc.; citing 1 Rand. Com. Pap. § 7; and the statute applies to such a note as well as to one that is negotiable; citing *Railway Co. v. Potter*, 55 Mich. 627, 628; and promissory notes, whether negotiable or not, are admissible under the common counts, without reference to the statute; citing same case.
3. So far as the makers of notes are concerned, it has always been competent to sue them under the common counts; citing *Brown v. McHugh*, 35 Mich. 50.
4. The statement "for value received" imported a valuable consideration; citing 1 Rand. Com. Pap. § 178, and note; 1 Edw. Bills & N. § 202 (*169); and an action will lie under the common counts for a sum agreed upon as due, if based on a lawful consideration; citing *Miner v. O'Harrow*, 60 Mich. 91, 93; *Stevens v. Tuller*, 4 Id. 387, 388.

CHAMPLIN, C. J. The plaintiff brought suit against the defendant, declaring upon the common counts in *assumpsit*, and annexing thereto a copy of the following instrument in writing, and giving notice that the instrument, denominated a promissory note, would be given in evidence under the money counts, and that it constituted the plaintiff's sole cause of action, viz.:

THE CONRAD SEIPP BREWING CO.

"$720.00. GRAND RAPIDS, MICH., April 20th, 1888.

"Six months after date, for value received, I promise to pay to the order of the Conrad Seipp Brewing Co., Chicago, Ill., seven hundred and twenty 00-100 dollars, at their office, Chicago, Ill., with interest at 6 per cent. per annum after maturity, until paid.

"And to secure the payment of said amount I hereby authorize irrevocably any attorney of any court of record to appear for me in such court, in term-time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and usual attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment; hereby ratifying and confirming all that my said attorney may do by virtue hereof.

"No. 4,042. E. J. MCKITTRICK."

The plea was the general issue, with notice of recoupment.

The case was tried before the court without a jury, and a written findings of fact and law filed, in which it was found that the plaintiff was a corporation, and that the defendant on the 20th day of April, 1888, made and executed for a valuable consideration the written instrument, a copy of which is given above; that by the delivery thereof to the plaintiff, which occurred on the 20th day of April aforesaid, defendant became liable to pay plaintiff $720, with interest at 6 per cent. after maturity; that plaintiff demanded payment after the money became payable, and defendant refused to pay; and that there was at the time of such finding due and unpaid to plaintiff on such written instrument, $801.60.

The judge also found at the request of defendant—

"That by the statutes of the state of Illinois it is pro-

vided that 'any person, for a debt *bona fide* due, may confess judgment by himself or attorney, duly authorized, either in term-time or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens, in like manner and extent as judgments entered in term,'—as appears in the Revised Statutes of the state of Illinois for the year 1880, at page 1107, as appeared by the evidence in the case."

A bill of exceptions was settled, and is a part of the record in the case, from which it appears that when the instrument in writing signed by defendant was offered in evidence the defendant's attorneys objected to the introduction thereof, on the ground that the paper writing was not a promissory note, and was incompetent, immaterial, and irrelevant to the issue; that, if anything, it is a mere contract, irrelevant to the issue joined; and also because it was not shown that the person who executed the paper writing is the same person as the defendant,—which objections were overruled, and the instrument admitted in evidence. This ruling of the court constitutes the defendant's first assignment of error.

Defendant's counsel contend that the instrument, not being a promissory note, is not admissible in evidence under the common counts of the declaration. That the instrument is not a promissory note is settled by the decisions of this Court. *Cayuga Co. Bank v. Purdy*, 56 Mich. 6; *Altman v. Fowler*, 70 Id. 57; *Altman v. Rittershofer*, 68 Id. 287; *Wright v. Traver*, 73 Id. 493; *Second Nat'l Bank v. Wheeler*, 75 Id. 546, and other cases. In each of these cases the suit was brought by an indorsee of the instrument, and not by an original promisee named in the contract; and as to such indorsees they failed to recover upon the instrument because it was not a promissory note negotiable under the law-merchant, and the declarations upon the common counts failed to allege title in the plaintiff by assignment, the bare indorsement being

insufficient, indorsed on the back of a contract, to transfer title, or operate as an assignment of a contract.

In this case the action is brought by the party to the instrument to whom the promise is made. A copy of the instrument being set out and served with the declaration, with a notice that it constituted the plaintiff's sole cause of action, it was not necessary to offer proof of its execution by defendant, as the signature was not denied under oath. Cir. Ct. Rule No. 79. The suit was brought to recover a money demand. The promise is to pay money, and its non-payment constitutes the sole breach. In such cases a recovery may be had under the common counts, and the contract is admissible in evidence under such counts. *Pt. Huron, etc., Ry. Co. v. Potter,* 55 Mich. 627; *Miner v. O'Harrow,* 60 Id. 91; *Phippen v. Morehouse,* 50 Id. 537; *Rickey v. Morrison,* 69 Id. 139; *Thomas v. Caulkett,* 57 Id. 392.

No question is made that the consideration was not proved. The admission of value received in the contract was *prima facie* sufficient to show that the promise contained in the contract had an adequate consideration to support it.

The court was not in error in admitting the contract in evidence, and the judgment is affirmed, with costs of both courts.

The other Justices concurred.

SIDNEY S. VARDEN, HIGHWAY COMMISSIONER, v. JAMES H. RITCHIE.

Highways—Trespass—Declaration.

Where the declaration in an action of trespass prosecuted under How. Stat. § 1371, for an encroachment upon a highway, describes the highway and the encroachment, which encroachment as described is not in said highway as described, to which declaration the defendant pleads the general issue, with a denial of any encroachment upon the highway as described in the declaration, the defect is fatal to the plaintiff's recovery.

Error to Huron. (Beach, J.) Argued May 15, 1891. Decided May 21, 1891.

Trespass for encroaching on a highway. Defendant brings error. Reversed, and judgment entered for defendant for costs of both courts. The facts are stated in the opinion.

Charles L. Hall, for appellant.

John F. Murphy (*E. F. Bacon*, of counsel), for plaintiff, contended:

1. The question of the sufficiency of the declaration was not raised on the trial or ruled upon by the court, and the defendant cannot take advantage of such objection at this time; citing *Burke v. Wilber*, 42 Mich. 327; *Cook v. Perry*, 43 Id. 623.

LONG, J. This is an action of trespass brought by the plaintiff as highway commissioner, under section 1371, How. Stat., to recover the statutory penalty from the defendant for an encroachment on the highway.

The cause was tried before the justice, and defendant had judgment, which was reversed in the circuit court of Huron county, and judgment entered for plaintiff for 50 cents penalty and costs. *Defendant brings error.*

The defendant pleaded the general issue, and gave notice that he wholly denied any encroachment upon the highway, as described in plaintiff's declaration. The declaration is set out in the record, and describes the highway and encroachment thereon. The highway is described as beginning at the corner of sections 10, 11, 14, and 15, in said township, and thence north along the section line to the Sand Beach and Sebewaing State road, while the encroachment is described as commencing at these section corners, and extending south twelve rods; that is, that the defendant maintained a fence south of the point where the highway is described as commencing. This is a fatal defect, and no recovery should have been permitted in the court below.

The judgment of the court below must be vacated, and judgment entered for defendant in this Court for costs of both courts.

The other Justices concurred.

JUNE TERM, 1891.

JOHN K. FISKEN v. THE MILWAUKEE BRIDGE & IRON WORKS (A CORPORATION).

Contract—Assignment of money due—Lien—Priority.

Defendant sublet the contract for erecting the piers of a bridge which it had contracted to build, which work, when completed, was to be free from labor or material liens. Fifteen per cent. of the contract price was reserved until the completion of the contract, and all payments might be refused until the subcontractor presented full releases or waivers of claims or liens of laborers and material-men. Provision was made for completing the contract in case of default on the part of the subcontractor. After commencing work the subcontractor assigned the reserved percentage to secure a loan made to enable him to prosecute the subcontract, and the assignee notified the main contractor of such assignment, and that it must retain the percentage to the extent of the assignee's lien; to which notice the main contractor replied that it could not undertake to retain any sum from the subcontractor if by so doing the work would be impeded or jeopardized. In a suit by the assignee to recover from the contractor the reserved percentage, which was less than the amount of the loan, it is held:

a—That the plaintiff was in no better position than if he had been the assignee of the subcontractor, and had brought suit upon the contract; and that the defendant was entitled to set up in defense any matter which it might have availed itself of had such latter suit been brought, except, perhaps, voluntary payments to the subcontractor after notice of the assignment.

b—That the fact that the defendant, as a further protection

to itself, in making payments to third parties, required the subcontractor's certificate of the correctness of the amounts, would not, of itself, preclude it from offsetting such payments, if shown to have been necessarily made in the prosecution of the work.

c—That the very object of the reservation was defendant's protection, and it was entitled to avail itself of the reserved fund to do what was actually necessary for the completion of the subcontract and its own protection, its lien thereon being prior to that of the plaintiff.

Error to Wayne. (Gartner, J.) Argued April 14, 1891. Decided June 5, 1891.

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

Bowen, Douglas & Whiting, for appellant, contended:

1. Plaintiff took his assignor's interests and rights in the contract subject to all the rights and equities existing between Esson and the defendant; citing *Warner v. Whittaker*, 6 Mich. 133; *Bloomer v. Henderson*, 8 Id. 395; *Edson v. Gates*, 44 Id. 253; *Spinning v. Sullivan*, 48 Id. 5; *Seligman v. Ten Eyck*, 49 Id. 104; *Bank v. Carson*, 60 Id. 432; *Kinney v. Tabor*, 62 Id. 517; and he could recover precisely as Esson might have done had no assignment been made; citing *Howell v. Medler*, 41 Mich. 641.
2. Defendant, by the terms of the contract, could, and did, refuse to make payment to Esson until he presented full releases or waivers of claims or liens by all persons supplying material or labor to him; and it might on its failure to pay such claims apply all the money coming to him under the contract to that purpose, on presentation of certificates from Esson that a certain sum was due for such labor or material, and no assignment he might make could prevent defendant from so doing; citing *Hendrie v. Bank*, 49 Mich. 401; *Bank v. Mayor*, 58 How. Pr. 207 (affirmed in 27 Hun, 467); *Murphy v. Bank*, 30 Hun, 40; *Drake v. Harrison*, 69 Wis. 99.
3. Defendant had such an interest in having the laborers and material-men paid as would justify it in using Esson's money to pay off his indebtedness; citing Act No. 45, Laws of 1885; *Drake v. Harrison*, 69 Wis. 99.

Barbour & Rexford, for plaintiff, contended:

1. A "claim" is a challenge of the ownership of a thing which a man has not in possession, and which is wrongfully withheld by another; citing Bouv. Law Dict.; *Stowel v. Zouch,* Plowd. 359; *Cummings v. Lynn,* 1 Dall. 444; *Willing v. Peters,* 12 Serg. & R. 179; and it is therefore evident from the terms of the contract—

   a—That it gave defendant no right to pay Esson's debts.

   b—That it gave no right to refuse payment of the amount due Esson or his assignee, unless there were *liens* for labor performed or material furnished.

   c—That, it being matter of defense, it devolved on defendant to show that there were such liens, which it had satisfied or might be compelled to satisfy.

2. There is no evidence that there were any such liens, and there are three very good reasons why such liens could not have existed:

   a—Because the mechanic's lien, under the statutes of this State, only attaches under contracts performed on land, and then only to the land-owner's actual interest; citing *Stout v. Sawyer,* 37 Mich. 313; *Wagar v. Briscoe,* 38 Id. 587.

   b—This was work performed on and material furnished for a bridge over a navigable stream; and if it is claimed that the city of Detroit is the owner of the land at the approaches of the bridge to the channel bank of the river, the answer is that a mechanic's lien cannot attach to public or city property; citing Phillips, Mech. Liens, §§ 179, 180.

   c—Supposing a lien could have been maintained, after the assignment it could only be to the extent of the balance due Esson, and could not affect the 15 per cent. drawback, which belonged to plaintiff; and after the assignment no lien could be placed on the property that would defeat the assignee's right to the money assigned; citing *Lauer v. Dunn,* 52 Hun, 191.

3. Without some provision in the contract to that effect, defendant would not be authorized to pay Esson's debts, even though interested in having them paid. The case of *Drake v. Harrison,* 69 Wis. 99, does not decide that the mere interest of a contractor in having a subcontractor's debts paid is sufficient authority to the contractor to make the payments. In that case the contract provided that the contractor should have the right to pay the laborers employed by the subcontractor out of the money due on the contract.

Bowen, Douglas & Whiting, for appellant, in their supplemental brief, contended:

1. Webster says that a claim is "a demand of right or supposed right; a calling on another for something due or supposed to be due;" and usually and commonly it imports the assertion, demand, or challenge of something as a right, or it means the thing thus demanded or challenged; citing *Fordyce v. Godman*, 20 Ohio St. 14; *Scott v. Perley*, 98 Mass. 511; *Douglas v. Beasley*, 40 Ala. 147; *Prigg v. Com.*, 16 Pet. 615.

McGRATH, J. Defendant entered into a contract with the city of Detroit for the construction of a bridge, and on November 14, 1887, John Esson entered into a subcontract with defendant for the construction of the piers to said bridge. Esson's work was to be finished July 18, 1888, and, when completed, was to be entirely freed and cleared of any lien for labor or material; and the contract provided that all subcontractors of said Esson must "have first waived their right to any claim for lien before the payments" therein provided for should be required to be made. It further provided that payment should be made by monthly estimates to the amount of 85 per cent. of the amount of work done and material furnished, and the balance of 15 per cent. at the full completion of the contract; that defendant might at any time refuse to make any payment to said Esson until he should have presented full releases or waivers of claims or liens by all persons supplying material or labor to him; that, if said Esson should neglect or delay the performance of his agreements therein contained to such an extent as to hinder or delay any other part of the construction of said bridge, or in case he should provide such material or workmanship as should be notoriously or obviously unfit with respect to compliance with the plans and specifications of the contract, then, or in either of such cases, said first party (defendant herein) should have the right and authority to rescind and annul the contract, and to forbid said Esson from entering upon the premises occupied by said work, and might then complete and

finish the contract of said Esson, regardless of the covenants herein contained, but should be obliged to pay said Esson such reasonable compensation for his work and material furnished as should be right, if the same should be used by said first party; provided, however, that any actual damage said first party might suffer by reason of said Esson thus failing to comply with the contract might first be deducted from the moneys so as aforesaid to be paid said Esson. The contract provided that the covenants therein contained should bind the said parties mutually, and their respective heirs, executors, successors, or assigns.

Work was commenced under this contract, and on February 13, 1888, Esson entered into a written agreement with plaintiff, which recited the existence of the aforesaid contract; the loan to Esson by plaintiff of the sum of $5,500 "to enable Esson to prosecute the said subcontract;" the agreement by Esson to repay the said sum on or before August 1, 1888; and provided that,—

"If default be made by the said Esson in repayment of the said sum of five thousand five hundred dollars on the day hereinbefore appointed for the repayment thereof, then the said Esson hereby gives to the said Fisken a first charge upon the drawback or sum of 15 per cent. on the contract price of the said work so to be done and performed by him under the said subcontract, and such first charge against the said drawback is hereby given and assigned to the said Fisken as further collateral security for the said advance."

Notice of this assignment, dated Toronto, June 12, 1888, was mailed to defendant, and received by it June 18, 1888. The notice recited the contract, and concludes as follows:

"Now, therefore, I, the said John Kerr Fisken, beg to notify you that I claim, by virtue of the said agreement, a first charge and lien upon the drawback or sum of fifteen per cent. on the contract price of the said

work to be done and performed by the said John Esson under the said subcontract with you, to the extent of five thousand five hundred dollars, principal, and all interest, commission, or incidental expenses which may be due to me in respect to the same; and I also further notify you to retain the said drawback as aforesaid on my behalf, and not to make payment of the same, or any part thereof, to the extent of my said charge and lien to any person or persons, corporation or corporations, without my written order and consent."

Defendant on the same day acknowledged the receipt of this notice, and replied as follows:

"We in the mean time have advanced Mr. Esson considerable money for the purpose of carrying on the work, and should the 15 per cent., or any portion of it, be required to complete the work, we will have to pay it to him, and cannot undertake to retain any sum from Mr. Esson that might jeopardize or impede the progress of the work."

Plaintiff, as assignee of John Esson, sued to recover the 15 per cent. which was to be reserved under the contract. Upon the trial, plaintiff showed that the work done by Esson under the contract amounted to $26,580.57; that 15 per cent. upon that amount was $3,987.07; and that interest thereon from July 18, 1888, to the time of the trial was $398.70,—making a total of $4,385.77. It did not appear that Esson's contract had been completed. Defendant showed that $12,809.58 had been paid to Esson directly, and that $24,700 had been paid on account of Esson's work, and that there yet remained unpaid over $7,000 to stone-cutters and other parties for work done under the Esson contract. Defendant sought to show that it had been compelled to advance this sum of $24,700 to material-men and for labor, in order to complete the structure within the time provided by its contract with the city of Detroit, and to protect itself under said contract; but the court rejected this testimony,

and directed a verdict for the plaintiff for the full amount claimed.

It did not appear just when this $24,700 was paid out by defendant, nor did it appear just what portion of that sum, if any part, was paid after notice of the assignment. It was admitted, however, that this sum had been paid out by defendant, and, if so, it left but $1,880.57 of a balance in defendant's hands, under the Esson contract, irrespective of the question as to whether or not defendant was entitled to retain that sum until Esson should produce releases for all claims due his subcontractors for labor and material. It appeared that defendant had required from Esson certificates of the correctness of the amounts paid out by it to third parties for labor and material, and the court held that payments made under such certificates were equivalent to payments to Esson.

Plaintiff was in no better position than if Esson's contract had been assigned to him, and he had brought suit thereon, and defendant was entitled to set up in defense any matter which it might have availed itself of had suit been brought under the contract, except, perhaps, voluntary payments to Esson since the notice of the assignment. The fact that defendant, as a further protection to itself, in making payments to third parties, required Esson's certificate of the correctness of the amounts, would not, of itself, preclude defendant from offsetting such amounts, if it was shown that such payments became actually necessary in the conduct of the work. The very object of this reservation of 15 per cent. was defendant's protection, and it was entitled to avail itself of this reserve to do what was actually necessary for the completion of Esson's contract and its own protection. Its lien upon that reserve was prior to that of plaintiff. Plaintiff did not take the assignment of the contract, and had not chosen to assume its control, but had left

that with Esson. Defendant was not bound to protect the reserve at its own expense.

Defendant should have been allowed to show when, and under what circumstances, the payments by it were made, and, so far as they were properly made, it was entitled to offset them against the amount of Esson's work.

The judgment will be reversed, with costs to defendant, and a new trial ordered.

The other Justices concurred.

FREDERICK G. BLUM v. MARY BUSH.

Deed—Condition—Breach—Support of parents.

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92 117
86 206
97 282

A deed from a father and mother to their daughter, containing the following clause immediately after the description of the land, namely: "This deed is given for the full support and care of parties of the first part during their natural life-time. Also said party of the second part shall pay all funeral expenses of parties of the first part,"—is held a conveyance upon condition, which was broken when the grantee abandoned the premises, of which she had taken possession and entered upon the performance of the condition; and that the retention of possession by the parents, and their subsequent conveyance of the land to their son on a similar condition, constituted a sufficient entry for the breach, and terminated the legal right of the daughter under the deed, whose equitable rights are held to have been barred by a settlement made with her parents after such breach.

Appeal from Macomb. (Canfield, J.) Argued April 10, 1891. Decided June 5, 1891.

Bill to quiet title. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Eldredge & Spier, for complainant, contended:

1. If the deed is treated as having been delivered, it created an estate upon condition, and the retention of possession by the grantors, and the reconveyance of the premises, after the breach of the condition by the defendant, should be held equivalent to a re-entry; citing *Richter v. Richter*, 111 Ind. 456 (12 N E. Rep. 698).
2. The courts have frequently held that like deeds should be set aside upon the failure of the grantee to carry out the agreement which constituted the consideration for the conveyance; citing *Patterson v. Patterson*, 47 N. W. Rep. 768; *Nolan v. Nolan*, 78 Mich. 17.
3. Assuming that the deed was delivered, the subsequent conduct of the defendant in abandoning her contract, leaving the premises, and the title of record thereto and the possession thereof in Henry Blum, Sr., denoted to the complainant that he was at liberty to take title by mesne conveyance, and she is equitably estopped from now asserting her paper title; citing Story, Eq. Jur. §§ 705, 705*a*, 707; and this principle has been frequently applied by this Court; citing *Powell v. Conant*, 33 Mich. 396; *Peake v. Thomas*, 39 Id. 584; *Maxwell v. Bridge Co.*, 41 Id. 453; *Ferguson v. Millikin*, 42 Id. 441; *Lumber Co. v. Fletcher*, 48 Id. 555; *Bell v. Todd*, 51 Id. 21.

F. P. Monfort (*T. M. Crocker*, of counsel), for defendant. Brief is confined to a discussion of the testimony, no authorities being cited.

CHAMPLIN, C. J. The bill is filed in this case to have a certain deed declared to be without consideration, void, and of no effect, and to have such deed decreed to be delivered up and canceled, and the complainant's title declared to be complete, absolute, and perfect as against defendant, Mary Bush, and she be decreed to release and convey to complainant all the right, title, and interest she has or claims to have under such deed, and she be enjoined from prosecuting a certain suit in ejectment, and from enforcing a judgment in such suit.

Henry Blum, Sr., and his wife, Margarette Blum, were aged people, who resided on a farm of 30 acres in the township of Erin, Macomb county, Mich. Their children

had grown up, and were married, leaving their parents to reside alone upon this small farm. Besides being aged and infirm, they were afflicted with partial blindness, Mr. Blum being more so than his wife.

In 1880 he made an arrangement with his son Henry Blum, Jr., to work the farm, and care for himself and wife, and made a deed of the land, signed by himself and wife, by which he conveyed the premises to his son Henry, in consideration of his supporting them and the survivor of them during their lives, but this deed was not delivered.

In 1885 he requested his daughter Mary Bush, who had married George Bush, and was then living upon a farm belonging to her husband in the town of Sterling, Macomb county, to move upon his place, and support and care for himself and wife during their lives and the life of the survivor, and pay all funeral expenses after their decease, for which he promised to give to said Mary a deed of the 30 acres. In compliance with this request Mary Bush and her husband removed to the place in the fall of 1885, and brought with them certain household goods, and some other personal property. After Mary Bush and her husband had been upon the place several weeks, Henry Blum, Sr., and his wife, Margarette, signed a deed, bearing date December 22, 1885, conveying the 30 acres to Mary Bush, which deed purported to be in consideration of one dollar; and immediately after the description are inserted the following words:

"This deed is given for the full support and care of parties of the first part during their natural life-time. Also said party of the second part shall pay all funeral expenses of parties of the first part."

Whether this deed was delivered is a question over which there is a great conflict in the testimony; the grantors testifying that it was not, for the reason that

other papers were to be executed by Mary Bush and her husband to secure to the grantors the performance of the consideration; and the grantee and the subscribing witnesses testifying that it was delivered in their presence. The grantors testify that the deed was not delivered, but remained in their custody and control until produced at the trial; and the defendant testifies that after the deed was delivered to her she kept it for a time in her bureau drawer, and afterwards upon the clock-shelf, until she missed it, and supposed it was lost, or some one had taken it. She made no inquiries of any one about it. No one testifies to ever having seen it in her possession. Godleif Muehlhaeuser testifies to seeing the deed in Mrs. Margarette Blum's possession during the time defendant resided upon the place. The question of the delivery of the deed was submitted to a jury in a suit in ejectment brought by Mary Bush against Frederick G. Blum (the complainant), and they found that it was delivered. Whether additional testimony upon the point is contained in this record than was submitted for the consideration of the jury we do not know.

It appears that, prior to the time when Mary Bush and her husband moved upon the premises in question, Henry Blum, Sr., had loaned to George Bush $500, for which he held his note; and it also appears that on the 26th day of April, 1886, Henry Blum, Sr., loaned to George Bush and Mary Bush $500, and to secure the payment thereof five years from that date, with interest at 6 per cent. yearly, they executed and delivered to Henry Blum, Sr., their note and indenture of mortgage upon their farm in the township of Sterling, which mortgage was recorded on the 26th day of October, 1886, in Liber 72 of Mortgages, on page 1, in the office of the register of deeds of Macomb county. George Bush testified that

the reason why he borrowed the last $500 was that, on account of his moving upon the land with his wife, he was obliged "to buy one horse more, and all his machinery, to start down there with." It also appeared that Bush left his son upon his place in Sterling, which consisted of about 104 acres.

George and Mary Bush lived in the house with Henry Blum, Sr., and his wife a little over a year. George Bush worked the farm, and in the fall of 1886 sowed winter wheat upon the place. Mary cared for her father and mother, but matters did not progress smoothly in the families, and the minister was called upon to settle up differences and make peace. The parties belonged to the Evangelical Lutheran Church, and it was upon the occasion of one of these visits that Mrs. Blum showed Mr. Muehlhaeuser, the minister, the deed she had in her possession, heretofore referred to. The daughter disagreed with her mother. In plain English, they quarrelled more or less, until finally Mary Bush left the place, and went to her former home in Sterling, taking with her part of her household goods. She left her daughter, who remained some three or four weeks longer; and Mr. Bush remained while he marketed his produce, when he removed everything from the place, including stoves and furniture, and with the last load took his daughter home, leaving these aged and nearly blind people alone in the house, and, as they claim, without wood, or suitable provisions to eat, and no one to cook for them. This was in December. In this extremity Mr. Blum sent for his son Henry, who came and brought provisions, and supplied them with fuel, and shortly thereafter removed them to his own home.

The minister again tendered his kind offices to bring about a reconciliation in the family. Bush and wife felt

aggrieved at being put to the expense and trouble of moving to and from the place, and at the minister's suggestion arbitrators were chosen to settle all difficulties, who met the parties at the house of Henry Blum, Jr., in the month of January, 1887, where a full and satisfactory settlement was had. Henry Blum, Sr., was to surrender to George Bush the two notes he held, amounting, with interest, to nearly $1,100, and Bush was to have the right to harvest the wheat he had sown upon the place, and Blum was to discharge the mortgage. With the terms of this settlement all expressed themselves satisfied. Henry Blum, Sr., at that time surrendered to George Bush the unsecured note, and delivered him the mortgage. The mortgage note, for some reason not satisfactorily explained, was not handed over at that time, but it was agreed that it should be, and the mortgage discharged. The testimony is very convincing that this was a full settlement of all differences between Henry Blum, Sr., and his wife upon one side, and George and Mary Bush on the other.

Henry Blum, Sr., regarding the arrangement with his daughter at an end, entered into a new agreement with his son Henry for the care and support of himself and wife. On the 24th of February, 1887, Henry Blum, Sr., and his wife executed to Henry Blum, Jr., a warranty deed of the 30 acres, in which, after the description, is inserted the following clause:

"And as a further consideration the said party of the second part promises and hereby binds himself to support and decently keep each of the said parties of the first part during their natural life-time."

This deed was recorded February 28, 1887. Afterwards, and on the 6th day of April, 1887, Henry Blum, Jr., and his wife, Sarah, conveyed the same premises to Frederick G. Blum (the complainant) by warranty deed,

and he immediately went into possession of the same. He claims to have purchased in reliance upon the record title, and without any notice of any title, claim, or demand of Mary Bush or George Bush in or to the land or crop of wheat growing thereon. When the wheat was fit for the harvest, he cut and threshed it, and denied any right of George Bush thereto. The consequence was a suit brought by George Bush for the value of the wheat. This suit was settled, and Henry Blum, Sr., furnished the money to pay Bush for the wheat. Mary Bush then brought ejectment, claiming title under the aforesaid deed, and recovered judgment.

Complainant then filed this bill of complaint. Answer was filed, and issue joined, and proofs were taken in open court. Upon final hearing the court decreed that Mary Bush had abandoned her said undertaking and agreement to support and maintain said Henry and Margarette Blum, and that she had been paid in full, and she had settled for the services, care, and support rendered, bestowed, and furnished by her and her husband; that complainant afterwards in good faith purchased the premises described in the deed, and went into possession, and now holds the same. He also decreed an injunction as prayed for in the bill, and declared, adjudged, and decreed that the title to the premises is in Frederick G. Blum, free and clear of any and all right, title, or claim of the said defendant, Mary Bush, or any other person claiming by, from, or under her, and directing her to convey to complainant.

We think the deed from Henry Blum, Sr., to Mary Bush must be construed as a conveyance upon condition, and that such condition was broken by Mary Bush when she abandoned the premises; that such was the mutual understanding when the settlement was had, she and her husband being recompensed for all the trouble, expense,

care, and support she or they had suffered and done on account of such deed; that the possession of Henry Blum, Sr., and his subsequent conveyance, constituted a sufficient entry for condition broken, and terminated the legal right of defendant under such deed; and that the settlement bars all equitable claims.

It is claimed by defendant that the deed of December 22, 1885, from her father to her, was executed without any security given back on her part to secure the performance of the consideration for which the deed was given. She might die, or convey the land away, or refuse or neglect to care for and maintain her father and mother, and he would have no redress except by treating the language made use of in the deed as a covenant. We had occasion to say in a somewhat similar case that—

"An unsecured agreement of this kind, in exchange for property of which a father denudes himself, is unconscionable, unless very evidently safe, as it certainly was not here." *Nolan v. Nolan,* 78 Mich. 24.

The construction of the language in the deed which accords with reason and justice is that which holds the grant of the land to depend upon the condition that the grantee shall give to the grantors full support and care during their natural lives. Such was clearly the intention of the parties to the instrument, and such intention should be given full force and effect. See, as bearing upon the question, *Horner v. Railway Co.,* 38 Wis. 165, where a clause in the deed stating the purpose for which it was given was held to be a condition subsequent. And see *Hunt v. Beeson,* 18 Ind. 380; *Marwick v. Andrews,* 25 Me. 525; *Horsey's Lessee v. Horsey,* 4 Har. (Del.) 517.

It is not a sufficient answer for her to say now or in her answer that she is still ready and willing to take said Henry Blum, Sr., and his wife to her husband's

home, and there care for and support them. Such was not the arrangement she entered into. They were to remain in their own home, and receive care, attention, and support there. All the facts and circumstances and acts of the parties show such to have been the understanding of the parties.

We think the decree of the circuit court is right, and it is affirmed, with costs.

MORSE, MCGRATH, and LONG, JJ., concurred. GRANT, J., did not sit.

JOHN HICKS ET AL. v. WILLIAM S. TURCK AND TOWNSEND A. ELY.

Specific performance—Fraud.

Equity will not decree the performance of a contract into which a party has been led by misrepresentation; and parties asking for such relief must exhibit a contract free from any charge or suspicion of unfairness or fraud.

Appeal from Clinton. (Daboll, J.) Argued April 17, 1891. Decided June 5, 1891.

Bill for specific performance of contract for purchase of land. Defendants appeal. Decree reversed, and bill dismissed. The facts are stated in the opinion.

Spaulding & Walbridge, for complainants.

James L. Clark and *George P. Stone*, for defendants.

MCGRATH, J. This is a bill filed to enforce the performance of the following instrument:

"RIVERTON, NEBRASKA, October 31, 1885.

"Due David S. French, attorney in fact for Hicks, Bennett & Co., eighteen thousand three hundred and sixty-six dollars ($18,366), being balance on consideration of one-half interest in personal property and lands this day sold Robert M. Steel, John Hicks, William S. Turck, and Townsend A. Ely; above sum to be paid by assignment of a certain mortgage on lands in Gratiot county, Michigan, to said David S. French, attorney, for $2,000, and balance of sixteen thousand three hundred and sixty-six dollars ($16,366) to be paid by promissory note due and payable on or before five years from date, with annual interest at 7 per cent. per annum, said note secured by mortgage on the undivided one-half interest in said ranch property as collateral security for payment of said sum of sixteen thousand three hundred and sixty-six dollars and interest, as aforesaid.

"$18,366. WM. S. TURCK.

"TOWNSEND A. ELY."

The parties are all residents of Michigan. In the fall of 1885 defendant Turck was in such poor health that it became necessary to give up the business in which he was then engaged. He was contemplating the purchase of a ranch or stock farm in company with his brother-in-law, the defendant Ely, believing that employment thereon would benefit his health. At this time he met David S. French, with whom he had been on most intimate terms for some 18 years, and their relations had been such that Turck relied implicitly on French. He made known his intention to French, who at once called his attention to a ranch in Nebraska, owned by complainants. French and defendants met by appointment a few days afterwards, when it is claimed that French gave a golden description of the ranch, representing that it was particularly valuable, and well adapted to stock-farming; that it was only necessary to feed stock about five months during the winter season; that there were 900 acres of bottom land, on which a sheep could be seen anywhere; that the property was owned by Hicks,

Bennett & Co., whom he represented, and that he also represented John Hicks and Robert M. Steel, who would buy a half interest if these defendants would; and, as he represented both parties,—that is, the vendors and a part of the vendees,—he would deal exactly just with them. He showed them a map on which the railroad was so located as not to injure that part of the ranch known as "Lots 2 and 3" at all. It was then arranged that the three should start on the following Monday for Nebraska, with the intention of looking at the property, and they went to Nebraska accordingly. The land consisted of several different parcels within a range of five or six miles.

It is claimed by defendants that French represented—

1. That the railroad right of way was on the north line of the parcel occupied by the ranch buildings, whereas it was in fact some distance south of the north line, running two miles through the premises, cutting off a large portion of land from the remainder, and rendering it practically of but little value.
2. That French pointed out to them a long side track adjacent to said railroad, with stock-pens conveniently arranged for shipping stock, and represented that the same, with the switch, belonged to complainants, whereas in truth and in fact the same belonged to the railroad company, and the railroad company afterwards removed the same.
3. That said French, in driving past one of said parcels of land with defendants, pointed to a stack containing about 75 tons of hay, and represented that said stack of hay had been cut that season from that parcel of land, which contained about 40 acres, whereas the said stack of hay represented two years' product of said parcel.
4. That in driving past other parcels of land said French simply skirted said parcels, and took defendants over and past the best and most productive portions of said land, and represented to defendants that the remaining portions, which defendants had not seen, were as good as those portions through and along which defendants had been driven, whereas in truth and in fact large

portions of the land which defendants had not seen were not as good as that which had been seen, and were inferior, and almost worthless, because of the broken character of their surface, their inferior soil, and numerous ravines or washouts, which they contained.

5. That there was a large number of cattle upon said ranch, whereas in truth and in fact there was a much less number.

6. That it was necessary to feed cattle in that locality but five months in the year, whereas in truth and in fact it was necessary to feed them seven months in the year.

7. That the said ranch, and the climate of that locality, was well adapted for stock-raising purposes, whereas neither the ranch nor the climate was adapted to stock-raising, and the attempts of complainants in that direction had failed.

The defendants claimed also that they relied upon these representations made by said French, and that they knew nothing of their own knowledge concerning the matters in relation to which said misrepresentations had been made. Defendants further claimed that in the execution of the paper above set forth they were misled; that they did not read it or hear it read; that prior to its execution the following paper had been prepared and executed by said French, and had been read by them:

"RIVERTON, NEBRASKA, October 31, 1885.

"Know all men by these presents that I, David S. French, attorney in fact for Hicks, Bennett & Co., of Mt. Pleasant, Mich., in consideration of the sum of forty-five thousand dollars ($45,000), to me in hand paid by Robert M. Steel and John Hicks, of St. Johns, Clinton county, Michigan, and William S. Turck and Townsend A. Ely, of Alma, Gratiot county, Michigan, the receipt of which is hereby acknowledged, do hereby sell, assign, and transfer to the said Steel, Hicks, Turck, and Ely all the right, title, and interest of the said firm of Hicks, Bennett & Co., of Mt. Pleasant, Michigan, in and to the personal property of said firm of Hicks, Bennett & Co., now on the ranch in Franklin county, Nebraska, owned by said firm of Hicks, Bennett & Co., and also do hereby agree and bind the said firm of Hicks, Bennett &

Co. to make and deliver in fee-simple to the said Robert M. Steel, John Hicks, and William S. Turck, and Townsend A. Ely a clear title to the following described lands in Franklin county, Nebraska. [Then follows a description of certain lands.]

"Also I do hereby agree and bind myself, as attorney for said firm of Hicks, Bennett & Co., to assign and transfer to said Steel, Hicks, Turck, and Ely a certain contract for school lands made by the state of Nebraska to A. B. Upton, April 18, 1881, for the following described lands. [Then follows further description.] The said Steel, Hicks, Turck, and Ely hereby assuming to pay the balance of twenty-two hundred and sixty-eight dollars ($2,268) due upon the above state land contract, as being a part of the above consideration of forty-five thousand dollars ($45,000). The above transfer of real and personal property to Robert M. Steel, John Hicks, William S. Turck, and Townsend A. Ely is made to each in their individual right an undivided one-fourth interest in and to said personal property and real estate above enumerated.

"DAVID S. FRENCH,
"Attorney in fact for Hicks, Bennett & Co."

The defendants claim that it was not intended that they should be jointly liable for the amount named in the paper executed by them, but that each should have an undivided one-fourth of the property, and be liable for an undivided one-fourth of the consideration, and that such paper was handed to them for execution by French, who represented to them that it was in accordance with that understanding, and that, relying upon his representations, they executed it and returned it to him, and defendants did not again see said paper until long afterwards, when the deed of the premises was tendered to them. In the fall of 1886 complainants tendered to defendants a deed running to defendants Steel and Hicks, conveying to each an undivided one-fourth of the property in question, which deed defendants refused to accept for the reasons above given. Ely, representing all the parties, had gone upon the land soon after the contract

was entered into. Turck had gone south after the visit to the ranch, in the fall of 1885, and did not again see it until the fall of 1886, and complainants had been engaged during the interim in perfecting their title to the property in question.

From a careful examination of the record we are forced to the conclusion that Turck, by reason of his intimacy with French, relied largely upon the representations made by French to him, and that many of these representations relating to the productiveness and character of the land, the adaptability of the ranch and climate for stock-raising, the number of cattle upon the ranch, the location of the right of way of the railroad company, and the ownership of the spur and sheep-pens, were untrue, and misled defendants, and that the value of the ranch is much less than it would have been had it been as represented.

Equity will not decree performance of a contract into which a party has been led by misrepresentation. Parties asking the aid of a court of equity to enforce an agreement must exhibit a contract free from any charge or suspicion of unfairness or fraud.

The decree of the court below will be set aside, and a decree entered here dismissing complainants' bill, with costs of both courts to defendants.

The other Justices concurred.

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CHARLES D. CRITTENDEN v. THE CITY OF MT. CLEMENS.

Taxes—Payment under protest—Action against city—Presentation of claim—Bank-stock—Assessment.

1. The presentation to the council of a city incorporated under chapter 80, How. Stat., of a verified claim for money paid under protest for taxes assessed against the claimant, as provided in How. Stat. § 2528, is a condition precedent to bringing suit for the recovery of the money so paid.
2. The provisions of the tax law of 1889 as to the time, manner, and place of assessment of personal property are mandatory; but it cannot be said that a property-owner can avoid assessment at the place of his actual residence by assuming and claiming a residence in another place for the very purpose of escaping taxation.
3. The fact that a county clerk certified bank-stock to a supervisor who had no right to assess it will not invalidate its assessment to the owner where legally assessable, although not certified to the supervisor making such assessment.

Error to Macomb. (Canfield, J.) Argued April 23, 1891. Decided June 5, 1891.

Assumpsit for taxes paid under protest. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

A. E. Chadwick, for appellant, contended:

1. The citizen has a right to fix his own residence or domicile, place of business, and the place where his personal property shall be assessed; citing *McCoy v. Anderson,* 47 Mich. 502, 504; *Torrent v. Yager,* 52 Id. 507; *Monroe v. Greenhoe,* 54 Id. 9, 11; *Lumbering Co. v. Witter,* 58 Id. 625; *Hood v. Judkins,* 61 Id. 578, 583.
2. It cannot be held with reason that the governing municipal body shall have demanded of it damages for its deliberate torts, in the face of the protest filed with it against such torts before they are committed; citing *Louden v. East Saginaw,* 41

Mich. 18; *Mead v. City of Lansing*, 56 Id. 601; *Lay v. Adrian*, 75 Id. 438.

O. C. Lungerhausen, for defendant, contended:

1. The provision of the statute requiring the presentation of a claim to the city council before suit is founded on sound principles of common sense and public policy, and is mandatory, and compliance therewith is a condition precedent to such suit; citing *Howland v. Edmonds*, 24 N. Y. 307; *Detroit v. Paving Co.*, 38 Mich. 358; *Louden v. East Saginaw*, 41 Id. 18; *Mead v. City of Lansing*, 56 Id. 601; *Lay v. Adrian*, 75 Id. 438.

LONG, J. This action is brought to recover the sum of $132.01, being the amount of taxes assessed upon personal property paid by the plaintiff to the collector of the city of Mt. Clemens under compulsion of law, and under protest, which reads as follows:

"I hereby protest against the collection of or payment by me of the taxes spread upon the tax roll of the city of Mt. Clemens (Third ward) for the year 1889, for the following reasons:

"*First.* I am not a resident and was not a resident of said ward at the time of the pretended assessment or levy of said tax, but was an inhabitant of and voter in the township of Chesterfield, another and different township in the same county, at the time of such assessment, and have been ever since, and was there assessed and there paid the State, county, and township taxes assessed upon all of my personal property owned and controlled by me for said year.

"*Second.* I notified the supervisor of said ward, before and at the time for assessing and levying taxes for said year, of all the facts above stated, and he knew them.

"*Third.* The county clerk, as by law required, notified the supervisor of Chesterfield of my holding of bank-stock, that the same might be, as it was, assessed in said township of Chesterfield, and did not notify said supervisor of said Third ward.

"*Fourth.* Said assessment was fraudulent, willful, and malicious, and the valuation double the relative and average valuation of like property in said Third ward, and said supervisor never requested me to make a state-

ment in writing or otherwise of any of my personal property.

"*Fifth.* No property is specified in the assessment or tax roll, and the nature and kind is not given.

"*Sixth.* The assessment was not made by said supervisor of said Third ward until after time for assessment had passed, and then by the illegal and oppressive order of the common council, and I had no notice or opportunity to protest against the same.

"*Seventh.* No demand was made of me for the payment of said taxes within the time prescribed by law.

"*Eighth.* Said collector, acting under the illegal and oppressive order and direction of the common council of said city, February 13 last, levied on my personal property, and posted notices for the sale of the same on February 19 last. The warrant of said collector was never legally extended, nor was he entitled to the benefits of the alleged extension; nor was the common council for said city, which attempted to extend said warrant, legally convened for that purpose, nor had it authority to make such extension.

"*Ninth.* That said proceedings for the collection of said tax are otherwise and in other respects illegal and oppressive, and said tax or assessment roll is on its face void.

"*Tenth.* I believe, though the said assessment roll of said supervisor of the Third ward in no manner informs or specifies the nature and kind of property assessed, that the personal property so assessed consists wholly or principally of shares of the capital stock of the Mt. Clemens Savings Bank, a bank in said city of Mt. Clemens, duly incorporated, and that no demand was made by said collector of the cashier of said bank to pay such taxes, nor any request or opportunity given said cashier to pay such taxes, and charge the amount of such taxes to the said shares so assessed.

"*Eleventh.* I believe, and it is so represented by the said collector, that the whole or principal part of the tax so assessed against me is on the capital stock of the said Mt. Clemens Savings Bank, and for such tax the collector's only remedy was and is against the cashier of said bank.

"*Twelfth.* That the whole amount of my bank-stock subject to assessment does not exceed $4,000; and that personal property belonging to me in the township of Chesterfield by law assessable in said township, independ-

ent of my residence, was fraudulently, illegally, and willfully assessed in said city by the supervisor of the Third ward, on which said personal property I was duly assessed and paid the taxes thereon in the township of Chesterfield.

"This protest is executed in duplicate.

"*Dated February* 19, 1890.

"CHAS. D. CRITTENDEN."

The plaintiff testified that before this assessment was made he saw a notice in the press that the supervisor was going to assess him in the Third ward of the city of Mt. Clemens; that he got a notice from the supervisor of Chesterfield showing that he had been assessed there, and took it to the supervisor, and was advised by him that he would not be assessed in the city of Mt. Clemens, and that he heard no more about the assessment until it was on the assessment roll.

Upon his cross-examination, it appeared that his wife purchased a home in the city of Mt. Clemens about the year 1873; that he came there to live with her, and claimed his residence there for 1877–78, after which he went back to the farm with his son, who resided there; that his wife continued to reside most of the time in the city; that he had two children, who attended school in the city from 1873 to 1878 as resident pupils; that the son was married in 1878, and then returned to the farm; that in 1874 he was elected to the office of assessor in the village (now city) of Mt. Clemens; that his wife owns the property still in the city of Mt. Clemens, and continues to reside there, calling that her home. The witness was asked the following questions:

"*Q.* You live with your wife now, do you not?

"*A.* Yes, sir.

"*Q.* And did in the year 1889, at the time you were assessed in the Third ward in the city of Mt. Clemens?

"*A.* No, sir; I was on the farm most of the time in 1889. I was hardly ever here."

The witness, continuing, said:

"I generally got my breakfast here, and took two meals at the farm, dinner and supper. I was sleeping here and sleeping there. My wife kept house for me on the farm in 1889, and locked up the house here. We were there about nine months. We were there from September, 1888, until the next June. We have no children, but a couple of grandchildren have been with us for 18 months, and they have attended school in Mt. Clemens as resident pupils."

The city clerk was called as a witness, and produced the records of the city on the subject of the taxes assessed to Mr. Crittenden, from which it appears that April 15, 1889,—

"Ald. Ullrich moved that the question of the legality of assessing personal property of Chas. D. Crittenden in the city of Mt. Clemens be referred to the city attorney, to be reported on at the next meeting of the council. Carried; all voting yea."

Under date of May 6, 1889, it appears:

"Ald. Crocker moved that the supervisor of the Third ward of the city of Mt. Clemens be instructed to assess such property of Chas. D. Crittenden as may be properly taxable in the city of Mt. Clemens. Carried; all voting yea."

Under date of February 3, 1890, it appears that—

"A communication from Charles D. Crittenden relative to taxes on his personal property was presented, and, on motion of Ald. Crocker, the same was read, and placed on file; all voting yea. Ald. Crocker moved that said collector be instructed to collect the tax assessed to Charles D. Crittenden on the tax roll of the Third ward of the city of Mt. Clemens, which was carried; all voting yea."

The township treasurer's receipt was also produced to the council under date of February 3, 1890.

Plaintiff also called the supervisor of the township of Chesterfield, who testified that he assessed the plaintiff

upon this bank-stock in that township; that he had the certificate from the county clerk showing that the plaintiff held 50 shares of stock in the Mt. Clemens Savings Bank. It appears from the record that this bank-stock was not certified to the supervisor of the Third ward of Mt. Clemens. Plaintiff was recalled, and asked whether he ever presented any claim to the council asking them to repay the amount of this tax, and admitted that he had not.

On the part of the defense the supervisor of the Third ward was called as a witness, and testified that he had a conversation with plaintiff about his assessment. He said that he was being assessed in the township of Chesterfield, and that the supervisor of the Third ward of Mt. Clemens had nothing to do with him. The witness says:

"I told him, in case the council instructed me to assess him, I should certainly do so, and try to find what property I could. Later on I met him again, after the council had instructed me to assess him, and I told him then I would have to assess him, and he made no reply to it. Thereafter I saw him about town nearly every day."

Other evidence was given by the defendant tending to show that the plaintiff was an actual resident of the city of Mt. Clemens, and properly assessed with a personal tax in that city. Issues were thus raised which should have been submitted to the jury, unless the court was right in holding that no recovery could be had by reason of the fact that no claim was presented to the common council, as provided by the charter of the city.

If the plaintiff was an actual resident of the city of Mt. Clemens, and domiciled there in the spring of 1889, at the time the assessment was taken, he was properly put upon the assessment roll, and was bound to pay the tax. If the plaintiff was an actual resident of the city

of Mt. Clemens for several months, and domiciled there, and went out of the city in the fall of 1888, and remained in Chesterfield upon the farm merely for the purpose of escaping taxation in the city, and not with the intent to reside or claim a home in Chesterfield, and intending to return as soon as the time for taking the assessment was passed, he was properly assessed upon his personal property in the city of Mt. Clemens, and the fact that he was assessed and paid the tax in the township would not estop the city from its defense in this case.

On the other hand, if it is a fact, as claimed by the plaintiff, that his wife rented her house, and they went upon the farm in Chesterfield in the fall of 1888 with the intent to reside there, and were actually domiciled there at the time the assessment was made, and did not go for the purpose simply of escaping taxation in the city, the plaintiff was not properly assessed in the city of Mt. Clemens.

These were questions of fact for the jury.

Section 1170*a*9, 3 How. Stat., is mandatory as to the place of assessment of personal property; that is, the township of which the owner is an inhabitant on the second Monday in April of each year.

Section 1170*b*, in the third subdivision, declares that the shares of bank-stock owned by a person residing in the county where the bank is located shall be assessed in the township where he resides.

Section 1170*b*1 requires the cashier of every bank to file, on the second Monday of April in each year, in the office of the county clerk, a statement of all real estate held by the bank, and its value, a list of the names of its stockholders, with stock held by each, and their residence. The county clerk shall notify the supervisor of each township of the name of each stockholder residing

in his township, and the amount of such stock held by him. All property is to be assessed as of the second Monday of April.

It is claimed by the plaintiff that all these sections are mandatory, and that the fact that the county clerk certified the stock to the supervisor of Chesterfield is conclusive for the purpose of the assessment. These sections are mandatory as to the time, manner, and place of assessment, but it cannot be said that the party can avoid the assessment where his actual residence is, by assuming and claiming a residence in another place for the very purpose of escaping taxation; and the fact that the county clerk certified the stock to a supervisor who had no right to assess it would not invalidate the tax, when properly assessable, though not certified to that supervisor by the county clerk.

These questions, however, were not submitted to the jury. They were wholly ignored by the trial court, and we think very properly, under the provisions of the city charter.

The court, after the conclusion of the evidence, instructed the jury as follows:

"It is provided, in substance, by the charter of the city of Mt. Clemens, that all claims against the city shall be audited and allowed by the common council, and that a statement of the claim shall be made by the claimant, and filed with the common council, and verified by the oath of the claimant before the claim is allowed, and that it shall be a conclusive answer to any suit, brought by the party to enforce such a claim, that it had not been presented to the council. In my judgment, gentlemen of the jury, that provision of the charter is applicable to this case. It is conceded by the plaintiff that, before commencing this suit, he did not present any claim to the common council for a return or payment back to him of this tax as provided by the charter; and consequently for this reason it becomes my duty, as I view the law, to instruct you that the plaintiff cannot recover

in this action, and that your verdict should be for the defendant."

It is claimed that the court was in error in this ruling, as the matter was laid before the council at its meeting on February 3, 1890, and it then directed the collector to collect the tax assessed against Charles D. Crittenden on the tax roll of the Third ward, and all the aldermen voted aye upon the resolution; but this was before the tax was paid. And it is further claimed that the demand upon the council thereafter for repayment, or the presentation of a claim to be passed upon by it, would have been a futile effort on the part of the plaintiff.

The purpose of this provision of the charter is to enable the council to have a fair and reasonable opportunity to examine claims against the city before it shall be mulcted in damages and costs by litigation. This provision of the charter is reasonable. It is conceded that, after the tax was paid, no such claim was filed. We cannot say, upon this record, that, had the plaintiff complied with this requirement of the charter, the common council would not have rescinded their action, and directed the repayment of the money. The presentation of a sworn claim would have enabled the council to go fully into the facts, and an opportunity undoubtedly would have been given the plaintiff to appear before the council, and present his whole claim, and the reasons which plaintiff claims to believe should exempt him from taxation in the city. No such effort was made by him, and the court was not in error in holding that this was a condition precedent to his bringing suit.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JOHN E. BOLLES AND ERASTUS H. CHAMBERLAIN v. THE SAULT SAVINGS BANK LOAN & TRUST COMPANY ET AL.

Transfer of cause—Discretion of commissioner.

Where, on an application to a circuit court commissioner for the transfer of a cause on account of the disqualification of the circuit judge, a counter-application is presented asking for such removal, and both are within the statute, it is within the discretion of the commissioner to select the place of removal; and the convenience of the parties and the residence of witnesses are proper matters for his consideration.[1]

Certiorari to the circuit court commissioner of Chippewa county to review proceedings to transfer a suit. Argued April 23, 1891. Writ dismissed June 5, 1891. The facts are stated in the opinion.

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[1] See the following cases in which the statute has been construed, in whole or in part:

In *Stimson v. Shingle Co.*, 71 Mich. 374, it is held that the residence of the parties or of the attorneys of record controls as to the place of transfer.

In *Pack v. Alcona Circuit Judge*, 74 Mich. 28, the Court hold that the statute is imperative if proper cause is shown, and the only matter left to the discretion of the judge or commissioner is the circuit and county to which the cause shall be removed.

In *Curtis v. Wilcox*, 74 Mich. 69, it is held that on *certiorari* to a commissioner to review proceedings under the statute, in the absence of any real conflict in the testimony, the Court will apply the law to the testimony without regard to the finding of the commissioner, which will be considered a finding of law, and not of fact; citing *Fellows v. Canney*, 75 Mich. 445, where a similar question is discussed, and also the question of the sufficiency of a petition for such transfer.

See *Kelley v. Alcona Circuit Judge*, 79 Mich. 392, for a general discussion of the statute.

In *Kittridge v. Washtenaw Circuit Judge*, 80 Mich. 200, it is held that, upon application to the chancery court to exercise its supervisory powers over common-law assignments, the assignment becomes a civil proceeding pending in the circuit court, and is subject to be transferred under How. Stat. §§ 6495-6502.

In *Simpson v. Alpena Circuit Judge*, 81 Mich. 116, a transfer of a cause to a county in which neither of the parties or their attorneys resided is held unwarranted.

Corliss, Andrus & Leete, for complainants.

H. M. Oren, for defendant corporation.

J. H. Goff, for defendant William H. Myers.

George Hayden, for defendant Edward F. Myers.

McGRATH, J. The bill in this case was filed in the Chippewa circuit by residents of Wayne county against the Sault Savings Bank Loan & Trust Company, a resident of Chippewa county, William H. Myers, a resident of Hillsdale county, and Edward F. Myers, a resident of Indiana.

The solicitors for complainants applied to a circuit court commissioner under the statute for the removal of the case to the Wayne circuit court on the ground that the circuit judge of Chippewa circuit was disqualified to sit in the trial thereof. Before the hearing of the application, Edward F. Myers appeared by George Hayden, his solicitor, and filed a counter-petition, setting forth that said George Hayden was a resident of Marquette county, and praying that the case might be transferred to that county; and upon the hearing the commissioner made an order transferring the cause to the Marquette circuit. The case comes here upon *certiorari* for review.

It is insisted by complainants that the commissioner had no discretion under their petition after the fact of the disqualification of the circuit judge of the Chippewa circuit, and the fact that the circuit judges of Wayne county were not disqualified, had been determined, as to the county to which the removal should be made, but that he should have removed the cause to the Wayne circuit.

There having been two petitions for removal to different counties, both of which were within the statute, it was within the discretion of the commissioner to select

one of the two places named. The statute provides that the parties interested shall be notified of the application, and, after hearing the parties, the commissioner "shall grant an order for the transfer of said cause or proceeding to the circuit court of some other county." It is not the intention of the statute that a plaintiff may commence a proceeding, and, before time for even service or appearance shall have elapsed, he may, by reason of the filing of an application for removal, arbitrarily determine the county to which the cause shall be removed. Upon such application, as between two or more counties coming within the statute, the convenience of the parties and the residence of witnesses are proper matters for consideration by the commissioner.

In *Shannon v. Smith*, 31 Mich. 451, 452, cited by counsel for complainants, it was held that the statute contemplates the exercise of some discretion in appointing the place of transfer, and the removal in that case was held invalid because the disqualified judge made the order, and the Court say "he is not expected or allowed to exercise his discretion in any part of the proceedings." In *Stimson v. Shingle Co.*, 71 Mich. 374, 377, also cited, the Court say that the statute applies only to a party or "the attorney or solicitor of record," and that the removal of a cause to a county could not be based upon the residence in that county of "counsel" who was not the attorney of record, and, in the absence of a party or solicitor or an attorney of record in that county, the number or residence of witnesses therein would cut no figure under the statute.

The matter of the place of transfer was one within the discretion of the commissioner, and it does not appear that there was any abuse of that discretion.

The writ will be dismissed, with costs to defendants.

The other Justices concurred.

BYRON EDGELL v. LEWIS FRANCIS.

[See 66 Mich. 303.]

Trial—Exceptions to refusal to charge.

1. An exception to the refusal of the court to give a portion of defendant's requests, "that the court thereupon refused to charge the jury as requested by the defendant, to which refusal defendant excepted," is too indefinite to base an assignment of error upon.
2. For the law of this case, as settled by the former decision, see 66 Mich. 303.

Error to Eaton. (Hooker, J.) Argued April 22, 1891. Decided June 5, 1891.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion, and in the former report of the case, found in 66 Mich. 303.

H. F., F. A. & H. F. Pennington, for appellant.

Huggett & Smith, for plaintiff.

MCGRATH, J. Plaintiff sued defendant, his father-in-law, for enticing away plaintiff's wife and child, and recovered judgment for $101, and defendant appeals.

Eighteen requests were submitted by counsel for defendant to the trial judge, three of which are not relied on, seven are admitted to have been given, five are alleged to have been improperly given, and three to have been refused. Defendant's exception is a general one, in the following language:

"And the court thereupon refused to charge the jury as requested by the defendant, to which refusal defendant excepted."

The assignment of error is as follows:

"The court erred in refusing to charge the jury as requested in and by the defendant's several requests to charge submitted to the court."

It has been frequently held by this Court that a general exception to a charge is insufficient, when the charge covers several distinct matters, and that in such case the exception must point out the specific matter complained of. *Tupper v. Kilduff*, 26 Mich. 394; *Lange v. Kaiser*, 34 Id. 317; *Hopkins Manfg. Co. v. Aurora, etc., Ins. Co.*, 48 Id. 148; *McKay v. Evans*, Id. 597. It has also been held that a single exception to an entire charge, although it is "to each line, part, sentence, and paragraph," will not be considered, if any portion of the charge is correct. *Danielson v. Dyckman*, 26 Mich. 169; *Mandigo v. Mandigo*, Id. 349; *Goodsell v. Seeley*, 46 Id. 623; *McAllister v. Engle*, 52 Id. 56. These cases dispose of these exceptions and the assignment of errors.

Error is assigned upon a remark made by plaintiff's counsel in his argument to the jury as to what was said by this Court when the case was here before, but no exception was taken thereto, and the trial court, at the time and of its own motion, corrected the counsel, and stated that the comments of this Court upon the evidence taken at the former trial had nothing to do with the present trial.

Plaintiff was asked by defendant's counsel if he did not meet his wife at one time when he had a Miss Maud Moyer in the buggy with him, and plaintiff's counsel asked him to explain the circumstances of his riding with Miss Moyer, which he did. There was no error in the admission of this testimony.

Defendant called a witness who testified as to statements made by plaintiff after the separation, and after the first trial of the cause. Upon motion, this testimony

was stricken out, and this is assigned as error; but we have carefully read the testimony, and it does not appear to us that the defendant was prejudiced by the court's action,—indeed, we are at a loss to know why the plaintiff made the motion.

This is the second time that this case has been before this Court, and the other questions raised by the record are disposed of by the rulings of this Court in that case. See 66 Mich. 303.

The judgment is affirmed, with costs to plaintiff.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred with MCGRATH, J.

MORSE, J. I concur because of the decision in this Court when the case was here before, but I cannot do so without expressing my feeling that the rule is most unjust that permits a plaintiff, in such a case as this, to testify to what his wife said to the prejudice of the defendant, her father, and will not permit her, as a witness for the defendant, to dispute such testimony.

DEGRAAF, VRIELING & COMPANY (A CORPORATION) v. ADELINE L. MULICK, JAMES M. TRAVIS, AND AMELIA P. IVES.

Mechanic's lien—Appeal.

The bill in this case was filed to enforce a mechanic's lien, and the questions raised are questions of fact, and the conclusions of the circuit judge are not disturbed.

Appeal from Kent. (Grove, J.) Argued May 7, 1891. Decided June 5, 1891.

Bill to enforce a mechanic's lien. Defendant Travis appeals. Decree affirmed. The facts are stated in the opinion.

Montgomery & Bundy and *P. H. Travis*, for complainant.

Earle & Hyde, for appellant.

McGRATH, J. The bill in this case was filed to enforce a mechanic's lien for materials furnished by complainant, a corporation, in the construction of a building on lot 2, Dolbee's addition to the city of Grand Rapids.

Defendant Adeline L. Mulick was the owner of the lot when the building was constructed. Amelia P. Ives is the mortgagee, and James M. Travis, who appeals, is the grantee, of defendant Mulick.

The court below found that the contract for the materials was entered into with defendant Mulick, through her husband, William W. Mulick, who was her general agent, thereunto authorized. The defense was that the building was constructed by William W. Mulick under a contract with his wife, Adeline L. Mulick; but the court found that no contract for the construction of said building was ever in good faith entered into between the said William W. Mulick and his wife. The court further found that defendant Travis was a purchaser with notice; that the defendant Ives had a prior lien; and ordered a sale of the premises subject to the Ives mortgage to satisfy complainant's lien.

The questions raised are questions of fact, and, after a careful examination of the record, we find no reason to disturb the conclusions arrived at by the trial judge.

The decree is affirmed, with costs to complainant, and the record remanded for further proceedings.

The other Justices concurred.

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105	454
86	236
114	523
86	236
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e133	4159
86	236
137	3233

HENRY WERBOWLSKY v. THE FORT WAYNE & ELMWOOD RAILWAY COMPANY.

Negligence—Street-car companies—Injury to passenger.

1. A passenger who voluntarily jumps on or from off a moving street-car does so at his own peril, and that construction of the car cannot be said to be defective which is only unsafe in view of such conduct.
2. It is the duty of street-car companies to allow their patrons an opportunity to get on and off the cars, and the starting of the car while the passenger is so doing is clearly negligent;[1] but such act does not make defective a construction of the car which, under other circumstances, is reasonably safe.
3. Negligence will not be presumed from the bare fact of the accident. There must have existed before its occurrence some suggestion of danger in order to make the defendant liable as for negligence.
4. The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence.
5. In this case it is held that the court erred in submitting to the jury, under the evidence, the question of defendant's negligence in adopting the style of car in question, and in having the apertures therein, described in the opinion, into one of which the plaintiff claimed his foot was forced by the sudden movement of the car before he had an opportunity to alight, whereby he was thrown from the car, and dragged some distance before he could extricate his foot.

Error to Wayne. (Hosmer, J.) Argued May 8, 1891. Decided June 5, 1891.

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

Orla B. Taylor and *Edwin F. Conely*, for appellant.

Washington I. Robinson, for plaintiff.

[1] See *Finn v. Railway Co.*, 86 Mich. 74.

[The points of counsel are fully covered by the opinion.—Reporter.]

McGRATH, J. This is an action on the case to recover damages for injuries which plaintiff claims to have suffered while a passenger on one of the defendant's street-cars, through the defendant's negligence. Plaintiff recovered in the court below, and the defendant appeals.

Plaintiff was a passenger on one of defendant's cars, and claims that, having signaled the conductor to stop the car, and after the car had stopped, the plaintiff undertook to alight, when the car started suddenly, and threw him to the ground; that in falling his foot caught in a hole in the step, and he was dragged some distance. Defendant denies this story, and insists that plaintiff undertook to get off when the car was in motion.

The car was an open car, with seats running cross-wise of the car, and with a foot-board about eight or ten inches wide. The foot-board is about six or eight inches below the floor of the car. On the inside edge of this foot-board is a shoe, or riser, about three or four inches high. The box or bed of the car rests upon the outer ends of the axles, upon heavy spiral springs, which are about six inches in length, the upper ends of which are attached to the car, and the lower ends are affixed to castings, into which the axles run. The shape of the upper surface of these castings is as follows:  The springs occupy positions marked "*a*, *a*." On each side of the car there are two openings in the riser, opposite the wheels. The face of the risers is flush with the outside edge of the car-bed, and the springs come out flush with the face of the risers. The face of the wheels is six or eight inches from the inside edge of the step or foot-board. There are, therefore, two openings in the riser, between the springs, on each side of the car, which

are each about twelve inches long and about six or eight inches deep between the car-bed and the lower surface of the castings. The foot-board is generally about even with the lower surface of the castings. It would be almost impossible for a passenger in entering or alighting from a car to put his foot into this opening in such a way as to injure it, or admit of its being caught, although it may be possible that one falling from the foot-board might get his foot caught therein. There was no testimony offered upon the trial tending to show that these openings are unnecessary, or improper, or dangerous, or defective, or not properly guarded, or that the cars were not reasonably safe, or that the defendant had not used reasonable caution in adopting the style of car that it had adopted, but there was testimony that similar cars with similar openings were in general use.

The jury were permitted to view the car in question, and the court instructed the jury as follows:

"If you think, gentlemen of the jury, that it was negligence, having seen the car in question, to leave the aperture there, why then, gentlemen of the jury, under those circumstances the plaintiff would be entitled to recover. * * * It [the defendant] must use cars which are reasonably safe; and the question for your consideration on this branch of the case is whether the defendant used reasonable caution in adopting the style of car that it did adopt."

If the plaintiff undertook to alight when the car was in motion, the existence of this aperture, and the fact that he got his foot caught therein, would not aid his recovery. The proximate cause of the injury in that case would be his own negligence. If the car started before giving plaintiff time to alight, the company was liable for the consequences of that act, although the car was properly constructed, and the existence of the aperture actually necessary.

Negligence will not be presumed from the bare fact of the accident. There must have existed before its occurrence some suggestion of danger in order to make defendant liable as for negligence. The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence. Nor can it be said that a mode of construction is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of passengers or company.

It was not claimed by plaintiff that his fall was occasioned by getting his foot into this aperture, but that the sudden movement of the car before he had opportunity to alight threw him, and forced his foot into the aperture, and wedged it in so that it caught, and he was dragged some distance. A passenger who voluntarily jumps on or off from a car while it is in motion does so at his own peril, and that construction cannot be said to be defective which is only unsafe in view of such conduct. On the other hand, street-car companies owe it to their patrons to allow them an opportunity to get on and off, and the starting of the car while either is being done is clearly negligent; but such act does not make defective a construction which, under other circumstances, is reasonably safe. In other words, conveyances are constructed with reference to their prudent and careful management and use.

The court erred in submitting to the jury, under the evidence in the case, the question of defendant's negligence in adopting the style of car in question, and in having the apertures therein.

Judgment is reversed, and a new trial granted, with costs of this Court to defendant.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not sit.

GODFREY KALMBACH v. THADDEUS FOOTE.

[See 79 Mich. 236.]

Execution—Voluntary payment—Reversal of judgment on appeal.

1. Plaintiff sued defendant to recover the amount of a judgment rendered against him, as surety upon a guardian's bond, which he had paid to defendant, who was the attorney for the ward in prosecuting the suit, under a threatened levy of execution, as he claims, which judgment was afterwards reversed on appeal. The jury found by their verdict under the questions submitted that the defendant did not know of the principal's intention to appeal the suit when he went with the sheriff to collect the execution, nor when he afterwards accounted to the ward for the avails of the judgment, and that he made no misrepresentations to the plaintiff at the time of such payment; and the judgment in favor of the defendant is affirmed.
2. The failure of an execution issued upon a judgment upon a guardian's bond to state that it is for the use of the ward, as provided by How. Stat. § 5998, cannot be urged by the defendant in the execution where no levy is made, and the money is voluntarily paid.

Error to Kent. (Burch, J.) Argued May 6, 1891. Decided June 5, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in 79 Mich. 236.

Earle & Hyde, for appellant, contended:

1. If a guardian brings or defends a suit when his ward has no assets, he becomes personally liable for all costs, and in this case is liable for all that plaintiff paid; citing 3 Wms. Exr's, 1979; and if an executor deliver all of the estate to the heir or next of kin or one creditor, leaving other debts unpaid, it is a *devastavit*, and he is personally liable; citing Id. 1798 (note *p*); *Cobb v. Muzzey*, 13 Gray, 58, 59; *McNair v. Ragland*, 1 Dev. Eq. 516; and this must be true of any trustee, and is true of this defendant, who brought the action ill-advisedly upon his

personal liability, having no assets of his ward, and taking his chances on the result. He received plaintiff's payments in his own right, and applied them in payment of his own debts.

Fletcher & Wanty, for defendant.

McGRATH, J. This is the second time that this case has been before this Court. 79 Mich. 236. The jury found for defendant, and plaintiff again appeals.

The questions submitted to the jury were:

1. Did defendant know when he went with the sheriff to plaintiff that Tooley intended to appeal the case in which the execution was issued.
2. Did he make any misrepresentations to plaintiff?
3. Did defendant ascertain, before he accounted to Anna Tooley for the proceeds of the note, that the original suit was to be appealed?
4. Was the defendant personally liable to Friedrich for the price of the piano which Anna Tooley had in her possession?
5. Did the defendant account to Anna Tooley for the avails of the execution before he had knowledge of the intention to appeal the original suit, and had she received the benefit of these avails?

These questions have been answered by the verdict of the jury in defendant's favor.

Defendant's claim was that the piano was in fact rented from Friedrich, with the understanding that, if purchased, the rent would be allowed upon the purchase, and, when rented, it was expected that it would be bought, if at all, with the moneys coming from this very suit, and that defendant was not personally liable to Friedrich; that no threats were made by defendant or the sheriff to plaintiff; that plaintiff assumed to pay for the piano and gave the note as the most convenient method of paying the judgment; that defendant, on the evening of the day upon which he received the note, saw Anna Tooley, and turned over to her plaintiff's agreement to pay for the

piano, and exhibited to her the note which he had received, and Anna Tooley instructed him, out of the proceeds of the note, to pay a Mr. Post the sum of $45, which she was indebted for tuition, to pay the insurance upon the piano, to reimburse himself for certain amounts which he had paid in her behalf, and to pay her the sum of $20, which he did, leaving nothing in his hands, charging nothing for his own services, and accounting to her for all the moneys received, including attorney's fees; that before the note was given by plaintiff to defendant, and before plaintiff had assumed to pay for the piano, plaintiff consulted with his attorney with regard to the same, and said attorney drew up the note in question, and the assignment to himself of the judgment, which assignment defendant executed and delivered, and immediately afterwards the sheriff, by direction of plaintiff herein, made a levy upon the property of Noah Tooley. In the present case it is found by the verdict that Anna Tooley received the benefit of the fund; that it did not go to the individual purposes of the defendant, and the discounting of the note is found to have been for Miss Tooley's benefit.

We think that these questions upon which the case turned were fairly submitted to the jury, under clear and explicit instructions from the court.

Error is assigned upon the admission of certain testimony, but, from the careful examination of the record, it does not appear that plaintiff was prejudiced thereby.

It is claimed by plaintiff that the execution affords defendant no protection, for the reason that the form of the execution did not comply with the statute, which is as follows:

"In all suits upon such bonds, the writ and proceedings shall be in the name of the judge of probate, and, when the action is brought for the benefit of any par-

ticular person as creditor, next of kin, or legatee, as provided in this chapter, *the execution shall express that it is for the use of such creditor, next of kin, or legatee,* and in such case the person for whose use the action is brought shall be deemed the plaintiff." How. Stat. § 5998.

The execution did not express the fact that it was "for the use of Anna Tooley," but this defect would not avail plaintiff in any case where no levy was made, and the money was voluntarily paid, and it cannot avail him here. The defendant in the execution was fully aware of the suit in which he paid the money, and the payment must be regarded as voluntary.

The judgment is therefore affirmed, with costs to defendant.

The other Justices concurred.

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THE PEOPLE v. LEWIS J. PARTRIDGE.

Criminal law—Rape—Indecent assault—Evidence.

Where a respondent is informed against for the crime of rape, and is also charged in the same information, under Act No. 153, Laws of 1887 (3 How. Stat. §§ 9314*b*, 9314*c*), with having committed an indecent assault upon the same female, without committing or intending to commit the first-named crime, his conviction of the latter offense acquits him of the former, and, in the absence of a *scintilla* of evidence to warrant such conviction, the judgment entered thereon must be reversed, and the respondent discharged.

Error to Alpena. (Cobb, J., presiding.) Argued May 6, 1891. Decided June 5, 1891.

Information for rape. Judgment reversed, and respondent discharged. The facts are stated in the opinion.

Joseph H. Cobb, for respondent.

A. A. Ellis, Attorney General, and *James McNamara,* Prosecuting Attorney, for the people.

MORSE, J. The respondent was tried in the Alpena circuit court upon an information containing two counts.

The first count charged him with unlawfully and carnally knowing and abusing a female child under the age of 14 years, and of the age of 13 years, on the 3d day of July, 1890, at the city of Alpena.

The second count was added under the statute, and averred that the respondent, on the same day and year, and at the same place, feloniously assaulted the said female child, and did then and there take indecent and improper liberties with her person, *without then and there committing or intending to commit the crime of rape upon her.* See Act No. 153, Laws of 1887.

The defendant was convicted and sentenced upon the second count.

There are 79 assignments of error. Several of them are well assigned, and there was serious error in the charge of the court to the jury. But, as the respondent must be discharged, and cannot be tried again upon the information in this case, we do not deem in necessary to specify the errors we have found in the record, except the one upon which we ground the discharge of the respondent.

The testimony given upon the trial was of a most revolting nature, and will not be referred to in detail. The complaining witness swore positively to an act of sexual intercourse with defendant on the day named in the information, and her testimony was corroborated by

another girl, 15 years of age, who gave evidence that she stood by and witnessed it. The two girls were working for Partridge in a candy-shop, in the back part of which it is claimed the crime was committed. There was also the testimony of a gentleman who looked through a hole in the building, and saw respondent having connection with a girl at the same place, and upon the same day; but he could not or did not tell which one of the girls it was.

The verdict cannot stand. The respondent, by this verdict, was acquitted of the charge in the first count, and there was not a *scintilla* of evidence to support the second count. If the testimony of the prosecution was true, the crime committed was rape under the statute. If it was not true, then there was no crime committed. There was nothing tending to show that any indecent or improper liberties were taken with the girl *without the intent of committing rape.* Under the testimony the respondent was guilty of rape, or not guilty of any offense. The court should have instructed the jury that there could be no conviction under the second count.

As respondent was acquitted on the first count, and should have been acquitted on the second count, the judgment of the court below must be reversed, and the respondent discharged. The jury have found him not guilty of carnally knowing the girl. They found him guilty of an entirely different offense, of the commission of which there was absolutely no evidence in the case. It is our duty, no matter how much we may deplore the result, to discharge him.

Judgment and sentence vacated, and respondent discharged.

The other Justices concurred.

Ocenus Van Buren v. Billius Stocking.

Specific performance—Laches.

1. Where a party to a land contract has delayed performance on his part until there has been such a change in the value of the property as to render the contract unequal if made when its performance is sought to be enforced, equity will refuse relief. *Smith v. Lawrence*, 15 Mich. 499.
2. The mere assertion of a claim, unaccompanied by any act to give it effect, cannot avail to keep alive a right which would otherwise be precluded. *Mackall v. Casilear*, 137 U. S. 556.
3. After waiting 35 years, a bill was filed for the specific performance of a contract by which the defendant had sold to complainant an undivided half interest in about 25 acres of land, which was to be platted, and the lots sold, and one-half of the proceeds credited upon the purchase until a specified amount was paid, when defendant was to deed to complainant an undivided one-half interest in all land remaining unsold. The complainant was to look after the property and make sales. The contract was destroyed, and parol evidence was given of its contents. The defendant testified that it was to be fully performed within six years from date, while the complainant testified that no time was fixed for such performance. At the time the bill was filed a large city had grown up, and the land was a part of its territory, and a portion of it had been sold, and buildings had been erected, and the property had become valuable. And in affirming a decree dismissing the bill, the Court find that the contract ended after the lapse of six years from its date, during which time complainant had not made sufficient sales to meet his payments due thereon, and that since that time the contract has been treated by the defendant as having no force.

Appeal from Kent. (Grove, J.) Argued May 7, 1891. Decided June 5, 1891.

Bill for specific performance of land contract. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

M. L. Dunham, for complainant, contended:

1. The contract constituted the defendant a trustee for the lands; citing *House v. Dexter*, 9 Mich. 246; and an express trust was created; citing *Culbertson v. Witbeck Co.*, 127 U. S. 326; and no particular formality is required for such creation; it may be by an express declaration or by any formal memorandum; citing *Fisher v. Fields*, 10 Johns. 495; *Corse v. Leggett*, 25 Barb. 389; *Urann v. Coates*, 109 Mass. 581; or by letters; citing *Forster v. Hale*, 3 Ves. 696; *Montague v. Hayes*, 10 Gray, 609; or by a pamphlet; citing *Barrell v. Joy*, 16 Mass. 221; or by a receipt; citing *Faxon v. Folvey*, 110 Mass. 392; or by a deposition or affidavit; citing *Pinney v. Fellows*, 15 Vt. 525; or by a recital in a bond; citing *Wright v. Douglass*, 7 N. Y. 564; or, in short, by any writing in which the fiduciary relations between the parties and its terms can be clearly read; citing 1 Perry, Tr. § 82; Browne, Stat. Fr. §§ 98, 109.
2. An express trust having been clearly established in this case, the burden of showing a repudiation or abrogation is upon the defendant; citing *Seymour v. Freer*, 8 Wall. 202; *Prevost v. Gratz*, 6 Wheat. 481; and to abrogate a trust by denial there must be a definite act of denial of unmistakable import, and not a mere and uncertain declaration of intent; citing *Campau v. Campau*, 45 Mich. 367; 2 Perry, Tr. § 864; Ang. Lim. § 468.
3. Courts of equity have control over matters of trust; citing *Forrest v. O'Donnell*, 42 Mich. 556; and every trust in land ceases as soon as the purposes cease for which it was created; citing *Montgomery v. Merrill*, 18 Mich. 338.
4. An examination of the Michigan cases where this Court has treated of the doctrine of laches does not disclose a state of facts which would warrant the holding that in this case the complainant has been guilty of any delay in bringing this suit; citing *McLean v. Barton*, Har. Ch. 279; *Campau v. Chene*, 1 Mich. 400; *Newberry v. Manfg. Co.*, 17 Id. 141; *Russell v. Miller*, 26 Id. 1; *McVickar v. Filer*, 31 Id. 304; *Ritson v. Dodge*, 33 Id. 463; *Loomis v. Brush*, 36 Id. 40; *Webster v. Gray*, 37 Id. 37; *Harlow v. Iron Co.*, 41 Id. 583.

John H. Rozema, of counsel, for complainant.

Butterfield & Keeney, for defendant, contended:

1. It is no merely technical defense which defendant makes. Complainant took no steps to perform the contract, nor to enforce its terms, while it seemed to his disadvantage to do so, and it would be contrary to the dictates of conscience to allow him to reap the benefits of that contract now. The decisions

of this Court are conclusive against complainant upon this point; citing *McLean v. Barton*, Har. Ch. 279; *Sears v. Smith*, 2 Mich. 243; *Cook v. Finkler*, 9 Id. 131; *Campau v. VanDyke*, 15 Id. 371; *Smith v. Lawrence*, Id. 499; *McClintock v. Laing*, 22 Id. 212; *Russell v. Miller*, 26 Id. 1; *McVickar v. Filer*, 31 Id. 304; *Ritson v. Dodge*, 33 Id. 463, 465; *Loomis v. Brush*, 36 Id. 40; *Dickinson v. Seaver*, 44 Id. 624; *Allen v. Allen*, 47 Id. 74; *Campau v. Lafferty*, 50 Id. 114; *Dragoo v. Dragoo*, Id. 573; *Reed v. Reed*, 52 Id. 117; *Haff v. Haff*, 54 Id. 511; *Haldane v. Sweet*, 55 Id. 196; *Frost v. Society*, 56 Id. 62; *Morgan v. Morgan*, 58 Id. 612; *Bumpus v. Bumpus*, 59 Id. 95; *Wright v. Fisher*, 65 Id. 275.

LONG, J. This bill is filed for the specific performance of a land contract and for an accounting.

The defendant is now 82 years old. The contract set up in the bill is alleged to have been made in the year 1855. Defendant was at that time the owner and in possession of about 80 acres of land, lying now within the corporate limits of the city of Grand Rapids. The contract was in writing, and is claimed to have embraced 25 acres of this land. It has now been divided into city lots, the most of which have been sold and built upon. It is claimed that the land embraced in the contract is now known as blocks 1, 2, 3, 4, 9, 10, and 11 of Stocking & Smith's subdivision of Stocking & Allen's addition to the city of Grand Rapids.

The claim of the complainant is that about July 1, 1855, defendant sold to him an undivided half interest in this property for $2,500, $500 being paid down at the time of the purchase, the balance, $2,000, to be paid from the sales of the property; that is, the property was to be platted into lots and sold, and one-half of the proceeds to be retained by defendant and credited upon complainant's purchase until $2,000 was paid, together with complainant's share of taxes and expenses thereon; and that, when one-half of such sales should cover such amount, defendant was to deed complainant an equal un-

divided one-half interest in all said lands remaining unsold. This contract, it is claimed, was in writing, and was deposited with the register of deeds of Kent county for safe-keeping. No copy was kept. The records of the county of Kent were destroyed by fire in the year 1860, and this contract burned. The complainant attempts to prove its contents by parol evidence introduced on the hearing in the court below. While the description of the lands is set up in the bill as comprised within the blocks above mentioned, the complainant's testimony is not very satisfactory that this is the exact 25 acres of land embraced within the contract, and the parties are not agreed as to just what lands were embraced therein; neither do they agree as to the exact terms and conditions of the contract.

It is apparent that some sort of written agreement was entered into between the parties in the year 1855,—the complainant claiming that it was made in July of that year, the defendant insisting that it was made in October. They also disagree as to its terms. The complainant also claims that there was no time within which the contract was to be fully completed and performed, and no rate of interest fixed therein. The defendant is also uncertain what interest the contract was to bear, but insists that the contract, by its terms, was to be fully performed within 6 years from its date. More than 35 years elapsed after the contract was made before the complainant took any steps to enforce it, and 30 years have elapsed since the contract was destroyed, and the first attempt at its enforcement was by the filing of this bill in 1890. In the mean time defendant has sold a large amount of the property without consultation with the complainant. He has been in possession of the whole property, and there is nothing in the record showing that he did not deal with it as his own. He gave a large

block of it to his daughter years ago, has built upon certain of the lots, and by the growth of the city it has become valuable.

Defendant claims that, after the contract was made, the complainant became indebted to him in large sums of money; and that, though the contract was to expire within the six years, he offered to compromise with him, and deed him a small amount of the land, which was refused; that in 1867 or 1868 the complainant put the matter into the hands of Mr. Holmes, a lawyer of Grand Rapids, for settlement, and at which time the defendant denied that complainant had any rights in the land. It is not claimed by complainant that he attempted to assert any rights in the land from that time till about the time the bill was filed, except that he attempted to talk with the defendant about it some two or three years before that time.

Counsel for complainant attempts to excuse these laches. He says that from 1855 up to 1860 no sales of this property could be made for want of purchasers, and the property did not rise in value until after 1870, after which time defendant began to make sales, and sales have been made by defendant from time to time since that date; that the only right complainant could assert was the simple one of having the defendant deed him an equal undivided one-half interest in all of the property remaining unsold, after the payment of this contract; that sales of the property, and consequent payment, were postponed beyond the anticipation of the parties, which was the fault of neither party, and a right of action would not accrue to the complainant until the defendant should repudiate the contract, and when he so explicitly informed complainant; that complainant had no means of knowing the amount of sales made by defendant, or when the moneys due on the contract would be fully paid from

such sales, but that he inquired of the defendant from time to time how they stood, and the question was nearly always evaded by defendant, and when not evaded he universally replied that he was not yet paid; that three years ago was the last time complainant personally made such inquiry, and received no satisfaction; and that in the spring of 1890 he sent his attorney to see defendant, at which time defendant denied all obligation on his part to account to complainant, and denied that complainant had any interest in the property whatever.

There is another matter of controversy between the parties as to what the contract provided; and that is, by the terms of the contract, who was to look after and make sales of the properties? We are satisfied that it was understood that complainant should look after the properties and make sales. He was engaged to some extent in the real-estate business, and the defendant was more or less away from home, looking after lands in other parts of the State for other parties.

We are satisfied, however, from an examination of the record, that it would be most unjust and inequitable to permit the complainant at this late date, after having slept for nearly 30 years upon his rights, now to set up a claim to an interest in these premises. The contract was destroyed by fire in the year 1860. No copy was kept of it, which complainant well knew; and yet, from that date to the time of filing this bill, he has made no effort to enforce it, and during all that time he has known that it rested wholly within the recollection of himself and the defendant as to its terms and conditions. His statement of its contents, as to the particular description of land embraced within it, the time of its performance, and the question of interest, is altogether too meager for this Court to say that he has shown by a preponderance of

evidence that the contract was such as his counsel now claim. Some of the essentials of the contract, as claimed by complainant, are denied by the defendant, and we think that some weight should be given to the defendant's testimony in relation to the time in which the contract was to be performed. If it is true, as claimed by the defendant, that the limit of time fixed by the contract was six years, which the complainant should have to make sales of this property, the complainant certainly has no standing for its enforcement in this Court; and this claim of the defendant that there was a limitation of time for its performance seems most reasonable. The complainant has waited until a city has been built upon these lands, and now for the first time comes into a court of equity, and asks its aid to establish a claim which had slept for 30 years; and this, after the lands have become valuable by the growth of the city, and the moneys expended by the defendant upon the lands.

Where the party has lain by, without performance on his part, until there has been such a change in the value of the property as to render the contract unequal if made now, the court of equity will refuse relief. *Smith v. Lawrence,* 15 Mich. 499.

We do not think that a mere assertion of a claim made by the complainant from time to time has any effect to keep alive a right which would otherwise be precluded, as such claim has never been accompanied by any act to give effect to it. *Mackall v. Casilear,* 137 U. S. 556 (11 Sup. Ct. Rep. 178).

It is claimed by the complainant, however, that the contract created an express trust, by which the defendant was to hold these lands, and to dispose of them for the benefit of himself and the complainant, to account for the proceeds, and to deed over to the complainant

any lands remaining unsold after the contract had been fully performed; and that, therefore, a lapse of time could not affect his rights, as they could not be barred by the statute of limitations. We do not regard the contract, in view of the defendant's testimony, as creating such a trust upon which there was no fixed limit, and the conduct of the complainant himself shows that since 1860 he has not attempted to assert any rights thereunder, and the defendant, as early as 1867 or 1868, expressly denied the complainant's rights in the premises; and, if any express trust was created by the contract, the statute of limitations would begin to run from the time when such repudiation and claim came to the knowledge of the beneficiary.

The case, in our opinion, however, does not rest upon this question. We think by its terms it was to be ended after the lapse of six years from its date, unless in the mean time complainant had made sufficient sales of the lands to meet his payments thereon, and that since that time it has been treated by the defendant as having no force.

Upon the hearing in the court below the circuit judge dismissed complainant's bill, and we think very properly.

That decree must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. GRANT, J., did not sit.

BERTHA PFIRRMAN v. MYRTLE WATTLES ET AL.

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Deed—Covenant—Estoppel—Infants—Guardian's sale—Jurisdiction—Foreclosure of mortgage—Set-off.

1. Where, after the conveyance of land with covenants of warranty, it is discovered that minor heirs have an interest in the land adverse to the grantor, which interest is acquired by the grantor at guardian's sale, the title thus acquired inures to the benefit of his grantee, who can recover nothing more than nominal damages under said covenants.
2. Where the probate court acquired jurisdiction to license the sale of real estate by a foreign guardian under How. Stat. § 6067 *et seq.*, it is not perceived how the validity of the sale can be attacked in collateral proceedings by defendants who do not represent the minors, and when no one having a right to represent them is complaining of such sale, or of the proceedings by which it was consummated; citing *Marvin v. Schilling*, 12 Mich. 360; *Griffin v. Johnson*, 37 Id. 91; *Ellsworth v. Hall*, 48 Id. 407; *Curtis v. Campbell*, 54 Id. 340; *Norman v. Olney*, 64 Id. 559; *Schaale v. Wasey*, 70 Id. 414.

Appeal from Kalamazoo. (Buck, J.) Argued May 7, 1891. Decided June 5, 1891.

Bill to foreclose a mortgage. Complainant appeals. Decree modified and affirmed. The facts are stated in the opinion.

A. M. Stearns, for complainant, contended:

1. If defendants' defense is construed as an equitable set-off, then it is not available, because the damages are unliquidated. The purchase money and interest is not necessarily the measure of damages where the vendee has had the benefit of the possession, as in this case, and taken off a large amount of timber; citing *Hunt v. Middlesworth*, 44 Mich. 448; *Bowne v. Wolcott* (N. D.), 48 N. W. Rep. 336; 2 Jones, Mort. § 1496.
2. The defendants' remedy is upon the covenants in the deed, and this defense is not available upon the foreclosure of the mortgage; citing *Smith v. Fiting*, 37 Mich. 148; *Leal v. Ter-*

bush, 52 Id. 100; *Haldane v. Sweet*, 55 Id. 196; 2 Jones, Mort. § 1500; and in New York it seems to have been entirely settled that the defense cannot be made available unless there has been an eviction; citing *Parkinson v. Sherman*, 74 N. Y. 88; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Abbott v. Allen*, 2 Id. 519; *Platt v. Gilchrist*, 3 Sand. 118; and this principle has been very generally recognized throughout the United States; citing Rawle, Cov. §§ 332, 333; 2 Jones, Mort. § 1502.

Osborne & Mills, for defendants, contended:

1. In support of right to recoup damages in this suit, counsel cited *Burchard v. Frazer*, 23 Mich. 224; *Dayton v. Melick*, 32 N. J. Eq. 570; *Pierce v. Tiersch*, 40 Ohio St. 168; *Allen v. Shackelton*, 15 Id. 145; Wilt. Mort. Fore. §§ 384 *et seq.*, 435 *et seq.*
2. The guardian could not legally delegate the license to sell, as he attempted to do; citing *Crouch v. Eveleth*, 12 Mass. 503; *Pearson v. Jamison*, 1 McLean, 197; *Chambers v. Jones*, 72 Ill. 275; *Sebastian v. Johnson*, Id. 282.
3. There was no report of the sale under the oath of the guardian. It was, in form, under his oath, but was mere hearsay, and was not made otherwise by being positive in form; citing *Proctor v. Prout*, 17 Mich. 473.

CHAMPLIN, C. J. By a warranty deed bearing date December 6, 1888, Andrew Pfirrman and Bertha Pfirrman, his wife, of Cincinnati, Ohio, conveyed to Myrtle Wattles, Henry H. Deming, and James E. Vane, of Kalamazoo, Mich., 300.38 acres of land situated in Kalamazoo county, for the consideration of $7,350; one-half of which was paid down, and the balance secured by a note for $3,675, signed by the purchasers, payable to the order of Mrs. Bertha Pfirrman one year after date, with 6 per cent. interest, and a mortgage upon the land purchased, executed by them to secure the payment of the note. The mortgage expressed the consideration to be purchase money.

Before the purchase the purchasers were furnished with an abstract, which showed a clear title in Andrew Pfirrman to the whole of the lands, and they made the purchase relying upon such abstract. Before the note became

due defendants ascertained that the title was defective to 160 acres of the land. It appears that the title to this parcel of land was on the 14th day of September, 1867, "conveyed to John P. Pfirrman and Charles Pfirrman, jointly." The record does not contain a copy of this deed, and there is nothing to show whether the term "jointly" is intended to convey the impression that the conveyance was in joint tenancy, or whether it was conveyed to them without expressly stating it to be in joint tenancy. If in joint tenancy, the whole title would have passed upon the death of Charles to John P. No conveyance appears of record from Charles, and he died, without having been married, on the 16th day of December, 1882, leaving one brother and one sister surviving him, and two minor children of a deceased sister, as his sole heirs.

A short time previous to the sale to defendants, Andrew Pfirrman, who then claimed to own the land, took proceedings in the probate court of Kalamazoo county to establish the fact of who were the heirs of Charles Pfirrman, deceased, and in the petition filed by him represented that a brother, John H. Pfirrman, and a sister, Barbara, were the sole heirs. After obtaining a decree to that effect he obtained quitclaim deeds from these two heirs, thus making an apparently clear record title in himself. He claims and testifies that both the father and mother of these minor children were dead, and that John H. Pfirrman had adopted them as his legal heirs, and that he did not suppose, after they became the legal heirs of John H., they could inherit through their deceased mother; and he claims to have acted honestly and in good faith in the proceedings to establish who were the legal heirs of Charles Pfirrman. The defendants learned of the fact of these minor heirs to one-sixth of the 160 acres, and notified Andrew Pfirrman, their grantor,

of the defect in title. He then took steps to cure the defect. John H. Pfirrman was appointed guardian of the two minor children by the probate court of Hamilton county, where they resided. He gave the bond required by that court, presented a petition to the probate court of Kalamazoo county for license to sell their interest in the land, and such proceedings were had in that court that the lands were sold at guardian's sale, and Andrew Pfirrman became the purchaser thereat. The sale was confirmed, and conveyance made.

The note not having been paid, complainant filed her bill of complaint in the circuit court for the county of Kalamazoo to foreclose the mortgage. The defendants answered. They set up as a defense that Allen M. Stearns was the agent and attorney of Andrew and Bertha Pfirrman in making the sale to them, and that he represented that the title was clear and perfect in Andrew Pfirrman. They disclaim imputing any fraud on the part of Stearns, but allege that both complainant and her husband knew that he, Andrew, had not title to the premises, and that the abstract did not correctly show his title thereto. They assert that the attempted sale of the minors' interest was ineffectual to convey their title; that the petition was not such as to confer jurisdiction. They assail the title of Andrew Pfirrman, obtained through the guardian's sale, on the ground that the guardian took no oath in this State before the sale; that he was not present at the sale; that he could not legally delegate his authority to sell to another; that there was no report of sale under oath by the guardian.

They further set up in their answer that both complainant and her husband are non-residents of the State of Michigan, and are pecuniarily insolvent and irresponsible, and ask to recoup and have allowed to them their

damages by reason of the failure of consideration, and also the damages they have sustained in consequence of the loss of an opportunity to sell the premises, and pray the benefit of a cross-bill.

The circuit court found that defendants were entitled to offset against the complainant's note and mortgage the sum of $653.34 by reason of their damage sustained on account of the defective title obtained by them from Andrew Pfirrman, and directed a decree of foreclosure for the balance. Complainant appeals.

If the proceedings to perfect the title through the guardian's sale in the probate court of Kalamazoo county were legal, the title acquired thereby by Andrew Pfirrman inured to the defendants by virtue of the covenants of warranty in his deed to them, and the alleged defect in title would be cured, and nothing more than nominal damages could be recovered under the covenants of warranty in the deed.

There is nothing in the testimony to show that the appointment of the guardian by the probate court of Hamilton county, Ohio, was not legal. How. Stat. § 6067, authorizes the foreign guardian of minors residing out of this State, and having no guardian in this State, to file an authenticated copy of his appointment in the probate court of any county in this State where there may be real estate of the ward; and then he may be licensed to sell the real estate for the payment of debts of the ward and the charges of managing his estate, in the same manner and upon like terms and conditions as domestic guardians, except that, if it appear to the court that the foreign guardian is already bound with sufficient sureties in the county where appointed, and an authenticated copy of such bond is filed in the probate court of this State, no further bond shall be required here, etc.

These requirements were complied with, and the petition for license was very full, and showed that it was necessary to sell the real estate of the minors to pay the debts of the wards incurred for their maintenance. The petition was sworn to before a notary public of Hamilton county, Ohio, and his authority to administer the oath was duly authenticated. If it were not, it has been held by this Court that the want of verification will not avoid a sale. *Coon v. Fry*, 6 Mich. 506.

We are satisfied that the probate court obtained jurisdiction to license the sale. This being so, it is not perceived how the validity of the sale can be attacked in these collateral proceedings. The defendants do not represent the minors, and no one having a right to represent them is complaining of such sale, or the proceedings by which it was consummated. As was said in *Marvin v. Schilling*, 12 Mich. 360: "It is not for defendants to drag their rights into this Court in a litigation between them and plaintiff." See, also, *Griffin v. Johnson*, 37 Mich. 91; *Ellsworth v. Hall*, 48 Id. 407; *Curtis v. Campbell*, 54 Id. 340; *Norman v. Olney*, 64 Id. 559; *Schaale v. Wasey*, 70 Id. 414.

The defendants failed to make good the allegations of their answer wherein they stated that complainant and Andrew Pfirrman are pecuniarily irresponsible. The evidence discloses, and it is uncontradicted, that Andrew Pfirrman is worth $100,000 over all liabilities, and that complainant owns property worth $16,000. The defendants set up in their answer, and the testimony shows, that the land purchased, with the exception of about 35 acres, was wild timbered land. The proofs further show that defendants have cut and sold timber from said lands of the value of over $6,000. It is true that Mr. Vane thinks they lost money in getting out the timber; that the value was all consumed in the expense of getting the

timber ready for the market. It further appears from the testimony of Mr. Vane that defendants had an offer for the land of $7,500, they reserving all lumber, wood, and logs that had been cut, which at that time was estimated as worth something over $4,000.

We do not think that under the facts disclosed in the record the defendants are entitled to an equitable offset. They have not been ousted, and the title has not entirely failed to any portion of the premises purchased, and at the time the bill was filed the title of record was perfected. If any defect still exists in fact or law they have a perfect remedy against their grantor upon the covenants of the deed. It might work injustice to deduct over $600 from the money due complainant on the suspicion that the minors, when they arrive of age four or five years hence, may attempt to and succeed in overthrowing the guardian's sale. They may not endeavor to do so, and might not succeed if they should make the attempt.

The decree of the circuit court must be modified so as to include the whole amount secured and unpaid upon the note and mortgage, and, so modified, will be affirmed, with the costs of both courts to complainant.

MORSE and MCGRATH, JJ., concurred. GRANT and LONG, JJ., did not sit.

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GEORGE B. RIPLEY v. GEORGE F. CASE.

[See 78 Mich. 126.]

Sale—False representations—Principal and agent—Ratification—Assumpsit.

1. The doctrine is settled in this State that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the injured party being as serious as though it had proceeded from a *vicious* purpose, he would have a right of action for the damages caused thereby, either at law or in equity. *Holcomb v. Noble*, 69 Mich. 396, and cases there cited.
2. For the remaining questions of law decided, see the former opinion, reported in 78 Mich. 126, and *Busch v. Wilcox*, 82 Id. 336.

Error to Wayne. (Gartner, J.) Argued May 8, 1891. Decided June 5, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion, and in 78 Mich. 126.

Barbour & Rexford, for appellant.

Alfred Russell, for defendant.

MORSE, J. This case has been here once before, and will be found reported in 78 Mich. 126.

The case, as made by the plaintiff on the last trial, does not differ materially from that shown in the record of the first trial, upon which our opinion was based. The case of the defendant did not at all contradict or alter the case made by the plaintiff, except to show his good faith in the transaction; that he did not warrant

the bond; that he sent it to New York, believing it to be good; that he himself made no fraudulent representations to Mr. Ripley; and that Ripley had ample opportunity to read the bond, examine and inquire about it.

The circuit judge put the case to the jury upon the good faith of Case, and said to them that all the law necessary to be stated to them in the case was from the opinion of the Supreme Court as follows:

"If defendant actually *cheated* plaintiff out of good money for a worthless bond, under circumstances which deceived, and were naturally calculated or intended to deceive, there is no reason why he should not be compelled to refund."

He also submitted five questions to the jury specially, which, and the answers found to them by the jury, are as follows:

"1. Did not Mr. Case consult Mr. Coleman, cashier of the People's Savings Bank, and did he not inform Case it was worth $1.03?

"A. Yes.

"2. Did not Mr. Case send the bond to New York afterwards, believing it to be good, and with no fraudulent intent?

"A. Yes.

"3. Did Mr. Case make any fraudulent representation of any kind to Mr. Ripley, the plaintiff?

"A. No.

"4. Did Mr. Case in any way warrant or guarantee the bond?

"A. No.

"5. Did not Ripley, the plaintiff, have ample opportunity to read the bond, examine and inquire about it?

"A. Yes."

Under the charge of the court and the finding of the jury in answer to these special questions they very naturally brought in a general verdict for the defendant.

In our opinion, the question of the good faith of Case

was not material to a determination of the real issue. While it may have been proper enough for him to show his good faith in rebuttal of an implication of actual fraud, yet actual fraud on his part was not necessary to the plaintiff's recovery. If the plaintiff was defrauded by purchasing a worthless bond which was represented to be a good one, he is entitled to recover its value, although fraud is alleged upon the part of the defendant, and yet the defendant is shown to have been innocent of any intentional fraud or misrepresentation.

"The doctrine is settled in this State that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a *vicious* purpose, he would have a right of action for the damages caused thereby either at law or in equity." See *Holcomb v. Noble,* 69 Mich. 396, and cases there cited.

The record here shows that Case sent this bond to a friend in New York to deposit the same with a firm of brokers for sale, stating in his letter that it was a Michigan Central Railroad bond. This letter led those in New York handling the bond in his interest to suppose that it was a Michigan Central Air Line bond, which bonds were guaranteed by the Michigan Central Railroad Company, and were good, when in fact it was a Michigan Air Line bond, not guaranteed by said company, and worthless. The plaintiff bought the bond on the representation of the broker that it was a Michigan Central Air Line bond. This is not disputed. The defendant, having accepted the proceeds of this sale, ratified it, and, having ratified it, must be held to be bound by all the acts of the agent within his assumed authority; and, the representations of the agent being within such assumed authority, his representations by such ratification became and were the representations of Case, the

same as if he had made them himself. *Busch v. Wilcox*, 82 Mich. 336.

There remains, then, no reason why Ripley should not recover back from Case the amount he paid for this worthless bond, unless, as argued by defendant's counsel, the plaintiff, having ample opportunity to examine this bond, and equal opportunity with defendant to ascertain its true character and worth, therefore took it at his own peril, and cannot make Case liable for plaintiff's failure to ascertain what kind of a bond it was. In answer to this argument it is only necessary to say that the law of this case as laid down when it was here before must remain the law of this case to its end. In deciding the case then Mr. Justice CAMPBELL said, in answer to this same claim then made:

"If a bond is represented as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and if it is purchased honestly on such a recommendation, it is a fraud to so transfer it."

There can be no doubt that the plaintiff purchased this bond honestly relying upon the recommendation of the broker, and the fact that he did not closely inspect it cannot be used against his recovery, any more than it could in the case of a counterfeit bill.

The action was properly brought in *assumpsit*. The plain, indisputable fact is that the defendant has received the money of the plaintiff for nothing; for a worthless bond, which the plaintiff was induced to take by the misrepresentation of a person assuming to act as the agent of defendant, and whose acts the defendant has ratified, and for which he is responsible on account of such ratification. The plain case, stripped of all verbiage, is that the defendant has money in his hands, received from the sale of this bond, which equitably belongs to plaintiff, and refuses to pay it over.

The circuit judge should have directed a verdict for the plaintiff for the amount admitted on the trial to be his due if he was entitled to recover at all. It did not necessarily follow from our opinion delivered when the case was here before that there was any question to be submitted to the jury. On the trial we were then examining, the judge directed a verdict for the defendant, and we held that the plaintiff was entitled to go to the jury on his case as then made, and intimated pretty clearly, we think, that the plaintiff had made out a clear case upon that trial. The question whether a verdict should have been directed for the plaintiff was not examined, but we plainly said that the plaintiff had made out a case for recovery, and had a right to go to the jury, and added:

"Whether defendant's case was likely to help him, or what view might be taken of the testimony on either side, the jury, under proper instructions, will have to determine."

We did not intend to rule, as contended by defendant's counsel, that in any event the defendant's case must be submitted to a jury, whether or not such case had any tendency to disprove the case of the plaintiff on the vital issue. The "proper instruction," as the case stood upon the last trial, would have been that a verdict must be given the plaintiff.

The judgment below is reversed, and a new trial granted, with costs of this Court to plaintiff.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

MARVIN S. CADWELL v. ORMAN O. PRAY AND JOHN A. BARRINGTON.

[See 41 Mich. 307; 50 Id. 222.]

Trover—Demand—Estoppel—Evidence—Assignment of claim.

1. One who, in answer to a demand for personal property, admits that it is in his possession and under his control, but refuses to deliver it to the demandant, and thereby induces him to incur the expense of a suit for its value, is estopped from claiming as a defense in such suit that he did not, at the time of such demand, have possession and control of the property.
2. Evidence of matters pertaining to the history of the case in which it is offered is held unobjectionable.
3. An assignment by a defendant in a replevin suit of all of his right, title, and interest in the suit conveys his right, title, and interest in the goods taken under the writ.

Error to Ingham. (Peck, J.) Argued May 8, 1891. Decided June 5, 1891.

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

Spaulding & Walbridge, for appellants, contended:

1. No relation existed between Barrington and the plaintiff to which the doctrine of estoppel can apply. Plaintiff's evidence shows that he did not and could not have relied upon Cook's report of what Barrington said to him; citing, as bearing on the doctrine of estoppel, *Gorham v. Arnold*, 22 Mich. 247; *Palmer v. Williams*, 24 Id. 328; *Fredenburg v. Church*, 37 Id. 476; *Rust v. Bennett*, 39 Id. 521; *DeMill v. Moffatt*, 49 Id. 125; *Conrad v. Fisher*, 37 Mo. App. 352.

John B. Cook (*J. E. Nichols* and *Q. A. Smith*, of counsel), for plaintiff, contended:

1. The second demand was no waiver of the prior conversion of the goods by Barrington; citing 6 Wait, Act. & Def. 211; *Manwell v. Briggs*, 17 Vt. 176; *Cobb v Wallace*, 5 Coldw. 539.

2. The absolute refusal of Barrington to give up the residue of the goods on Cook's demand is full evidence of a conversion unless rebutted or explained; citing *Dietus v. Fuss*, 8 Md. 148; *Magee v. Scott*, 9 Cush. 148.

3. Where the issue involves a charge of fraud, evidence tending to show it is freely admitted, and a wide range of inquiry into transactions between the parties is allowed; citing *Anderson v. Walter*, 34 Mich. 113; *Jacobson v. Metzger*, 35 Id. 103; *Fury v. Strohecker*, 44 Id. 337.

4. Defendant Barrington could not absolutely refuse to deliver the goods, and then, upon the trial, show matters in justification short of a right in himself; citing 6 Wait, Act. & Def. 212; *Spence v. Mitchell*, 9 Ala. 744; *Ingalls v. Bulkley*, 15 Ill. 224; *O'Donoghue v. Corby*, 22 Mo. 393.

MORSE, J. The plaintiff sued the defendants jointly for the conversion of certain goods, and recovered judgment, in the circuit court for the county of Ingham.

The suit grows out of the litigation in the case of *Pray v. Cadwell*, 50 Mich. 222.

The undisputed facts leading up to the present controversy are briefly as follows: In April, 1878, Orman O. Pray held a note and chattel mortgage against Marvin S. Cadwell, upon which the sum of $600 was due. The note and mortgage were originally given by Cadwell to the defendant John A. Barrington, who had guaranteed the collection of the same to Pray. A day or two before the maturity of this note, Marvin S. Cadwell sold his entire stock of goods, which were covered by the mortgage, to his brother, Warren W. Cadwell. Barrington, in the interest of Pray, demanded payment of the note of Marvin S. Cadwell, which was refused; and Warren W. Cadwell refused to surrender the goods, or permit them to be taken upon the mortgage. Pray thereupon replevied the entire stock of goods, which was the suit settled by this Court in *Pray v. Cadwell, supra*. The opinion of the Supreme Court was filed February 27, 1883. In the meantime Pray sold enough

of the goods under and by virtue of the chattel mortgage to satisfy the debt secured by the same. The goods not sold he boxed up, and stored them in the same building where they were when taken, in the village of Eureka, Clinton county. The goods remained where placed until the summer of 1883, when they were removed to a small barn. In 1884, by the direction of Orman O. Pray, these goods were shipped to Petoskey, Mich., and there disposed of by him.

This act of Pray was admitted to be a conversion of the goods, as far as he was concerned; but the defense was that Barrington had never converted the goods or meddled with them in any way so as to render him liable in this action.

The plaintiff claimed and introduced evidence tending to show that in September, 1880, Warren W. Cadwell assigned his interest in the lawsuit between Pray and Cadwell and the goods to him; that on the 28th day of February, 1883, the next day after the opinion of the Supreme Court was filed in that suit, he sent one S. L. Cook and Arthur Morse, of Lansing, with a team and wagon to Eureka for the goods, with full authority on the part of Cook to demand and receive the goods. It was understood by Cadwell that the goods were in the possession of the defendant Barrington, and the demand by Cook was made to him. Cook testifies, and is corroborated by Morse, that Barrington said he had the possession of the goods, but he would not give them up, except upon a writ of replevin. He refused to tell where they were. In November, 1888, before the commencement of this suit, the plaintiff went to Barrington, and again demanded the goods. He testifies that Barrington informed him that he had turned them over to Pray. He then went and demanded the goods of Pray, but did not get them. After the demand made by Cook, the

plaintiff testifies that he assigned his interest in the goods to Anderson Stout, of St. Johns, an attorney, for collection. Mr. Stout, with an officer from St. Johns, went to Eureka, and searched for the goods upon the premises of Barrington, but did not find them. Plaintiff claims that before the beginning of the present suit Stout had reassigned the goods to him.

The defendants introduced testimony tending to show that, soon after the boxing up of the unsold goods by Pray, Mr. Walbridge, his attorney, notified Warren W. Cadwell, in the presence of the plaintiff, at Stout's office, in the village of St. Johns, of the disposition he had made of the goods, and served a written notice upon him to the effect that the goods were subject to the order of the Cadwells at any time they saw fit to take them. Walbridge testified that he served this written notice upon both of the Cadwells, and that Warren tore his notice up, and stamped upon the pieces, saying he would have the whole of the goods or none. The plaintiff has no recollection of any such occurrence.

Barrington testified that he had nothing to do with the goods after they were taken by Pray upon the mortgage in the replevin suit of *Pray v. Cadwell.* He admitted that he demanded pay upon the note, and for the reason that he was interested in its collection by reason of his guaranty, and that he employed an attorney to assist in trying the replevin suit of *Pray v. Cadwell.* He admitted that Cook demanded the goods of him for plaintiff in 1883, but denied that he had any possession or control of the goods at that time, or that he told Cook that he had; yet on his direct examination he testified that he told Cook, in substance, that he did not feel safe in giving the goods over to Cadwell; that he thought Pray had the better right to them, and Pray would hold him responsible for them; and that he knew

where the goods were. On cross-examination, he further testified that he told Cook he had the goods, and would not let him have them.

It is evident from the whole testimony that, in his talk with Cook, Barrington led him to believe that he had possession or control of the goods, and refused to deliver them up. This was sufficient to justify the court in charging the jury as he did, in substance, that, if Barrington in this interview admitted that he had the goods in his possession and under his control, and refused to deliver them up, and the plaintiff acted upon such demand, admission, and refusal in bringing this suit, and was thereby induced to incur the expense of litigation in this case, Barrington was estopped from now claiming and asserting in defense that he did not, at that time, have possession and control of the goods.

Error is assigned because the court permitted the plaintiff to state the inception of the note and mortgage, the institution of the replevin suit of Pray against Cadwell, the demand made by Barrington for the payment of the note, and other matters leading up to the controversy out of which his claim against the defendants arose, being matters, as we think, of the history of the present case, and unobjectionable. There was nothing in the testimony calculated to prejudice the defendants' case, except, perhaps, the fact that Barrington demanded payment of the note while Pray owned it, and before the beginning of the replevin suit, and this fact was material and competent.

Error is also assigned upon the admission of three exhibits. One was dated September 27, 1880, in which Warren W. Cadwell assigned to plaintiff all his right, title, and interest in the suit in which Pray was plaintiff and Warren W. Cadwell was defendant, upon the condition that plaintiff should pay all the costs in the suit

and the attorney fees of Stout and Strickland. Another was an assignment from Warren to plaintiff of all his right, title, and interest in the goods taken upon the writ of replevin in the same suit (*Pray v. Cadwell*), and reciting that this transfer was made for the purpose of more fully specifying the conditions of the sale made in the first exhibit of September 27, 1880, which was meant and understood to be an assignment of his interest in the goods. This last assignment was dated January 16, 1889. We think these exhibits were admissible.

Testimony of plaintiff was permitted, against objection, that the understanding was that the assignment of September 27, 1880, conveyed the title of Warren in the goods to plaintiff. This was not error, because we are satisfied that the first assignment conveyed the goods without such testimony, and therefore no harm was done the defendants. All the interest that Warren had in the replevin suit was the goods or their value, and, when he assigned his right, title, and interest in the suit to plaintiff, he conveyed all his right, title, and interest in all the goods taken under the writ. The last exhibit was the assignment of Stout to plaintiff, and was clearly admissible.

We find no error in the latitude allowed counsel by the court in the cross-examination of the defendant Barrington.

The court was requested by defendants' counsel to instruct the jury that title to the goods in question did not pass from Warren Cadwell to plaintiff until the last assignment was made, January 16, 1889. This was based upon the claim that the first assignment was not an absolute one, and that it devolved upon plaintiff to prove that he had performed the conditions of the instrument at the time he made the demand of Barrington. We think this claim not tenable. It appears by the second

assignment that the conditions had been fulfilled when this suit was brought, and Barrington did not refuse to deliver the property to plaintiff because it belonged to Warren, but because he thought Pray had the better right to it.

Some of the requests of counsel for defendants, upon which assignments of error are based because of the refusal of the court to give them, were substantially given by the court in other requests or in his general charge. The plaintiff was not permitted to recover because of the demand made in November, 1888, for the reason that at that time the claim had been assigned to Stout. This covered the defendants' eighth request.

The court was asked to instruct the jury that there was no evidence in the case tending to show that the goods were ever in the actual or visible possession or control of Barrington. This was properly refused. There was enough in Barrington's own testimony to warrant them in believing that he had the control of the goods, and could have delivered them when Cook demanded them; and plaintiff testified that Barrington told him in November, 1888, that he had turned them over to Pray, which, if true, was an admission that he was at one time in possession of the goods.

The court instructed the jury, in substance, that if the defendants conspired together, united in a common design, to withhold these goods from plaintiff, both would be responsible for what each said and did in furtherance of such common purpose; but if they found no such conspiracy or common design, then one defendant could not be held responsible for what the other said or did, not in the presence of both of them. It is contended that there was no testimony in the case tending to show any such conspiracy or common purpose. We think there was sufficient evidence to warrant the jury in finding

that there was such common design. At any rate there were circumstances tending to show it, and the instruction was not error.

We do not deem it necessary to notice the other allegations of error. The charge of the court was an exhaustive one, and remarkably clear and explicit, and we find no error in it.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

THE PEOPLE v. ALFRED L. LEWIS AND GEORGE W. BODEN.

Municipal corporations—Smoke ordinance—Unjust discrimination.

1. An ordinance which makes any owner, agent, lessee, or manager of any building, boat, locomotive, or other structure in the city, who shall cause or permit dense smoke, or smoke containing soot or other substance, to be emitted from such structure, or from any other place, and which shall damage the property or injure the health of any person, or shall especially annoy the public, liable to fine or imprisonment, or both in the discretion of the court, on the complaint of any citizen or officer of the city, in case of especial annoyance, is not invalid on the ground that it exempts dwelling-houses and steam-boats from its operation, and thus makes an unreasonable discrimination between classes of persons residing in the same municipality; and the common council of the city of Detroit had power under section 42, chap. 7, Act No. 326, Local Acts of 1883, to pass such an ordinance.
2. From the testimony returned in this record, it is evident that the court very properly found that the manner in which the defendants conducted their business, producing smoke and soot,

was a nuisance in *fact*, and the defendants were properly convicted. It was the *manner* in which they conducted their business of which complaint was made, and it is shown that it was so conducted as to be injurious to the property of the people in that vicinity, as well as a great annoyance.

Certiorari to recorder's court of Detroit. (Chambers, J.) Argued May 6, 1891. Decided June 5, 1891.

Respondents were convicted of a violation of a smoke ordinance of the city of Detroit. Conviction affirmed. The facts are stated in the opinion.

James H. Pound, for respondents, contended:

1. To render a by-law reasonable, it should tend in some degree to the accomplishment of the objects for which the corporation was created and its powers conferred; citing Cooley, Const. Lim. 200; *Mayor v. Thorne*, 7 Paige, 261; and it is void if in restraint of trade; citing Cooley, Const. Lim. 202; *Clark v. Le Cren*, 9 Barn. & C. 52; *Chamberlain v. Compton*, 7 Dowl. & R. 597; *Hayden v. Noyes*, 5 Conn. 391; *Dunham v. Rochester*, 5 Cow. 462; *Mayor v. Nichols*, 4 Hill, 209; *Austin v. Murray*, 16 Pick. 125; *Wreford v. People*, 14 Mich. 41.
2. The charter does not authorize or sanction the ordinance. It contravenes common right; citing 1 Dill. Mun. Corp. §§ 325, 327 (note 1); *Taylor v. Griswold*, 2 Green (N. J.), 222; and is oppressive, and therefore void; citing 1 Dill. Mun. Corp. § 320, and cases cited; and courts will declare such invalidity; citing *Mayor v. Winfield*, 8 Humph. 707; *St. Louis v. Fitz*, 53 Mo. 582; *Mayor v. Radecke*, 49 Md. 217.

Charles W. Casgrain and *Charles S. McDonald,* for the people.

LONG, J. The complaint in this case charges that at the city of Detroit, on or about the 19th day of November, A. D. 1890, and at divers other times and occasions, within the corporate limits of said city, to wit, in the rear of premises No. 256 Merrick avenue, one Alfred L. Lewis and one George W. Boden, being the managers of

a carpenter shop situated on said premises, did then and there unlawfully and willfully cause and permit dense smoke containing soot to issue from said shop, which said smoke and soot caused great injury to property, and annoyance to the public, to the evil example of all others in like case offending, and contrary to the ordinance of said city in such case made and provided, being section 2, chap. 67, p. 165, of the Revised Ordinances of 1890.

The defendants were arraigned, and pleaded not guilty to this complaint. They were tried before the court without a jury, found guilty as charged in the complaint, and fined each the sum of $50, on December 10, 1890. The sentence provided that, in default of the payment of such fine, defendants were each of them to be imprisoned in the Detroit House of Correction until such fine and the costs of commitment, $1, were paid, but not exceeding ten days from that date. The case comes to this Court by *certiorari*.

The return of the recorder of the city of Detroit, to whom the writ was directed, shows that the defendants are copartners, and are owners and managers of a carpenter shop and planing-mill, which is conducted in the rear of premises known as "No. 256 Merrick Avenue." The mill is operated by a five-horse-power engine.

The complaint is made under the ordinance above referred to, and which provides as follows:

"SEC. 2. Any owner, agent, lessee, or manager of any building, boat, locomotive, or other structure in the city of Detroit, who shall cause or permit dense smoke, or smoke containing soot or other substance as above, to be emitted from such structure, or from any other place, which said soot or other substance shall damage the property or injure the health of any person, or shall especially annoy the public, shall, upon the complaint of any citizen or officer of the city, in case of especial annoyance, be liable for each and every such offense to a fine of not less than ten dollars nor more than one hundred

dollars, or to imprisonment in the House of Correction, not less than 10 days nor more than 30 days, or both such fine and imprisonment, in the discretion of the court: *Provided*, that the provisions of this ordinance shall not apply to buildings used exclusively for private residence or to steam-boats."

Section 1 of the same chapter is as follows:

"The emission from any chimney or smokestack within the city of dense smoke, or smoke containing soot or other substance in sufficient quantity to permit the deposit of soot or other substance on any surface within the corporate limits of the city, shall be deemed and is hereby declared a public nuisance."

The return further shows that the part of the city wherein defendants conducted their business is principally occupied by dwelling-houses, and for private residence purposes, and a number of the residents of that vicinity have been constantly annoyed by smoke and soot which came from the mill of defendants, and entered their houses, settled upon their property, and on their clothing, which had been washed and hung out to dry, thereby necessitating its being rewashed; that the smoke, soot, and sparks emitted from defendants' mill injuriously affected their property.

The common council of the city of Detroit had power to pass the ordinance under which the conviction was had, by section 130 of the charter, compilation of 1886.

The complaint is that the ordinance should be held invalid upon the ground that it exempts dwelling-houses and steam-boats from its operation, and thus makes an unreasonable discrimination between classes of persons residing within the same municipal territory. Ordinances must not only be reasonable and within the power of the municipality to enact them under its charter, but must affect each member of the community alike. They should neither favor nor discriminate against any person or class

of persons or any particular portions of the municipal territory. Their burdens and their benefits should rest equally upon all. It cannot be said that this ordinance makes such a discrimination that the Court should declare it invalid.

From the testimony returned in this record it is evident that the court very properly found that the manner in which the defendants conducted their business, producing smoke and soot, was a nuisance in fact; and upon the whole record we think the defendants were properly convicted. It was the manner in which they conducted their business of which the complaint was made, and it is shown that it was conducted in such a way as to be injurious to the property of the people in that vicinity, as well as a great annoyance.

There are several questions raised upon this record which we do not think it necessary to discuss, being unable to find any error in the proceedings.

The conviction must be affirmed.

CHAMPLIN, C. J., and GRANT, J., concurred with LONG, J.

MORSE, J. I think the ordinance is unreasonable, and makes an unjust discrimination, which the law ought not to permit.

MCGRATH, J., concurred with MORSE, J.

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JOHN B. BRITTAIN v. JOHN KELLY.

Sale—Contract—Execution—Evidence.

One of two partners sold his interest in the business, and the vendee sued him to recover expenses incurred in enforcing his rights under the sale against the other partner, claiming that the vendor agreed *verbally* to pay such expenses. On the trial he testified to several conversations tending to prove the agreement, and the defendant's evidence tended to show that at the time the bill of sale was executed it was agreed that $100 should be deducted from the purchase price in full for such anticipated expenses. And it is held that the fact that the bargain was not binding upon either party until the execution of the bill of sale did not affect the verbal agreement, which became valid upon such execution, and would have become so if not mentioned at that time; that the sole question for the jury was whether such an agreement was made, and that it was of no consequence whether it was made before or at the time of the execution of the bill of sale; and that the jury might consider all of the conversations, including the last one, in determining that question.

Error to Kent. (Burch, J.) Argued May 6 and 7, 1891. Decided June 5, 1891.

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

Fletcher & Wanty, for appellant.

M. L. Dunham (*John H. Rozema,* of counsel), for plaintiff.

GRANT, J. Defendant, Kelly, and one Rice were copartners in a hotel business. Defendant sold and conveyed to plaintiff by a bill of sale his interest in the

business. It was anticipated that Rice might object to receiving plaintiff as a partner, and that there might be some trouble and litigation in enforcing plaintiff's interest after the purchase. Plaintiff claims an oral agreement with defendant by which defendant promised to pay for such expenses as plaintiff should incur in enforcing his interest against Rice. Defendant claims that he agreed to pay plaintiff only $100 to cover such expenses. This is the sole controversy between the parties.

Plaintiff brought suit to recover such expenses, and had verdict and judgment in his favor. Plaintiff introduced evidence of several conversations with the defendant, tending to prove his claim. The parties finally met in the office of Fletcher & Wanty to execute the bill of sale, which was drawn by Mr. Fletcher. Plaintiff testified that he there, in the presence of Mr. Fletcher, stated the agreement as to expenses; that Fletcher stated that he understood that defendant was to pay only $100; that Fletcher then left the room, and defendant then told plaintiff to keep the $100 out of the purchase price, and he would pay all the money expense, as he had told him before. The evidence on the part of the defendant tended to show that it was then agreed that plaintiff should deduct $100 from the purchase price, and that this was all defendant should pay.

The circuit judge correctly stated to the jury what the issue was between the parties, giving the claim of each. At the request of defendant's counsel he instructed them that they should consider the value of the property sold, the surroundings of the parties, and all the testimony in the case. They then requested the court to give the following instruction:

"The bargain, if there was one, had no binding legal effect before the interview at Fletcher & Wanty's office,

and the testimony of all the conversations leading up to that interview are before you only to throw light on what there occurred, and, if you find that at that interview, when the papers were drawn and exchanged, the bargain was that the $100 should be deducted, and Mr. Kelly should be to no more expense or liability in the matter, then, no matter what previous conversations disclosed, your verdict must be for the defendant."

Instead of giving this request, the court instructed them that they should take all the conversations into consideration, including the last one, in making up their minds what was the understanding.

While it is true that the bargain was not binding upon either party until the execution of the bill of sale, still that did not affect this parol agreement, which became valid upon such execution. If nothing had been said at that time about it, still it would have been valid. The sole question for the jury was whether such an agreement was made, and it was of no consequence whether it was made before or at the execution of the bill of sale. The request is objectionable, in that it would have been a virtual instruction to the jury that the parties had not previously agreed upon this matter.

We think no error was committed, and the judgment must be affirmed.

The other Justices concurred.

86 281
103 316

MICHAEL DAVIS v. AUGUST MARXHAUSEN.

Libel and slander—Identity of person—Charge to jury.

1. The publication of a statement that the party therein named, giving his street and number has been arrested for theft, is libelous *per se*, and, if false, the person thus described is entitled to nominal damages, if no actual damages are proved.
2. In such a case it is error to instruct the jury that, if from the evidence they believe another person of the same name was libeled, the plaintiff cannot recover; as under the evidence the article referred to the plaintiff, it describing him both by name and the number of the street where he resided.

Error to Wayne. (Brevoort, J.) Argued May 12, 1891. Decided June 5, 1891.

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

Sloman, Berry & Duffie, for appellant.

Morse Rohnert (*John G. Hawley,* of counsel), for defendant.

GRANT, J. This is an action of libel, the defendant being publisher of the Detroit Abend-Post, in which the alleged libelous article was published November 15, 1889. It reads as follows:

"The police detectives Noble and McDonald arrested yesterday Michael Davis, who resides at No. 311 East Columbia street, on account of the theft of a quantity of lead pipe which belongs to the company who are undertaking to bring natural gas to Detroit."

A man by the name of Michael Davis had been arrested for the theft, but he did not live at the place designated in the article, which was the residence of the plaintiff.

It is unnecessary to state here how the mistake occurred. On November 17 defendant, having learned of the mistake, published another article, stating that the Michael Davis arrested for the theft did not live at 311 East Columbia street. On the 23d of the same month defendant published another article, again stating the mistake, and that the Michael Davis living at 311 East Columbia street was an honest man in all respects, and that through mistake he had suffered an unintentional wrong.

One error was committed by the circuit judge in his charge to the jury. He said to them:

"It is a fundamental legal principle that in an action for libelous publication the name of the person is a general one, and there is nothing in the publication to show that it refers to the plaintiff unless the plaintiff shows to you that it refers to him,—that he was the person libeled; and if from the evidence you believe that another Michael Davis was libeled, then he cannot recover."

It was evidently intended by this charge to instruct the jury that the identity of the plaintiff with the person named in the publication must be shown. Under the evidence the article referred to plaintiff, as it described him both by name and residence. Of this there could be no doubt. The Michael Davis arrested was not libeled. The libel consisted in referring to the plaintiff as the person arrested, when in fact he was not.

At the commencement of his charge the judge had instructed the jury that the article was libelous *per se*, and that the plaintiff was entitled to recover damages. This instruction was correct, and under it the plaintiff was entitled to nominal damages, if no actual damages had been proven. These two portions of the charge were inconsistent with each other, and only by finding that

"another Michael Davis was libeled" could the jury under this charge have found for the defendant.

We find no other errors in the record.

Judgment reversed, and new trial ordered.

The other Justices concurred.

THE FARWELL BRICK, TILE & CLAY SHINGLE COMPANY (LIMITED) v. EDWARD MCKENNA AND JAMES MCKENNA.

Husband and wife—Homestead—Abandonment—Evidence.

A wife who abandons her husband and her home without legal cause —that is, not under circumstances that would entitle her to a divorce—does not carry with her her marital rights in the homestead.[1]

So *held*, where a husband and wife removed from their homestead to a neighboring village, and, after residing there for about two years, the wife left her husband, and refused to live with him, under circumstances entitling him to a divorce on the ground of desertion after the expiration of the statutory period. Four years after such desertion the husband, who had resumed the occupancy of the land, sold a portion of it, and deposited a deed in *escrow*, the purchaser retaining $200 of the purchase price until a release was secured of the dower interest of the wife. The wife, about two years before such sale, had written to her husband to sell the land, and just prior to said sale she conveyed it to a third party, who three days afterwards deeded it to her husband;—under which state of facts she is held to have abandoned her homestead interest.

Appeal from Clare. (Hart, J.) Argued May 12, 1891. Decided June 5, 1891.

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[1]See *Stanton v. Hitchcock*, 64 Mich. 316; *Trout v. Rumble*, 82 Id. 202.

Bill to quiet title. Both parties appeal. Decree reversed, and one entered as prayed by complainant. The facts are stated in the opinion.

Bunker & Carpenter, for complainant, contended:

1. In support of the claim that by her acts Mrs. McKenna has estopped herself from claiming homestead rights in the land in controversy as against the complainant if she were a party to this suit, and that James McKenna can stand in no better position than she, counsel cited *Truesdail v. Ward*, 24 Mich. 117, 133, 134; *Faxton v. Faxon*, 28 Id. 159, 161; *Sebright v. Moore*, 33 Id. 92; *Norton v. Nichols*, 35 Id. 148; *Peake v. Thomas*, 39 Id. 585; *Vanneter v. Crossman*, 42 Id. 465; *Heyn v. O'Hagen*, 60 Id. 150; *Wheeler v. Smith*, 62 Id. 373; *Dickerson v. Colgrove*, 100 U. S. 578.

C. W. Perry, for defendants, contended:

1. The position of defendants in this cause is that the homestead rights of Mrs. McKenna in the forty-acre tract of land existed at the time of the attempted conveyance by her husband to complainant, and, if so, that such conveyance is absolutely void, and should be so declared by the Court. The constitutional limitation of a homestead is $1,500, and the statute protects the wife and family in a home to that amount. The homestead interest is for the wife and children as much as for the husband, and it can be released by the wife only to the owner of the fee. The most positive parol promise to sell the homestead, or not to claim it, is void in law, even though the consideration is ample; citing *Showers v. Robinson*, 43 Mich. 511; *Nims v. Sherman*, Id. 45; *Hayes v. Livingston*, 34 Id. 384; *Ring v. Burt*, 17 Id. 465; *Wright v. DeGroff*, 14 Id. 164.
2. How. Stat. § 7722, makes any conveyance of the homestead absolutely void unless signed by the wife, except in case of a mortgage to secure the purchase price; citing *Beecher v. Baldy*, 7 Mich. 488; *Dye v. Mann*, 10 Id. 291; *McKee v. Wilcox*, 11 Id. 358; *Ring v. Burt*, 17 Id. 465; *Fisher v. Meister*, 24 Id. 447; *Wallace v. Harris*, 32 Id. 380; *Insurance Co. v. Sewing Machine Co.*, 41 Id. 131; *Sherrid v. Southwick*, 43 Id. 515.
3. If Mrs. McKenna went away with no intention of abandoning a known right, there could be no abandonment; citing *Showers v. Robinson*, 43 Mich. 502; *Bunker v. Paquette*, 37 Id. 79.

GRANT, J. Defendant Edward McKenna, in 1879, owned

40 acres of land, known as the S. W. ¼ of S. E. ¼ of section 24, in township 17 N., range 5 W., Clare county, Mich. He and his wife lived upon the premises until the fall of 1882. They had no children. They left the premises in 1882, and removed to a neighboring village, where they lived for about two years, when she left her husband, and has not since lived with him. Edward subsequently returned, and occupied this land until he deeded 32 acres of it to complainant. About 12 acres were cleared, and Edward lived in a small building erected thereon. The rest of the land was wild, partly swamp and partly timbered.

On March 23, 1888, the complainant made a parol agreement with Edward for the purchase of 32 acres of this land, on which were deposits of clay. Edward made out the deed, which was deposited in escrow. The money was paid April 21, 1888, except $200, which was to be retained until Edward procured from his wife a release of her dower interest. Complainant took possession of the land in March, and erected buildings and machinery for the manufacture of brick, tile, and shingles. At the commencement of this suit it had expended $3,700, and at the time of the hearing its entire investment amounted to about $7,000. September 21, 1888, Edward and his wife conveyed the entire 40 acres by quitclaim deed to defendant James McKenna, who immediately thereafter instituted an action of ejectment against complainant to recover possession. This deed was made without consideration, and for the sole purpose of having James institute proceedings to recover the entire premises, and, if successful, to reconvey them to Edward and his wife. Upon the execution of the deed to complainant, Edward fenced in his eight acres, and erected a new house thereon.

The sole question in the case is, did Elizabeth McKenna,

the wife of Edward, have homestead rights in these premises? The prayer of the bill is for a perpetual injunction of the ejectment suit, and the release by James McKenna of his title to the 32 acres. The circuit court found the value of the 40 acres at the time of the deed to complainant to be $1,800, and gave to the defendants the east half and to the complainant the west half. Both complainant and defendants appeal.

The wife had not occupied these premises for six years. She had left her husband for four years, and refused to live with him. She alleges no legal excuse for leaving him, and under the record here made he would have been entitled to a divorce on the ground of desertion. The sole reason given by her for leaving him, using her own language, was: "Because my home was made unpleasant on account of liquor." There is no evidence of cruelty, or that he was an habitual drunkard. She testified that he had not drank any for two or three years, and perhaps longer. Still she had not returned to him, although it appears that he desired she should. She had stated to others that she would never live on the land again, and that her husband could do with it as he saw fit. On June 13, 1886, she wrote to her husband a letter in which she said:

"You know that I will never live with you if you ever taste any kind of liquor. Now, the best thing you can do is to go somewhere and settle, and make sure that you can live a sober life, and I will try and forgive the past. Dr. Kelly wants to buy the place, and you can write to him, and see what he will give, and I am willing you should sell. Go to Minnesota (that is a good state), and settle. * * * There is nothing here for any one to settle for. * * * Sell the place, and go."

February 20, 1888, she executed a deed of the land to one Presley, and the deed was recorded the same day. The consideration expressed in this deed was $100. The purpose of this deed is unexplained. Three days afterwards Presley and wife reconveyed the land to her husband, but it does not appear whether this deed was recorded.

Under these facts she had abandoned her homestead interest, and retained only her right of dower. The case of *Sherrid v. Southwick*, 43 Mich. 515, cited by defendants' counsel, has no bearing upon the present case. In that case the wife was driven from her home by the misconduct of her husband, so grievous in its character that she was entitled to a divorce under the statute. Under those circumstances, she had a right to control the disposition of the homestead. But, when she abandons her husband and her home without legal cause,—that is, not under circumstances that would entitle her to a divorce,—she does not carry with her her marital rights in the homestead.

The decree of the court below must be reversed, and decree entered here according to the prayer of the bill, with costs of both courts to complainant.

The other Justices concurred.

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100 435
86 288
d151 18

WILLIAM TRAVIS v. THE STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

Principal and agent—False imprisonment.

Where, after the payment of a claim under an accident insurance policy, the insured is prosecuted criminally for obtaining the money under false pretenses upon the complaint of the State agent of the company, and upon his discharge sues the company for false imprisonment, and on the trial fails to show that the agent acted as such in making the complaint, or his authority so to act, or the ratification of his act by the company, and the agent testifies that he acted individually in making the complaint, there is no room for inference from the mere fact of agency that the agent represented the company in instituting the criminal proceeding, the burden being upon the plaintiff to show that fact.

Error to Wayne. (Gartner, J.) Argued May 12, 1891. Decided June 5, 1891.

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

John G. Hawley, for appellant, contended:

1. The principles governing the decision in *Turner v. Insurance Co.*, 55 Mich. 236, establish defendant's liability in this case.
2. In considering the force and effect of the evidence from which, it is claimed, the jury might justly find that the prosecution was authorized or countenanced by defendant, it must be borne in mind that the defendant remained mute. It denied nothing and asserted nothing. Having at its command all the sources of evidence and all the evidence which would have made everything clear, it suppressed them; citing *Wallace v. Harris*, 32 Mich. 380; and see *Bacon v. Johnson*, 56 Mich. 182, where a corporation was held liable for the acts of its agent although it expressly denied that the agent's authority extended to the transaction in question.

Keena & Lightner (F. H. Canfield, of counsel), for defendant.

GRANT, J. Plaintiff had been insured by the defendant against accident. His left hand had been shot off, and his claim was settled and paid in full. Subsequently he was prosecuted criminally for obtaining this money under false pretenses, upon the alleged ground that the injury was purposely inflicted. He was discharged upon the examination, and then brought this suit for false imprisonment.

The complaint was made by Joseph T. Patton, who was the State agent of the defendant. The complainant did not show that Patton was acting as the agent of the company in making it. The plaintiff introduced no evidence of direct authority conferred upon Patton to make the complaint, nor of ratification of his act in so doing. Mr. Patton testified that he acted individually, with no authority from the defendant, and wholly on his individual authority.

The claim having been adjusted and paid, there is no room for inference from the mere fact of agency that Mr. Patton represented the defendant in instituting the criminal proceeding. He could, of his own motion, institute the proceeding as well as by the direction of the defendant. The burden of proof was clearly upon the plaintiff to show affirmatively that the defendant authorized it.

The circuit court was correct in directing a verdict for the defendant, and the judgment is affirmed.

The other Justices concurred.

86 290
94 628

MERRILL B. MILLS ET AL. v. DUNCAN MCLEOD AND SARAH MCLEOD, IMPLEADED WITH THE CITY OF DETROIT.

Equity practice—Setting aside order pro confesso.

In this case the court is held not to have abused its discretion in refusing to set aside an order *pro confesso* on application made after the entry of decree, where the proposed answer fails to meet the case made by the bill, and the affidavit of one of the defendants filed in support of the application is met by the affidavit of complainants' solicitor to an understanding with the defendant, and with his solicitor, that the bill was to be taken as confessed to save unnecessary expense, and by the affidavit of defendant's solicitor that, after an examination of the case, he advised the defendant that complainants were entitled to the relief prayed for, and was instructed not to file an answer, but to endeavor to secure a settlement without a defense.

Appeal from Wayne. (Brevoort, J.) Argued May 12, 1891. Decided June 5, 1891.

Bill to quiet title. Defendants McLeod appeal from an order denying their motion to set aside an order *pro confesso*. Decree affirmed. The facts are stated in the opinion.

Keena & Lightner, for complainants.

S. E. Engle, for appellants.

GRANT, J. The bill in this case was filed to quiet title to certain lands in the city of Detroit. The lands had been platted by the defendants McLeod, together with other lands which belonged to them.

The bill was filed January 14, 1890. Subpœnas were duly served upon defendants, and on February 10, 1890, a copy of the bill was given to Mr. Andrus, of the firm

of Corliss, Andrus & Leete, attorneys, who were acting in the matter for the defendants. March 19 the order *pro confesso* was entered.[1] July 15 an application was made to set aside this order. The motion was heard July 28, and denied August 8.

The city appeared in the case, which was heard June 18, and decree entered for complainants.

Mr. Keena, one of the solicitors for complainants, swore in his affidavit opposing the motion that he had conversations with Duncan McLeod and Andrus, both before and after said *pro confesso*, in which it was understood both by McLeod and Andrus that defendant McLeod intended to allow the bill to be taken as confessed in order to avoid unnecessary expense. Mr. Andrus swore in his affidavit that, after an examination, he advised McLeod that the complainants were entitled to the relief prayed for; that McLeod instructed him not to file an answer, but to endeavor to make a settlement without making any defense. These affidavits are met by the affidavits of Duncan McLeod alone. We are also satisfied that the proposed answer does not meet the case made by the bill. Under these circumstances we do not think the court abused its discretion in refusing to set aside the order *pro confesso*.

The decree of the court is affirmed, with costs.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. McGRATH, J., did not sit.

[1] This order was based upon an affidavit showing the non-appearance of the defendants.

LOUIS DIETZ v. EMMA A. BIGNALL, CLAIMANT.

Garnishment—Claim by third party—Husband and wife—Agency —Findings of fact.

1. Findings of fact cannot be disturbed by the appellate court upon the ground that the weight of the evidence is against them, or because that court would have arrived at a different conclusion in passing upon the testimony. It is sufficient if there is some testimony tending to establish the facts as found.
2. In this case it is held that there was some evidence tending to support the finding that the claimant was the contracting party with the garnishee defendant, instead of her husband, who acted solely as her agent, and that she was entitled to the money due on said contract.

Error to Kent. (Grove, J.) Argued May 12, 1891. Decided June 5, 1891.

Garnishment proceedings; claimant declaring in trover. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Everett D. Comstock, for appellant, contended:

1. The pretended transfer or sale from Bignall to his wife was void as against his creditors, who could reach the property or its avails by proper proceedings.
2. Under the married woman's act the wife cannot carry on a general business, by her husband as her agent, so as to make the proceeds her own as against his creditors, but the entire capital and its avails will be liable for his debts; citing *Glover v. Alcott,* 11 Mich. 470; *Wortman v. Price,* 47 Ill. 22; *Robinson v. Brems,* 90 Id. 351; *Glidden v. Taylor,* 16 Ohio St. 509; *Wilder v. Abernethy,* 54 Ala. 644; and this doctrine is not overthrown by the decision in *Rankin v. West,* 25 Mich. 195, that being a case where the creditors had no reason to complain, the property in question having been sold to the wife on her credit by parties who would not trust her husband, and the distinction being fully explained at pages 200 and 201.
3. A conveyance by an insolvent husband to his wife is held void as to both existing and future creditors in *Bostwick v. Burnett,*

74 N. Y. 319; and a merely colorable family arrangement, being a pretended sale from a debtor to his wife and children, will not pass title so as to defeat an execution levy by the husband's creditors; citing *Cole v. Call*, 79 Mich. 159.

J. A. Fairfield, for claimant.

LONG, J. On December 19, 1889, plaintiff recovered judgment against Charles H. Bignall before a justice of the peace for the sum of $88.65 damages and $3.50 costs. This judgment was rendered upon a promissory note given by Bignall to the plaintiff, of date September 26, 1887.

The summons by which suit was commenced was issued on December 11, 1889, and on the same day the garnishee summons was issued in favor of plaintiff against one Henry C. Russell, as garnishee of said Charles H. Bignall. Russell, the garnishee defendant, on the return-day of the garnishee summons made disclosure to the justice that he was indebted to the said Charles H. Bignall in the sum of $150. On December 26, 1889, the judgment in the principal case not having been appealed from, a second summons was taken out by the plaintiff against Russell, the garnishee defendant, returnable before the justice on January 4, 1890, at which time the cause was continued by consent till January 11, 1890. On that day the garnishee defendant further disclosed that Emma A. Bignall, the claimant in this case, claimed the money which he had previously disclosed he owed to Charles H. Bignall, whereupon he paid into the hands of the justice the sum of $163.65, being the amount of his disclosed indebtedness. No judgment was rendered againt him, and the cause was adjourned till January 27, 1890, and a discharge was given the garnishee defendant for the amount so paid by him. At the same time a notice was issued by the justice to the claimant, Emma A. Bignall,

to appear before him on January 23, 1890, and maintain her claim to this money. The cause was thereafter tried on January 31, 1890, and the justice rendered judgment in favor of the plaintiff and against the claimant for the costs of the proceeding. The claimant appealed from this judgment to the circuit court for the county of Kent, and the justice paid the money deposited by the garnishee into the circuit court. The cause was tried in the Kent circuit court, and the judgment rendered by the justice reversed, and judgment rendered in the circuit court in favor of the claimant for the amount of the money deposited with costs.

Plaintiff brings error.

The cause was tried before the circuit court without a jury, and the court, at the request of the parties, made a finding of facts and of law. The court found as facts that the husband of the claimant, and as her agent, made a contract with the garnishee defendant, Henry C. Russell, for the construction of certain stone-work, and to furnish the stone, lime, and material for the foundation of the building to be built by the claimant, at the price of about seven or eight hundred dollars; that Russell, the garnishee defendant, paid all the said moneys on said contract, except $165; that one of the checks given by said Russell was given (not payable) to Charles H. Bignall, payable to Emma A. Bignall, claimant in this suit; that before his disclosure in garnishment in justice's court, but after service of the summons in garnishment was made on him, he was first informed that the claimant was entitled to the money, and that she was the contractor, and said Charles H. Bignall was only her agent, and which was the first direct notice he had received thereof; that the claimant purchased all the material that went into the Russell job, and paid the

men from her own money, and that such materials as went into the Russell job that were obtained on credit were obtained on the credit of the claimant, and that Charles H. Bignall had no credit whatever; that since said claimant assumed said business she has done about $50,000 worth of building walls and furnishing materials in her own name, and on her own credit; that the arrangement made in March, 1888, between the claimant and her husband for her to assume the property and management of the affairs was genuine and *bona fide*, and not made to cheat or defraud creditors; and from that time forward she has been the sole contractor, and all business has been carried on in her name.

The court found as matter of law:

1. That the contract was made between claimant and said Russell.
2. That the money due on said contract all belonged to the claimant.

The court thereupon directed judgment in favor of the claimant for the moneys due on the contract, and for costs against the plaintiff.

Several other findings of fact made by the circuit judge are found in the record, which we do not deem it necessary to discuss.

Some 20 errors are assigned upon the record by plaintiff's counsel; but if the facts found by the circuit judge heretofore set out are supported by any evidence, it must end the case in favor of the claimant. The controversy is therefore necessarily narrowed down to this one question, to wit: Is there any testimony that claimant was the contracting party with Russell under this contract? The husband of the claimant had been engaged in the same business prior to March, 1888. The testimony of claimant tends to show that at that time her husband had lost everything he possessed, except three or four

horses, two or three wagons, and a small steam-power and pump for the stone quarry which he had been working; that this was incumbered, and was of little or no value; that her husband had used money that belonged to her, and turned this property over to her that she might go on with the business if she desired; that from that time forward she had carried on a contract business in furnishing stone and material for buildings and in the erection of buildings in the city of Grand Rapids, her husband acting solely as her agent in the conduct of the business. She testifies positively that her husband had no interest whatever in the contract made with Russell; that it was her contract, in which her husband had no interest.

The findings of fact by the circuit judge cannot be disturbed by this Court upon the ground that the weight of evidence is against the findings, or that this Court would have arrived at a different conclusion in passing upon the testimony. It is sufficient if there is some testimony tending to show the facts as found.

We cannot say upon this record that there is no testimony to support the findings, and the judgment must be affirmed, with costs.

The other Justices concurred.

86	297
116	262
116	263
86	297
138	[2]141
86	297
145	[3]396

HERBERT W. NEWLOVE, SURVIVOR, ETC., v. JOHN CALLAGHAN AND ELIZABETH CALLAGHAN.

[See 61 Mich. 402; 86 Id. 301.]

Fraudulent conveyances—Husband and wife—Estates by entireties—Creditor's bill.

1. Where real estate is purchased by and conveyed to a husband and wife jointly, in the absence of any showing to the contrary the husband will be presumed to have paid one-half of the purchase price.
2. Estates in entirety cannot be created at the expense of creditors, and held in fraud of their rights.

So *held*, where a judgment creditor and his wife jointly purchased and paid for real estate, which was conveyed to them jointly, and the judgment creditor filed a bill to reach the interest of the husband therein, and the defendants in a joint answer set forth that the object of taking the title in their joint names was to enable the survivor to own the property, they having no children.

Appeal from Wayne. (Reilly, J.) Argued May 12, 1891. Decided June 5, 1891.

Judgment creditor's bill. Complainant appeals. Decree reversed, and one ordered for complainant. The facts are stated in the opinion.

Keena & Lightner, for complainant, contended:

1. The recital in the deed that defendants paid the purchase price is evidence, until the contrary is shown, of such payment; citing Dev. Deeds, § 992; *Gaugh v. Henderson*, 2 Head, 628, 634; *Peter v. Beverly*, 10 Pet. 570; and the interest of two joint purchasers or owners of property, whether real or personal, is presumed to be equal; citing *Northrup v. McGill*, 27 Mich. 235, 236; *Campau v. Campau*, 44 Id. 31; *Harrison v. Ingersoll*, 56 Id. 38; *Loring v. Palmer*, 118 U. S. 321, 341; *Goesale v. Bimeler*, 5 McLean, 223, 228; *Adams v. Leavens*, 20 Conn. 80; and

the same presumption from the deed and its recitals establishes the fact that John Callaghan paid one-half of the purchase price; citing *Reynolds v. Clark*, Wright (Ohio), 656.

2. The receipts from the real estate held by entireties, or at least one-half of such receipts, since complainant needs not to exceed one-half of the purchase price to satisfy his judgment, belonged to John Callaghan; citing Tyler, Inf. (2d ed.) 525; *Pray v. Stebbins*, 141 Mass. 223; *Washburn v. Burns*, 34 N. J. Law, 20; *French v. Mehan*, 56 Penn. St. 289; *Hall v. Stephens*, 65 Mo. 680; *Bennett v. Child*, 19 Wis. 362; and, being personal property, they were not subject to any of the rules applicable to estates by entireties; citing *Wait v. Bovee*, 35 Mich. 425.

3. As to the failure of defendant John Callaghan to allow his wife to testify when called upon, and her objection to his testifying, counsel cited *Barrett v. Lowrey*, 77 Mich. 673; *Page v. Stephens*, 23 Id. 357; *Heath v. Waters*, 40 Id. 457, 471; *Whitney v. Rose*, 43 Id. 29; *Ruppe v. Steinbach*, 48 Id. 465, 469; *Wiswall v. Ayres*, 51 Id. 324, 332; *Smith v. Tosini* (S. D.), 48 N. W. Rep. 301.

Conely, Maybury & Lucking, for defendants, contended:

1. The evidence of John Callaghan cannot be considered; citing Act No. 211, Laws of 1885; 1 Greenl. Ev. § 334; *Dixon v. People*, 18 Mich. 84, 92; *Hubbell v. Grant*, 39 Id. 641; *Gleason v. Knapp*, 56 Id. 291.

2. Complainant asks the Court to presume, from the fact of a deed being made to husband and wife jointly,—

a—That the husband's separate moneys were used to pay for it; or—

b—That one-half of the moneys were his separate moneys.

c—That they were so used with the fraudulent intent to defraud his creditors.

d—That they were not exempt moneys.

e—That they were not joint moneys, arising from the sale of other joint estate.

f—That the wife participated in the fraud.

—which presumptions are to be drawn for the purpose of taking away a woman's sole property, the title to which was not derived from the debtor; and that, too, when the bill is sworn to only upon information, and the sworn answer denies the equities of the bill and all fraud.

3. Where lands are so conveyed, why should the law presume that the husband furnished the consideration rather than the wife? Is he more generous, as a matter of law? Is his affection for the wife greater, as a matter of law, than hers for him? Is

his ability to pay so universally greater than hers as to make the presumption supply the place of evidence?

4. Are dealings generally carried on upon so strict a basis between husband and wife that the law presumes that each contributes one-half of the money to a joint purchase? On the contrary, such is rarely the case. Sometimes the one furnishes the consideration, and sometimes the other,—rarely the two equally, unless it be by joint deed of other property.

5. Does the law presume fraud? The contrary doctrine is established by a long line of Michigan cases; citing Jac. & C. Dig. pp. 978, 979; *Krolik v. Root*, 63 Mich. 562, 567; *Blish v. Collins*, 68 Id. 542; and the fact of relationship raises no presumption of wrong-doing; citing *Fraser v. Passage*, 63 Mich. 556.

6. The sole ground of complainant's suit, as alleged in his bill, is that John Callaghan, with fraudulent design and intent, took moneys which of right belonged to his creditor (the only one shown to exist), and, for the purpose of defeating the debt, bought with those moneys this land, and took the tittle to himself and wife; which fraud is denied under oath by the answer. The complainant is without a shadow of proof, and he asks the Court, in the face of its decisions, to presume the fraud from the mere fact that a deed was made to defendants jointly after the obligation to complainant was incurred.

7. If the law presumes that the moneys used belonged to the debtor, does it also absolutely presume that they were not moneys which might lawfully be so used? Or is it at all improbable that the defendants gave as a consideration other joint real estate, or moneys arising from its sale?

8. It is necessary to complainant's case, also, that the law presume the wife to be a party to the fraud; citing *Fraser v. Passage*, 63 Mich. 551, 555; *Iron Co. v. Waters*, 50 Id. 13; *Andrews v. Fillmore*, 46 Id. 315.

9. The usufruct of realty held jointly by husband and wife does not, in this State, belong to the husband alone, and it cannot be taken by his creditors; citing *Vinton v. Beamer*, 55 Mich. 559.

McGRATH, J. This is a judgment creditors' bill, filed by Alvin Wood and Herbert W. Newlove, copartners as Alvin Wood & Co., to obtain satisfaction of a judgment obtained January 23, 1886, against defendant John Callaghan, for $543.17, upon a promissory note. The note was given December 1, 1884, and was protested January

3, 1885. The levy in aid of which the bill was filed was made upon a certain lot of land purchased jointly as husband and wife, October 13, 1885, for the sum of $1,850, and deeded to them jointly at that time.

The testimony is voluminous, and consists mainly of the examination of defendant John Callaghan, by complainant, under objection made by his co-defendant, Elizabeth Callaghan. The complainant sought to examine the defendant Elizabeth Callaghan, but her husband objected, and she refused to be sworn and to testify. In the view I take of the case, it is unnecessary to consider the testimony of the defendant John Callaghan, and therefore unnecessary to discuss the question as to whether it was admissible or not.[1]

It does appear that, at the time of the purchase of this property, the defendant John Callaghan was indebted to complainant in the amount of this judgment, and that defendants jointly purchased this property, and jointly paid the sum of $1,850 therefor, and that the deed was made to them jointly. In the absence of any showing to the contrary, the defendant John Callaghan must be presumed to have paid one-half of the purchase price.

The answer sets forth that the object of taking the title in the joint names of defendants was "simply that the survivor should own the same, as they have no children." It appears from the testimony of John Callaghan, taken before objection was made thereto, that defendants owned jointly, exclusive of the lot in question, over $20,000 worth of real estate, consisting of several parcels which had been purchased prior to the origin of the debt in question, and that defendant John Callaghan owned no separate property.

It would be a gross injustice to permit debtors to

[1]See *Blanchard v. Moors*, 85 Mich. 380.

apply moneys which should be applied to the payment of their debts to the creation of an estate which would be beyond the reach of their creditors. Had the entire estate been placed in the wife's name, there could have been no question but that the same would be regarded as fraudulent under the statute, and it is no less a fraud upon creditors because the title has been taken in the name of the defendants jointly. In other words, estates in entirety cannot be created at the expense of creditors, and held in fraud of the latter's right.

The complainant is entitled to a decree for the sale of an undivided half of the premises in question, and the costs of both courts, and the same is ordered, and the case remanded for further proceedings in accordance herewith.

The other Justices concurred.

HERBERT W. NEWLOVE, SURVIVOR, ETC., v. JOHN CALLAGHAN AND ELIZABETH CALLAGHAN.

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[See 86 Mich. 297.]

Fraud—Evidence—Answer to bill.

1. A sworn answer is not conclusive, and, while treated as evidence, is subject to the same rules, as to weight, as any other evidence; citing *How v. Camp*, Walk. Ch. 427; *Roberts v. Miles*, 12 Mich. 297, 303.
2. A denial of actual intent to defraud will not avoid the consequences of an act which is in effect a fraud.

Application for rehearing. Submitted June 17, 1891. Denied July 3, 1891.

Conely, Maybury & Lucking, for motion.

Keena & Lightner, contra.

McGRATH, J. Defendants move for a rehearing upon the ground that, defendants' answer being under oath, there was a conclusive showing that the property in question was purchased chiefly with the money of defendant Elizabeth Callaghan.

A sworn answer is not conclusive. It is to be treated as evidence, and is subject to the same rules, as to weight, as any other evidence. In *Roberts v. Miles,* 12 Mich. 297, 303, this Court, referring to a sworn answer, say:

"The answer was not excepted to, but, in considering its value as a piece of testimony, it is to be observed that the object of a discovery is to be informed touching the entire transaction referred to, and a literal denial, which does not deny that the charge may, after all, be substantially true, is in many cases a mere evasion. * * * In chancery, as at law, a case is made out by proof of the substance of an allegation, and if such an answer is to be allowed the usual weight, so far as it goes, it cannot fairly be made to extend beyond its strict language. * * * Since the statute has removed the only reason which ever made a discovery by answer necessary, we think there is no longer any occasion for giving to the evidence of a witness in one shape any more force than it would have in another. * * * We are therefore of opinion that an answer in chancery, responsive to a bill, is now to be regarded as of the same force which it would have were it the defendant's deposition as a witness."

In *How v. Camp,* Walk. Ch. 427, the Court say:

"The denial of fraud by a defendant in his answer is not conclusive upon the court, if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion."

The bill in this case sets up that John Callaghan, defendant, purchased the property in question for $2,000; that,—

"With the purpose and intention of defrauding your orators and his other creditors, and for the purpose of hindering and delaying your orators, in the collection of their just claims, and to prevent a levy and sale of said premises under and by virtue of said execution, the said John Callaghan procured and obtained a deed of said premises to be made and delivered to himself and his wife, Elizabeth Callaghan; that the consideration above mentioned was paid by the said John Callaghan, and for the interest and title said deed conveyed to her, the said Elizabeth Callaghan, in said premises, she never paid any consideration whatever."

Defendants join in the answer, and set up that "they jointly purchased;" that "they purchased the same;" that—

"They paid $650 cash on the purchase price, principally of the moneys of said Elizabeth Callaghan, and they jointly gave back a mortgage to the People's Savings Bank for $1,200 on the said lot, and the said $1,200 was used to pay the remainder of the purchase price; that subsequently the said mortgage was paid by these defendants in installments, but principally from the moneys of the said Elizabeth Callaghan; that the said land was not paid for by the said John, nor was the title taken in their joint names to defraud the complainants or anybody, but simply so that the survivor should own the same, as they have no children."

John Callaghan was sworn in behalf of complainant, and is asked what property he owns, and replies, "Four suits of clothes and a black dog," and that he paid nothing for the dog; that for many years he had been in the saloon business, and his wife had been in the grocery business; that they had put the moneys received by them into one bank, in the name of the witness; that from time to time with these moneys they had purchased real estate, and taken the title in their joint names. When counsel sought to examine the witness John Callaghan in relation to this particular property, which was purchased after the debt sought to be collected was con-

tracted, the defendant Elizabeth Callaghan objected, and, when complainant sought to examine Elizabeth, defendant John objected.

According to the answer, the purpose of taking the title in the joints names of the defendants was that the survivor should take; but if any part of the consideration was paid by defendant John Callaghan, the effect was to place that part beyond the reach of process, and that operated as a fraud upon creditors. A denial of actual intent to defraud does not avoid the consequences of an act which is in effect a fraud. The defendants had it in their power to explain fully the transaction in question. They did not attempt to do this, but actually refused so to do. If any part of the consideration was contributed by John Callaghan, his creditors have a right to reach that part. An answer that the consideration was paid by defendants jointly, but "principally from the moneys of the said Elizabeth Callaghan" is evidence, it is true; but, in view of the refusal of defendants to testify as to just how much or what part was paid by Elizabeth, and of the other facts and circumstances in the case, it has little weight. The language used in the answer is evasive rather than responsive, and, in the absence of some further showing, the presumption created by the averments in the deed must prevail.

A rehearing is denied, with costs.

The other Justices concurred.

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RICHARD H. STEVENS v. WILLIAM W. HANNAN.

Bills and notes—Negotiability—Assignment to joint maker—Contribution—Action by indorsee.

1. One of several joint makers of a promissory note, to whom it is assigned by the payee, cannot, by its indorsement before maturity to a third party, convey any right except to bring suit for contribution, the appearance of his name as one of the makers being sufficient notice to his indorsee.
2. If the effect of the *assignment* of a promissory note is to make it thereafter non-negotiable, the assignee can bring suit thereon in his own name under the statute; and if such is not the effect, the indorsement of the note in blank by the assignee, and its delivery to a third party, entitles him, as holder, to bring suit in his own name.

Error to Wayne. (Hosmer, J.) Argued May 13, 1891. Decided June 5, 1891.

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

Bowen, Douglas & Whiting, for appellant, contended:

1. The words, "for value received, I hereby assign all interest in and to this note to Ralph E. Watson," do not affect or limit the negotiability of the note, and were sufficient, by the subsequent indorsement of Watson, to pass title to Stevens as purchaser for value before maturity, and this action can be maintained in his name; citing Tied. Com. Pap. § 265; Rand. Com. Pap. § 704; 2 Pars. Notes & Bills, 53; Story, Pr. Notes, §§ 121, 142; *Sears v. Lantz,* 47 Iowa, 658; *Adams v. Blethen,* 66 Me. 19; *Vanzant v. Arnold,* 31 Ga. 210; *Shelby v. Judd,* 24 Kan. 161; *Dixon v. Clayville,* 44 Md. 573; *Richards v. Frankum,* 9 Car. & P. 221; *Leavitt v. Putnam,* 3 N. Y. 494; Danl. Neg. Inst, § 699.
2. An indorsement is a separate contract, and the obligations of the parties to it are to be determined according to the law of

the state where it was made and first became effectual; citing Edw. Bills, § 381; *Everett v. Vendryes*, 19 N. Y. 436; *Brown v. Finance* Co., 31 Fed. Rep. 516; and in Ohio, where this indorsement was made, the holder, Stevens, would be entitled to bring an action in his own name, for a promissory note there is negotiable by delivery, and without indorsement, giving the right of action to the holder; citing *Avery v. Latimer*, 14 Ohio, 542; Rev. Stat. Ohio, §§ 3171, 3172.

3. Should it be held that this indorsement is on its face restrictive, and destroys the negotiability of the note, then—

a—Evidence should have been admitted to show that these words were purely accidental, and not intender by the indorsee or indorser to limit such negotiability citing *Farwell v. Ensign*, 66 Mich. 600; *Avery v. Miller*, 76 Ala. 495; *Cahal v. Frierson*, 3 Humph. 411; *Slack v. Kirk*, 67 Penn. St. 380; the sole question being as to their intention at the time of their indorsement; citing *Farr v. Ricker*, 46 Ohio St. 265.

b—But if the indorsement is held to destroy such negotiability, the plaintiff, being the assignee of the non-negotiable instrument, could bring suit in his own name under the statute; citing *Bank v. Carson*, 60 Mich. 432; *Draper v. Fletcher*, 26 Id. 154; *Wetmore v. Neuberger*, 44 Id. 362.

4. Although the original payee may restrain the negotiability of a promissory note by indorsement or otherwise, yet a subsequent indorsee may give it currency and negotiability from him, and then its negotiable quality recommences; citing *Carruth v. Walker*, 8 Wis. 252; *Long v. Smyser*, 3 Iowa, 266; *Seymour v. Van Slyck*, 8 Wend. 403; *Cromwell v. Hewitt*, 40 N. Y. 491; *Perkins v. Catlin*, 11 Conn. 213; *Castle v. Candee*, 16 Id. 223; *Kuntz v. Tempel*, 48 Mo. 71.

H. E. Spalding (*John D. Conely*, of counsel), for defendant Hannan, contended:

1. It is settled in this State that the assignee of a negotiable instrument must sue in the name of the payee; citing How. Stat. § 7344; *Redmond v. Stansbury*, 24 Mich. 445, *Robinson v. Wilkinson*, 38 Id. 299; *Spinning v. Sullivan*, 48 Id. 5.

2. We arrive at the intention of parties by a logical process based on facts capable of preception by the senses of others, and such facts may be given in evidence. But an intention cannot be so perceived, and, until given such expression as may be so perceived, it is for all legal purposes non-existent; citing *White v. Corlies*, 46 N. Y. 467.

3. The intention to which Watson undertook to testify was imma-

terial, and its oral expression, if such there was, would also be immaterial. The law regards what the parties *did*, not their unembodied intentions, and an oral expression of an understanding that this writing should be considered an indorsement, if admissible on other grounds, would be unavailing, for an indorsement must be in writing; citing Danl. Neg. Inst. § 666; *Bank v. Taylor*, 100 Mass. 18; *Haskell v. Mitchell*, 53 Me. 468.

4. The evidence at most establishes nothing but a mistake in law, which cannot be shown; citing *Holmes v. Hall*, 8 Mich. 66; *Martin v. Hamlin*, 18 Id. 354; *Macklem v. Bacon*, 57 Id. 342; *Tompkins v. Hollister*, 60 Id. 485; *Cook v. Brown*, 62 Id. 473; *Bank v. Taylor*, 100 Mass. 18.

5. All joint makers are discharged by the discharge of one; citing Danl. Neg. Inst. § 1294; and the identity of names of the names of the maker and indorser raises a presumption of identity of person, and apprised plaintiff of the fact of payment; citing *Goodell v. Hibbard*, 32 Mich. 47; *Campbell v. Wallace*, 46 Id. 320.

McGRATH, J. Defendants Hannan, Coolican, and Watson executed and delivered to defendant Batchelder, in part payment for some land, the following note:

"$1,300.00. TOLEDO, O., Nov. 1, 1887.

"On or before one year after date we promise to pay to the order of Wm. M. Batchelder thirteen hundred (1,300) dollars, at Toledo, O., value received, with interest at the rate of 6 per cent. per annum, payable semi-annually.

"WILLIAM W. HANNAN.
"JAMES S. COOLICAN.
"RALPH E. WATSON."

On the 4th of November, 1887, Batchelder transferred the note to Watson by written assignment of the note on the back thereof, as follows:

"TOLEDO, OHIO, Nov. 4, 1887.

"For value received, I hereby assign all interest in and to this note to Ralph E. Watson.

"W. M. BATCHELDER."

Watson transferred it in turn to the plaintiff, for

value, before maturity, by writing his name on the back, and delivering it to him.

The declaration was on the common counts, with a copy of the note and the writings on its back appended, with the usual notice. On the trial a count was added, averring an assignment of the note from Watson to plaintiff. Defendants had judgment, and plaintiff appeals.

The defendant Hannan upon the trial insisted—

1. That the plaintiff could not sue in his own name, but should have brought suit in the name of the payee.
2. That the note, being transferred to Watson, one of the makers, was paid, and therefore could not again be put in circulation so as to charge defendant Hannan in a suit upon it.

I do not think that the first point is well taken. If the effect of Batchelder's indorsement was to make the note thereafter non-negotiable, then the assignment from Watson to plaintiff entitled plaintiff to sue in his own name under the statute, and, if Batchelder's indorsement did not affect its negotiability, then Watson's indorsement entitled plaintiff, as holder of the note, to sue in his own name.

The second point raised is well taken. Watson, while the note was in his possession under the assignment or indorsement to him, could not have brought suit, except for contribution, and he could not, by assignment or indorsement, convey any greater right than he himself had. His name appearing as one of the makers was sufficient notice to plaintiff.

The judgment below is affirmed, with costs.

The other Justices concurred.

JOHN SPOON v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Railroad companies—Construction of side track—Mortgage—After-acquired property—Conversion.

Neither the mortgagee of a railroad, nor the purchaser under a foreclosure of the mortgage, acquires any lien upon or title to a side track built by the company upon adjoining land, under an agreement that it is to become the property of the land-owner.

Error to Kent. (Grove, J.) Argued May 21, 1891. Decided June 5, 1891.

Case. Defendant brings error. Affirmed, without costs. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant, contended:

1. The mortgage being on the entire road, etc., the rails of which the side track was constructed became a part of and subject to the mortgage by accession; citing *Pierce v. Emery*, 32 N. H. 485; *Railroad Co. v. Woelpper*, 64 Penn. St. 366.
2. Rolling stock and materials for repairs, designed to be attached to the realty, are real estate; citing *Palmer v. Forbes*, 23 Ill. 301; *Coopers v. Wolf*, 15 Ohio St. 523.
3. As between a mortgagee and an execution creditor, rolling stock of a railway company, mortgaged with the railroad, is a part of the realty; citing *Loan & Trust Co. v. Railway Co.*, 3 Dill. 412; *Coe v. Pennock*, 2 Red. Ry. Cas. 667; *Gue v. Canal Co.*, 24 How. 259; *Railroad Co. v. James*, 6 Wall. 750; *State v. Railway Co.*, 18 Md. 193; and iron rails constitute a part of the railroad, and pass by the mortgage on the road; citing *Navigation Co. v. Railroad Co.*, 35 N. J. Eq. 379.
4. A railroad company may mortgage not only the then acquired property, but all such property requisite for the exercise of its franchise as may be acquired in the future; citing *Pennock v. Coe*, 23 How. 117; *Dunham v. Railway Co.*, 1 Wall. 254; *Railroad Co. v. Cowdrey*, 11 Id. 480; *United States v. Railroad Co.*, 12 Id. 362; *Shaw v. Bill*, 95 U. S. 15; *Williamson v.*

Railroad Co., 1 Biss. 198; *Morrill v. Noyes*, 56 Me. 458; *Seymour v. Railroad Co.*, 25 Barb. 284; *Stevens v. Railroad Co.*, 31 Id. 596; *Railroad Co. v. Lampson*, 47 Id. 533; *Butler v. Rahm*, 46 Md. 541; *Meyer v. Johnston*, 53 Ala. 324; *Pierce v. Railroad Co.*, 24 Wis. 551.

G. A. Wolf and *McGarry & McKnight*, for plaintiff, contended:

1. When donations and benefits have been conferred upon a railroad corporation, and accepted by it, as a consideration for locating and operating a road in a particular place, and furnishing to the donors facilities connected therewith, as private side tracks, the company is liable in damages for a breach of its agreement; citing 1 Ror. R. R. 277; *State v. Railway Co.*, 71 Iowa 410; *Chapman v. Railroad Co.*, 6 Ohio St. 119; *Watterson v. Railroad Co.*, 74 Penn. St. 208; *Railroad Co. v. Compton*, 2 Gill, 20; *Railway Co. v. Molloy*, 64 Tex. 607; *Hubbard v. Railroad Co.*, 63 Mo. 68.
2. The foreclosure proceedings, and the reorganization of the defendant, did not deprive plaintiff of his rights in the premises, because—

   a—Defendant had notice of such rights, and purchased subject thereto. The plaintiff received no compensation for his land other than the railway facilities afforded by the construction of the road, which was the sole consideration for the deed, as stated therein; which deed, therefore, was notice to defendant of the rights of the plaintiff, and it was charged with notice of the recitals in the deed, because it purchased and claims through and under it; citing *Railroad Co. v. Reeves*, 64 Ga. 492; *Fitzhugh v. Barnard*, 12 Mich. 104.

   b—The mortgage attached to plaintiff's rights, if at all, as after-acquired property, which defendant holds subject to all antecedent equities; citing *U. S. v. Railroad Co.*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235; *Loomis v. Railroad Co.*, 17 Fed. Rep. 301; *Railroad Co. v. Railroad Co.*, 7 S. C. 433; *Pennock v. Coe*, 23 How. 117.

   c—The defendant appropriated the property of plaintiff, secured solely through contract relations, without tendering or paying other or different compensation than the contract prescribed, and thus became bound by its terms; citing *Railroad Co. v. Railroad Co.*, 7 S. C. 410; *Railway Co. v. Griffin*, 92 Ind. 487.

McGRATH, J. In 1870 the Chicago & Michigan Lake Shore Railroad Company projected a line of road from

St. Joseph to Muskegon by way of Holland, Spoonville, and Nunica. This company sought aid and assistance along its proposed line. Among others, it applied to plaintiff for right of way and assistance. The negotiations resulted in a deed of the right of way across plaintiff's farm, involving about 15 acres of land, the payment to the railroad company of $2,000, the establishment and construction of the main line of railroad, the establishment of a depot, and the building on plaintiff's land of a side track from the main line to plaintiff's mill. After the construction of the railroad and the establishment of the depot and side track, plaintiff bought a large tract of pine land, chiefly valuable for timber, and expended a large sum of money in the repair of his mill, preparatory to carrying on extensive lumbering operations, expecting and relying upon permament railway facilities and advantages at Spoonville.

In order to raise money for the construction of its road, the railroad company mortgaged its present and future to be acquired property. This mortgage was subsequently foreclosed, the property bid in by a purchasing committee, a new company organized, connecting lines consolidated therewith, and there finally emerged from such foreclosure and reorganization a consolidation under the name of the Chicago & West Michigan Railway Company. During the process of foreclosure the line was operated by one George C. Kimball as receiver, and after the reorganization and consolidation Mr. Kimball became vice-president and general manager. The last-named company, the present defendant, assumed all legal duties and obligations, both public and private, of the several consolidated companies, and became the owner of and vested with all the property, real and personal, of each of said companies. The mortgage which was foreclosed was given on the 12th day of October, 1870, and the deed of the

master in chancery was executed on the 15th day of November, 1878. The consolidation of the defendant and the connecting lines above mentioned occurred October 1, 1881, and the defendant has ever since continued to exercise the duties, franchises, and privileges of a railroad company. The deed from plaintiff to the railroad company for the right of way was dated October 17, 1870, but was not delivered till about the time it was recorded, —January 11, 1871. Plaintiff was not made a party to the foreclosure proceedings, and, if the mortgage attached to the property deeded by him to the railroad company, it attached only as after-acquired property.

About Sunday, December 4, 1881, Mr. Kimball, as general manager, directed Thomas Murphy, who was at that time train-master and road-master of the defendant, to get a gang of men together, and proceed to Spoonville, get there by daylight Sunday morning, and get the iron off from plaintiff's land before night. Mr. Murphy, under these instructions, proceeded to do as he was directed, and commenced early in the morning, and removed the iron from the side track in question. Plaintiff, hearing the noise and confusion, went out and learned what was being done, and forbade the removal of the iron, claiming it as his own. The defendant's agents and servants paid no attention to him, but, on the contrary, removed all but the ties from the side track, and converted the iron to its own use. The company further took up the iron on the main line, and at once discontinued the running of trains by the way of Spoonville, and thus denied to plaintiff the railway facilities at that point, the nearest railroad station being Nunica, about three miles north.

Upon the trial, the case naturally divided itself into two general branches:

1. That relating to the right of recovery for the discontinuance of railway facilities generally at Spoonville.

2. That relating to the right of recovery for the conversion of the iron on the side track.

The trial court withheld from the consideration of the jury the first branch of the case, and directed them that the defendant was not chargeable at all with any duty arising out of the contract between plaintiff and the Chicago & Michigan Lake Shore Railroad Company. Upon the second branch, however, the trial court submitted the case to the jury to determine whether the railroad company or plaintiff owned the iron. The jury found for plaintiff, and defendant appeals.

To the ruling on the first branch of the case plaintiff alleged exceptions, and has taken a cross-appeal, and, in the event that this case is reversed upon other grounds, desires to have the legality of the trial court's ruling upon this branch of the case reviewed; but as the plaintiff is anxious to bring the litigation to an end, and the jury have found a verdict in his favor for the value of the iron converted, he desires upon the whole record to have the case affirmed.

The plaintiff insisted that, under the agreement made with the railroad company, the side track, upon its construction, became plaintiff's sole property; that the deed to the company conveyed a right of way for the main line only, and that the side track was constructed upon plaintiff's property; that, inasmuch as the side track was the property of the plaintiff, it was not covered by the mortgage given before its construction, which was subsequently foreclosed, and that the side track was a part of the consideration for the grant of the right of way and the payment of the sum of $2,000. The contract was in writing, but its loss was shown, and its contents proved by parol.

The only questions raised by defendant's brief are:

1. That, the mortgage being for the entire road, the rails of which the side track was constructed became a part of and subject to the mortgage by accession.

2. That the contract as proven did not show that the title of the iron upon the side track should pass to plaintiff.

If, as a matter of fact, the agreement between the company and the plaintiff was that the side track was to become the property of plaintiff, neither the mortgagee nor the purchaser upon the foreclosure of the mortgage acquired any lien thereon or title thereto. The court instructed the jury very fully and fairly upon this point, and said to the jury:

"It is for you to say whether the side track belonged by that contract to plaintiff or to the railroad company, and in determining that question you will consider the evidence in the case as to what the contract was when originally made. I think it is also proper for you to consider the testimony in the case relating to the custom generally as to the question of ownership of side tracks when constructed by railroad companies for the convenience of mill-owners or manufacturers. That testimony was opened upon the part of the defendant in the case, and that testimony was subsequently put in by the plaintiff's counsel, and I think it is proper for you to consider it in connection with the evidence relating to what the real contract was, which, I believe, was reduced to writing and lost. If, on consideration of this evidence,—all the facts and circumstances of the case as shown by the evidence,—you find that the railroad company under that contract was the owner of the side track, that the title did not pass to plaintiff, then your verdict will be for the defendant. If, on the contrary, you find that the plaintiff became the owner of that side track by virtue of that contract, he is entitled to recover, and his measure of damages will be whatsoever you find was the value of the iron that was taken up and removed by the defendant and converted to its own use, on the 4th day of December, 1881, with interest thereon to the present day at 6 per cent."

There was no error in this charge. The jury found a verdict for the value of the iron, with interest, and that finding involved the further finding that the side track was to become, and did become at the time of its construction, the property of the plaintiff, and the mortgage did not attach.

The judgment below is affirmed, without costs to either party.

The other Justices concurred.

THE HAMILTON PROVIDENT & LOAN SOCIETY v. WILLIAM NORTHWOOD.

Mortgage—Evidence—Admissions of attorney—Burden of proof.

1. In a suit to recover the amount secured by a Canadian mortgage, under which, in case of default, the mortgagee was authorized to sell the land at private sale without notice, a summons issued by the solicitors for the plaintiff in a former suit in Canada, and served upon the defendant, with a statement of the particulars of plaintiff's claim, from which it appeared that the action was brought to recover the same indebtedness, less a specified sum received on the sale of the land, is competent evidence tending to show such sale, and that the defendant is entitled to credit for the sum realized thereon.
2. In such a case the defendant is entitled to have the papers go to the jury as admissions by the plaintiff of such sale, and it becomes the duty of the plaintiff to prove that the admissions were made by mistake, or without authority on the part of the solicitors to make them, and that in fact no sale had been made.
3. The fact of such non-sale cannot be established by showing two attempts to make a sale of the land when the witness was present, and the withdrawal of the land because of the inade-

quacy of the bids, and that, three months before the trial at which he testifies, he examined the books of the plaintiff, and found that there had been no sale made, such testimony being incompetent.

Error to Wayne. (Reilly, J.) Argued May 13, 1891. Decided June 5, 1891.

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

Marston, Cowles & Jerome (*H. E. Spalding,* of counsel), for appellant, contended:

1. It was shown by the testimony of a Canadian barrister that, by Canadian law, if the mortgaged premises had been sold, the plaintiff could not maintain an action of this kind. A defense or discharge good where the contract is made is good everywhere; citing *Bissell v. Lewis*, 4 Mich. 440; *Iron Co. v. Burkam*, 10 Id. 283; *Holdridge v. Bank*, 16 Id. 66; *Palmer v. Mason*, 42 Id. 146; 3 Amer. & Eng. Enc. Law, 579.
2. The summons and other papers were admissible, because the declarations of an agent, made within the scope of his authority and relating to the subject-matter of his agency, are always regarded as standing on the same footing as those of his principal; citing *Benedict v. Denton*, Walk. Ch. 336; *Fur Co. v. U. S.*, 2 Pet. 358, 364; *Gordon v. Parmelee*, 2 Allen, 212; and the fact that the handwriting on two of the exhibits is that of the clerk is immaterial. The papers emanated from the attorneys' office; citing *Taylor v. Willans*, 2 Barn. & Adol. 845, 856; *Standage v. Creighton*, 5 Car. & P. 486; *Taylor v. Forster*, 2 Id. 195; *Griffiths v. Williams*, 1 T. R. 710.

Bowen, Douglas & Whiting, for plaintiff, contended:

1. If a party amends his pleading, stating the facts differently, he would reap no benefit from his amendment if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading; citing *Mecham v. McKay*, 37 Cal. 165; and this rule applies with greater force to pleadings in suits which have been discontinued.
2. The amendment of a pleading is an acknowledgment by the pleader that he is mistaken, not that he willfully made a false statement; citing *Manufacturing Co. v. Campbell*, 13 Abb. Pr. 86.

3. The functions of a former pleading are at an end when amended by the filing of a new pleading, and it is not error to refuse to allow the original pleading to be read to the jury; citing *Machine Co. v. Pierce*, 5 Mo. App. 575; *Smith v. Davidson*, 41 Fed. Rep. 172; *Dennie v. Williams*, 135 Mass. 28.

4. A former complaint, not under oath nor signed by the plaintiff, but only by its attorneys, is clearly incompetent to prove an admission by the plaintiff that upon these facts it has no cause of action against the defendant; citing *Commissioners v. Safe Co.*, 133 U. S. 473; *Nichols, Shepard & Co. v. Jones*, 32 Mo. App. 664.

5. Admissions of facts by an attorney in one action are not admissible in evidence against the client in another action, unless acquiesced in by him; citing 1 Phil. Ev. 508; *Anderson v. McAleenan*, 8 N. Y. Supp. 483; *Wilkins v. Stidger*, 22 Cal. 239.

MORSE, J. July 11, 1882, F. Marx, a resident of Chatham, Ontario, sold and conveyed to the defendant, Northwood, a piece of land known as "Part of Block B, on King street, in Chatham." The consideration of this sale was $5,000, and the deed contained a covenant that Northwood should have quiet possession of the premises, free from all incumbrances.

Before this Marx had given a mortgage, covering this and other lands, to the Merchants' Bank of Canada for $43,500. Northwood, at the time of the sale, executed to the said Merchants' Bank a mortgage upon the land for $5,000, in payment of the purchase price of said land. This mortgage contains, among others, the following covenants:

1. That the mortgagor will pay the mortgagee the sum of $5,000, with interest at six per cent. per annum.

2. That the mortgagor has a good title in fee-simple to the lands, and has the right to convey them; and that on default the mortgagee shall have quiet possession of the premises, free from all incumbrances.

It also contains a proviso—

"That the said mortgagee, on default of payment for one month, may, on giving one month's notice, enter on

and lease or sell the said lands: *Provided*, further, that in case default be made in the payment of said principal or interest, or any part thereof, for three months after the same became payable as aforesaid, the power of sale, hereinbefore given, may be exercised without notice, and that any sale or sales made under the power hereinbefore given, may be exercised without notice, and that any sale or sales made under the power hereinbefore contained shall, notwithstanding any irregularity in the exercise thereof, be held and taken to be valid, and within such power, as regards the purchaser or purchasers at such sale or sales."

No cash being paid by Northwood on this purchase, the Merchants' Bank did not release the property from the Marx mortgage. It was understood that the bank would hold the Northwood mortgage as collateral security to the Marx mortgage, with the distinct agreement that upon payment of the Northwood mortgage both mortgages were to be discharged from the lands purchased by Northwood. This agreement continued down to December 16, 1885, when the bank sold the Northwood mortgage to the plaintiff in this suit. Northwood signed the assignment of the mortgage to plaintiff. This assignment recited the aforesaid agreement, and also that Northwood desired to have the mortgage assigned to plaintiff, and to release the Merchants' Bank of Canada from its covenant to carry out such agreement; but the assignment also contained a covenant that upon payment of the mortgage debt the lands should be free from both mortgages. At this time nothing had been paid upon the mortgage.

This suit was commenced November 15, 1889, to recover from Northwood the amount due upon this mortgage. It is admitted that no payments have ever been made upon it, but the defendant claims that the lands in 1886 were taken in possession by the plaintiff, he handing the keys of the building or buildings thereon to plaintiff;

that a sale was had without notice to him, at which sale the premises brought the sum of $3,250.

The circuit judge, Hon. C. J. Reilly, of the Wayne circuit, directed a verdict for the plaintiff for the full amount of the mortgage debt and interest, to wit, $6,675.

To sustain his claim of a sale of the premises, the defendant offered in evidence a declaration filed May 4, 1888, in a suit between plaintiff and defendant, embracing the same subject-matter as the present suit, filed by Bowen, Douglas & Whiting as plaintiff's attorneys, said firm also being plaintiff's attorneys in this suit. Said declaration stated that the lands described in the mortgage were sold under the power of sale contained in said mortgage at Chatham, September 30, 1886, for the sum of $3,250, which had been applied in reduction of the mortgage indebtedness, and claimed an unpaid balance due of $3,050. He also offered Samuel T. Douglas as a witness, and proved by him the filing of this declaration, and that his firm, Bowen, Douglas & Whiting, had been employed to collect the mortgage debt of defendant; but Douglas stated on his own motion that their firm never had any authority to make any admissions for plaintiff as to the sale of this property, or any amount being realized on it by sale or otherwise, or any credits to defendant. It also appeared that the suit in which this declaration was filed was discontinued before the commencement of the present suit. The declaration was permitted to be read in evidence, subject to plaintiff's objection. The defendant then offered to prove the value of the land, that defendant did not have any notice of the sale, and what the land sold for. The testimony was excluded, and exception taken. It was then shown by the testimony of a Canadian barrister that in the case of a sale under the power of sale in the mortgage,

without notice to the mortgagor, the mortgagee, under the laws of Canada, could not maintain an action upon the covenant in the mortgage for the deficiency.

It was also shown that Crerar, Muir & Crerar were the general solicitors of the plaintiff, and the following letter from said firm to defendant was offered in evidence and excluded:

"WILLIAM NORTHWOOD, Esq.,
"City of Detroit:

"As you are aware, the property situated in the town of Chatham, and described in the mortgage given by you to the Merchants' Bank of Canada, dated the eleventh day of July, 1882, and registered in the registry office for the county of Kent on the 7th of July, 1883, as No. 9,788, was offered for sale by public auction. It was not sold, however, then. It is about to be sold now to one Jacob Horatio West for $3,250.

"CRERAR, MUIR & CRERAR,
"Solicitors for the Assignee of the Merchants' Bank of Canada.
"*Hamilton, November* 8, 1886."

This letter was proven to be in the handwriting of the leading member of said firm. A summons issued by the same solicitors in a suit in Hamilton, Can., and served upon defendant, was also offered in evidence. In the particulars of the claim sued upon, attached to the summons, the suit being by the plaintiff against the defendant, it appears that the action was brought upon this mortgage, less a credit of $3,250 for sale of the land. A statement of the claim, afterwards filed in this same suit, was also offered, in which the same thing appears. This suit was commenced November 5, 1886. The proffered instruments were both rejected.

It was also shown that the rental value of the property in 1884 or 1885 was $650 per annum, and that plaintiff had collected the rents since 1886. The defendant also

testified that he knew that plaintiff held a judgment against him in Canada for the amount of the mortgage, less $3,250, the sum for which the land was sold; but no showing was made of any judgment entry or record by certified copy, or otherwise, except the statement of the defendant.

We think the letter of Crerar, Muir & Crerar should have been admitted in evidence; also the summons issued and statement of claim filed in the Canadian suit. This was some evidence tending to show a sale of the property, and whether or not, under the laws of Canada, the plaintiff could sue for the deficiency, the defendant at any rate would be entitled to a credit of the amount the land sold for. There being evidence tending to show a sale of the property, it devolved upon the plaintiff to show that there had been no sale. This was attempted, but another error was committed in admitting hearsay evidence. Marx was allowed to testify that he knew there had been no sale; that he attended at two attempts to sell, and both times no sale occurred, the property being withdrawn because the bids were inadequate; and that three months before the trial he went to the office of the plaintiff at Hamilton, and looked at the books of the plaintiff, and found there had been no sale. This last testimony was incompetent.

It is argued that, if there had been a sale of the property, the defendant could have shown such sale, and could not claim the right of going to the jury without showing it by some one who had knowledge of such sale. But the evidence whether or not there had been a sale was in the hands of plaintiff. When defendant showed papers served upon him by the general solicitors of plaintiff in a lawsuit, stating that a sale had been made, he was entitled to have the same go to the jury as admis-

sions by the plaintiff of such sale, and it was the duty of the plaintiff to prove that these admissions were made by mistake, or that there was no authority in the solicitors to make them, and that in fact no sale had been made; and this latter fact should have been shown by competent evidence, and it was not.

Nor was it satisfactorily shown that Crerar, Muir & Crerar had no authority to make these admissions. Mr. McCoy testified that he was an inspector of the plaintiff company, and his duties were inspecting securities, and looking after the assignment of mortgages after they came into the house. He undertook to testify that, although Crerar, Muir & Crerar were the general solicitors of plaintiff, they had no authority to make admissions for the plaintiff in respect to the amount of mortgage debts; but on cross-examination it plainly appeared that all he knew about their authority was that he did not know whether they had it or not.

It was shown by a Canadian barrister that when a mortgagee takes possession of property under such a mortgage as the one in this case such mortgagee must account to the mortgagor for the rents and profits while he holds it, until the land is sold. If this is the law in Canada, then the judgment in this case is erroneous, as there has been no such accounting, or no deduction from the same on account of such rents and profits.

We also think that it was proper for the defendant to show by McCoy on cross-examination what he knew, if anything, about the suit brought in Canada, as McCoy had testified that there had been no payments upon this mortgage, or any credits. McCoy also testified that no credit had ever been given the defendant by reason of a sale of the property, but all he knew about it was that

such credit had never been entered on any of the plaintiff's books that he had seen.

The judgment is reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

LOUISA M. COUSINO v. EDWIN COUSINO ET AL.

Will—Construction—Life-estate.

A will by which the testator, after providing for the payment of his debts, bequeaths the residue of his estate to his wife, "and after her death, or sooner, if she chooses to, to be divided among his children or their heirs, share and share alike," conveys a life-estate to the widow.

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Appeal from Wayne. (Hosmer, J.) Argued May 13, 1891. Decided June 5, 1891.

Bill to construe a will. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

William Look, for plaintiff, contended:

1. In construing wills, the general intention of the testator must first be fixed; citing *Jameson's Appeal*, 1 Mich. 99; *Eyer v. Beck*, 70 Id. 179; *Morrison v. Sessions Estate*, Id. 297.
2. Under the provisions of the will, and the intention of the testator as gained from the whole instrument, complainant is the immediate legatee, and takes an absolute estate; citing *Jones v. Jones*, 25 Mich. 401; *Proctor v. Robinson*, 35 Id. 291; *Sutphen v. Ellis*, Id. 446.

William E. Walsh, for defendants, contended:

1. The cases cited by complainant's counsel have a direct applica-

tion in the construction of this will, showing the intent of the testator to have been to make some provision for his children or their heirs after the death of his wife, and are distinguished by this Court in *Schehr v. Look*, 84 Mich. 263.

GRANT, J. Complainant is the executrix of her husband's will, and filed this bill to obtain an interpretation thereof. The testator, after providing for the payment of his debts, bequeathed the residue of his estate, real and personal, to complainant, and,—

"After her death, or sooner, if she chooses to, to be divided among my children or their heirs, share and share alike."

Complainant insists that the absolute title to the property, both real and personal, was by this clause vested in her. We think there can be no ambiguity as to the intent of the testator. The will conveyed only a life-estate to complainant. If he intended to devise the absolute title to complainant, the last clause of the above provision would be meaningless.[1]

The decree of the court below is affirmed, the costs to be paid out of the estate.

The other Justices concurred.

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[1] The testator left four minor children, and his estate was appraised at $11,779.28. The complainant introduced in evidence the statements of the deceased to the effect that he had willed his property to his wife absolutely, to do with as she liked.

THE VILLAGE OF EVART v. FRANK S. POSTAL.

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Official bonds—Defenses.

A bond voluntarily executed by a village treasurer upon the order of the village council, which it had the power to make, is not a nullity because the council failed to pass and have recorded formal resolutions requiring and approving the bond, nor can the principal or sureties urge such neglect as a defense in a suit upon the bond.

Error to Osceola. (Judkins, J.) Argued May 14, 1891. Decided June 5, 1891.

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

Sayles & Trumbull and *Cooper & Fleischhauer (Edward Cahill,* of counsel), for appellant.

C. H. Rose, for plaintiff.

GRANT, J. This is a suit upon an official bond executed by one Allen Campbell, treasurer of the village of Evart, as principal, and defendant, Postal, as surety. It was tried before the court without a jury, and the following is a substantial finding of the facts:

Campbell was appointed treasurer April 28, 1888, duly qualified, and continued in the office until January 9, 1889. He executed a bond, with one M. L. Stevens as surety, who was at the time a member of the village council. July 25, 1888, the village council, at a regular session, deeming it for the best interests of the village, directed the president to require the treasurer to furnish a new bond. The reasons for such action were that Stevens could not lawfully remain a member of the

council while surety upon the bond, and that Campbell had allowed some of his commercial paper to go to protest. In accordance with this instruction the president requested Campbell to give a new bond, with which request he complied, executing the present bond July 28, 1888. July 30, 1888, Campbell delivered this bond to the president, and the president and clerk indorsed their approval upon it. At the next meeting of the council the bond was reported by the president and clerk, and was by them duly accepted and approved. This bond was thereafter treated and accepted by the council as the treasurer's official bond. The action of the council in ordering, accepting, and approving the bond was not recorded in the council proceedings, and no reference therein is made to said bond. Campbell became a defaulter, and absconded, having embezzled village moneys. Upon these facts the court rendered judgment in favor of the plaintiff for the treasurer's deficiency.

Defendant insists that the bond is void because the council did not pass a formal resolution requiring an additional bond, and cause the same to be recorded in its proceedings, and because the approval is not evidenced by a like resolution and record. The power of the council to require an additional bond is undoubted. That the occasion for such bond existed is unquestioned. There is no evidence that Campbell did not thoroughly understand all the facts, and the manner in which the council made the request. Defendant does not claim that he was misled in any way, for he was not called as a witness. The village authorities acted upon this as a valid bond for nearly six months. Under this finding we think there are two fatal objections to the defendant's position:

1. This was a voluntary bond. *Board of Supervisors v.*

Coffenbury, 1 Mich. 354, and cases there cited. It may be admitted that the action of the council was not such as to render it obligatory upon Campbell to execute a new bond. This requirement he certainly could waive. We do not think it is the rule in this State that a bond so executed is a nullity.

2. The neglect of the council either to require or approve the bond by a recorded resolution constitutes no defense to this action. It is clear that Campbell could not make it; and, if the principal could not, neither could his sureties. Such defenses are not, in our judgment, favored by the law. Certainly they are against public policy. The neglect of officers in such matters is rarely, if ever, held a good defense on official bonds. Defendant's counsel concede that if this had been the first bond it would have been valid. We are unable to see any distinction in principle between the two.

It is not entirely clear that any formal resolution, either requiring an additional bond or approving it, was necessary. A similar question arose in *O'Marrow v. Port Huron*, 47 Mich. 585. The provision of the city charter of Port Huron appears to be the same as that in the present case. The Court there held that the mode of proceeding was not pointed out, but that, whatever it might be, it ought to carry with it some action sufficient to express in an affirmative manner the assent and approbation of the body. Tested by this rule, no doubt could reasonably exist of the assent and approval of the council in the present case.

Judgment affirmed.

The other Justices concurred.

DELOS ALLEN v. CHARLES MOHN.

Land contract—Breach—Remedies of vendor—Damages.

1. Under a land contract authorizing the vendor to declare the contract void and to take possession on failure of the vendee to perform the conditions, the vendor, upon the abandonment by the vendee of the contract and of the premises, has the choice of three remedies:
   a—A bill for specific performance.
   b—Suit to recover the purchase price.
   c—Repossession of the premises, and a suit to recover damages for the breach of the contract.
2. The measure of damages in a suit by the vendor in a land contract for its breach is the difference between the contract price and the value of the land at the time of re-entry, less the payments made thereon.

Error to Branch. (Loveridge, J.) Argued May 15, 1891. Decided June 5 1891.

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

F. A. Lyon, for appellant.

W. H. Lockerby, for defendant.

GRANT, J. Plaintiff and defendant made a contract, by which plaintiff agreed to sell to defendant certain real estate. The contract was made in November, 1886. In September, 1890, defendant informed plaintiff that he could not go on with the contract, refused to pay the interest which was then due, and said that he would give up the contract. While the testimony is not clear as to the circumstances under which plaintiff took possession of the land, it appears to be conceded by both parties that defendant abandoned the premises, and

plaintiff thereupon took possession. The contract contained the following clause:

"It is mutually agreed between the parties that the said party of the second part shall have possession of said premises on and after date hereof, and he shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid; and, if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid on such contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom."

Upon the abandonment of the contract and of the premises by defendant plaintiff had his choice of three remedies:

1. Bill for specific performance.
2. Suit at law to recover the purchase price.
3. A repossession of the premises, and a suit to recover damages for a breach of the contract.

The latter remedy is supported by the following authorities: *Railroad Co. v. Evans,* 6 Gray, 25; *Griswold v. Sabin,* 51 N. H. 170; *Meason v. Kaine,* 67 Penn. St. 126, 63 Id. 335; *Porter v. Travis,* 40 Ind. 556; *Wasson v. Palmer,* 17 Neb. 330 (22 N. W. Rep. 773). In such case the measure of damages is the difference between the contract price and the value of the land at the time of abandonment and re-entry, less what has been paid. This rule is just, and places vendor and vendee upon a footing of equality and mutuality. In order to deprive the vendor of this remedy it must either be excluded by the terms of the contract, or waived by his acts and conduct. In this case the contract does not exclude it, nor has the plaintiff waived it.

The circuit court was in error in directing a verdict for the defendant.

Judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

HANNAH HARVEY v. THE CITY OF HILLSDALE.

Municipal corporations—Master and servant—Negligence.

A city is not liable for the negligence of a contractor and his men while performing work in which the city is in no way interested, the relation of master and servant not existing between the parties.

So *held*, where by an arrangement with the mayor of a city a contractor engaged in laying water pipe for the city laid such pipe from the street into adjoining college grounds, and the trench was left open and unguarded on said grounds, into which a traveler fell, and sued the city for the injuries sustained.

Error to Hillsdale. (Lane, J.) Argued May 15, 1891. Decided June 5, 1891.

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

S. F. Dwight and *E. L. Koon*, for appellant.

James S. Galloway and *George A. Knickerbocker*, for defendant.

GRANT, J. The defendant is a municipal corporation, and was authorized by special act of the Legislature

to erect water-works to supply the city with water.[1]

A plan of pipe distribution through the streets of the city was adopted by resolution of the common council. The council did not authorize the laying of any pipe upon private grounds. The contract was let for the construction of the work in the streets according to the plans and specifications. During the progress of the work the mayor of the city proposed to the authorities of Hillsdale College to put a hydrant upon the college grounds. The arrangement was finally consummated between the mayor and the college authorities, by which the necessary pipe was to be furnished and the work done for the same prices that the city paid. When the work had reached the proper point in the street opposite the college grounds, the contractor, by the direction of the mayor, caused a trench to be dug into the college grounds, and the pipe to be laid therein. The trench extended across a walk near the college buildings, over which those having occasion to go to the college had the right of passage. The night after the pipe had been laid in the trench across this walk it was left open, unguarded, and without any light or other signal of danger. Plaintiff, on her way to the college in the evening to attend some public exercises, fell in and was injured. This suit is brought to recover damages for negligence of the defendant in leaving the trench so exposed.

Plaintiff's counsel concede that the mayor had no authority from the defendant to make this arrangement with the college, but insist that he was a voluntary agent, and that the city subsequently ratified his acts, and thereby made itself liable for the negligence which resulted in the injury to plaintiff.

The ratification relied upon consists in this, viz.:

[1] See Local Acts of 1885, No. 344.

After the work was done a bill was made out against the college in the name of the defendant for the work done and materials furnished. This was presented by the mayor to the college authorities, and was paid to and receipted by the mayor. The money then passed into the city treasury, and was included in the treasurer's report. Plaintiff was injured November 9, 1885, and brought suit against the city March 8, 1886. This suit was discontinued in May, 1887, and the present suit commenced August 20, 1887. On March 15, 1886, the mayor reported to the council the fact that plaintiff had brought suit. On November 22, 1886, the city attorney advised the council to withhold the unpaid balance due for putting in the water-works until plaintiff's suit was terminated. December 6 plaintiff's attorneys went before the council, and urged their claim for damages. After this the council approved the treasurer's report which contained this item.

We need not discuss the character and effect of these alleged acts of ratification. For the purposes of this case, it may be conceded that their effect was to ratify the unauthorized act of the mayor in arranging with the college for this work without any expense to the city. The relation of master and servant did not exist, at the time the work was done, between the contractor and his employés and the city. This relation must, of necessity, have existed in order to create a liability against the defendant. The contractor and his men were taken away from the work for the city, and placed upon the work of private parties. In this work the city had no interest, and clearly incurred no liability. Whatever may be the legal effect of these acts as between the city and the college, there can be no reason in holding the city liable for the negligence from which the plaintiff

suffered. The defendant was then under no duty to look after this work. Having no duty to perform, upon what principle can it be held liable?

The court below was correct in directing a verdict for defendant.

Judgment affirmed.

The other Justices concurred.

SARAH L. VAN INWAGEN v. JACOB VAN INWAGEN.

Divorce—Alimony—Pleading—Contempt proceedings.

1. The circuit courts may, in their discretion, upon application as in other cases, divorce from the bonds of matrimony any party who is a resident of this State, and whose husband or wife shall have obtained a divorce in another state (How. Stat. § 6228, subd. 6), and may order the payment of alimony as in other cases (*Wright v. Wright*, 24 Mich. 180).
2. Where a divorce is sought by the wife on other grounds than the granting of a prior divorce to the husband in another state, which fact he sets up in a cross-bill in bar of the relief sought, the complainant is not required to answer such new matter, nor is the court ousted of jurisdiction to decree the payment of temporary alimony and expenses, and to enforce such payment by contempt proceedings.
3. Verifying an answer in chancery gives it no greater effect than if unsworn, where an answer under oath is waived in the bill.

Appeal from Hillsdale. (Lane, J.) Argued May 15, 1891. Decided June 5, 1891.

Bill for divorce. Defendant appeals from an order adjudging him guilty of contempt in not paying alimony. Order affirmed. The facts are stated in the opinion.

Koon & Chester, for complainant.

Jacob V. Rogers, for defendant, contended:

1. The relation of husband and wife lies at the foundation of the question of granting alimony of any kind, and when that relation does not exist no divorce can be granted, and no alimony is allowed save on its existence, and even when it is in dispute the same rule applies; and where the same marriage has once been dissolved between the same parties by a court of competent jurisdiction, the decree and suit would be *res judicata* and a question of law, under which the marriage relation would cease to exist; citing *Collins v. Collins,* 71 N. Y. 269, 80 Id. 1; *Adams v. Cameron,* 40 Mich. 506, 511; *Pettiford v. Zoellner,* 45 Id. 358; *Waldo v. Waldo,* 52 Id. 94; 5 Amer. & Eng. Enc. Law, 384.
2. The Indiana divorce is set up in defendant's answer, which we claim severed the marriage relation, so that none existed when the bill was filed, which fact complainant does not deny in any way; hence the court was not justified in making the allowance asked for.

LONG, J. This is an appeal from an order and decree of the circuit court in chancery of Hillsdale county adjudging the defendant guilty of contempt of court in refusing to pay an allowance for alimony and expenses *pendente lite.*

The decree recites that—

"The defendant, being in court in person and by his solicitor, J. V. Rogers, admits in open court that an order was made in this cause by said court February 17, 1890, requiring this defendant to pay $250 within eight days for temporary alimony, solicitors' fees, and costs, and that a certified copy of said order was duly served upon him, and that a proper written and verbal demand for the payment of the same was duly made upon this defendant, and that he refused and still refuses to pay said alimony, or any part thereof, and says he refuses to pay said alimony because he is advised and believes the court had no jurisdiction, under the pleading and petition in this case, to make any order requiring the payment of temporary alimony, etc.

"Therefore, it now appearing to the court, by the voluntary admissions and showing in open court by the

said defendant, Jacob Van Inwagen, that he has committed the contempt with which he is charged, in refusing to pay the temporary alimony, etc., allowed by the order of this court made February 17, 1890, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to defeat, impair, impede, and prejudice the rights of the complainant in this case, it is, on motion of E. L. Koon and Guy M. Chester, solicitors for complainant, ordered that the said defendant, Jacob Van Inwagen, pay to the solicitors for the complainant the temporary alimony, etc., now due on said order made February 17, 1890, being the sum of $250.

"And it is further ordered that the said defendant, Jacob Van Inwagen, be, and he is hereby, directed to stand committed to the common jail for the county of Hillsdale, there to remain charged with this contempt until he shall have caused said sum of $250 to be paid to said solicitors for complainant, or until discharged by due course of law; and that a warrant issue for that purpose."

On an appeal being taken to this Court, the defendant was admitted to bail in the sum of $500 by the circuit judge.

The claim by defendant's counsel is that the court had no jurisdiction to compel the defendant to pay any sum as alimony, by reason of facts set up in the answer of defendant by way of cross-bill, and to which the complainant did not answer, except by filing general replication.

The complainant's bill charges that she intermarried with the defendant, August 18, 1851, at the town of Lyons, Wayne county, N. Y., and that the parties lived and cohabited together as husband and wife; that she has resided in this State for a period of one year and upwards immediately preceding the time of filing this bill, and still resides in and is an inhabitant of the county of Hillsdale, this State.

She alleges in her bill that, four years prior to their

said marriage, she kept company with the defendant, and that in the year 1849 the defendant seduced her upon a promise of marriage, the child being born October 20, 1850, and that the marriage took place between them the following August. By the bill it is made to appear, further, that the child died in 1864; that soon after the marriage the defendant left her, and went to the State of Michigan, but before going he published, or caused to be published, a notice in the newspapers circulated in Wayne county, N. Y., notifying all persons not to board or trust the complainant; that, after an absence of about one year, the defendant returned to New York, and lived and cohabited with the complainant for a time, and stayed there most of the three years following the fall of 1852, the complainant living with her father, and the defendant with his father, but he staying with her frequently, and cohabiting with her as his wife; that in 1855 he again went to Michigan, and returned in the spring of 1856, remaining there until the fall of that year, living and cohabiting with the complainant a portion of the time; that in the fall of 1856 complainant, with their daughter, came to Michigan with the defendant, and stayed about six months; that, in consequence of her husband's not furnishing her any home, she and her daughter returned to Lyons, N. Y., about March 1, 1857; that the defendant returned to Lyons, N. Y., in June or July following, and claimed that he had not yet got things ready for the complainant to come to Michigan, but, as soon as possible after his return to Michigan, he would send for complainant; that he then returned to Michigan, and remained until the year 1862, when he came back to New York, remaining a short time, when he returned to Michigan, and did not return to New York until August, 1864, soon after the death of their daughter; that he then paid the doctor's bill and the

funeral expenses of the daughter; that during the fall he went back to Michigan, and the complainant saw no more of him until the year 1887, but complainant claims that she frequently received letters from him during these years. In the fall of 1887 it is charged that defendant came to New York, and tried to induce the complainant to come with him to Michigan. She did not return with him at that time, but on receipt of a letter from him in May, 1888, inclosing money for her expenses, and at his solicitation, she came to Michigan, was met by the defendant at the depot, and accompanied him to his home in Hillsdale county, where she has continued to reside, and to live and cohabit with the defendant as his wife, taking care of his house.

The bill then charges that, soon after, the defendant commenced to treat her in a most cruel way, calling her vile names, and threatening to turn her out of doors, and striking her with his fists. The bill also charges that the defendant has become an habitual drunkard.

It is charged that the defendant owns a large and valuable farm of about 90 acres, with a brick house thereon, situated in the said Hillsdale county, and that the complainant has no property or means of her own. Answer under oath is waived by the bill.

The answer of the defendant, which is under oath, admits—

"That on or about the 18th day of August, A. D. 1851, he was supposed to be married to the complainant in the town of Lyons, Wayne county, New York, but emphatically denies that said parties did ever after said marriage ceremony live and cohabit together as husband and wife, and denies that said defendant ever seduced the complainant upon promise of marriage, or that he ever got her in a family way by such promise, * * * but admits that on or about the 20th day of October, 1850, the complainant gave birth to a child, * * * but

as to who the father of the child was this defendant had no knowledge, as he had reason to believe and does believe that, prior to the birth of said child, several different men were having sexual intercourse with said complainant, and had had for some time prior thereto."

The defendant also claims that he was coerced into the marriage with complainant, if any legal marriage ever took place between them. The answer also denies that defendant ever lived or cohabited with complainant after the marriage ceremony was performed, either in New York or in Michigan, and alleges that after complainant came to Michigan, in 1888, she came to his house as his housekeeper, and, when he learned that she was claiming to be his wife, he procured his sister, with her family, to move into the house with them. He denies that he has treated her cruelly, or that he is in the habit of getting intoxicated, and claims that no marriage relation exists between them.

The answer sets up, by way of cross-bill, that the defendant procured a divorce in the state of Indiana from complainant in the year 1853, and that he was a resident of that state at that time. This decree of divorce appears to have been obtained upon publication of an order. No notice, except by publication, was ever given to complainant, and the only claim made of notice to her is by the defendant in his answer that, about a year after this divorce was granted, he exhibited to the complainant a copy of the decree of divorce.

It is substantially under this state of facts that the court below made the order adjudging the defendant guilty of contempt in refusing to pay the alimony awarded.

We are of opinion that the order was properly made. The facts set up in the cross-bill relative to the defend-

ant procuring a divorce in the state of Indiana would not, if true, oust the circuit court in chancery for Hillsdale county of jurisdiction. It is provided by subdivision 6, § 6228, How. Stat., that—

"The circuit courts may, in their discretion, upon application as in other cases, divorce from the bonds of matrimony any party who is a resident of this State, and whose husband or wife shall have obtained a divorce in any other state."

In *Wright v. Wright*, 24 Mich. 180, it appeared that a bill was filed for divorce on the ground that the defendant, being a resident of this State, had gone into the state of Indiana, and there, without notice to or appearance by the defendant, had procured a divorce from her. The court below found the facts as alleged, and decreed a divorce as prayed. The defendant appealed on the ground that, the Indiana divorce being entitled to full faith and credit under the Constitution of the United States, there was no longer any marriage bond for the court to adjudicate upon, and therefore it was not competent for the Michigan court to assume to dissolve what no longer existed. After the statement of the case, it was said by this Court:

"We do not by any means concede, however, that, if the Indiana divorce had been valid, no relief of the nature demanded could have been granted to complainant in this State. Assuming, as we must, to give to the court in Indiana any jurisdiction, that defendant resided within that state, the case would be such that both that state and this had authority in respect to the marriage relation to determine upon its validity or to dissolve it, so far as the party resident within its own limits is concerned. If one proceeds first, there is no legal impediment to the other's taking like steps afterwards, if it appears important to the protection of any property or other rights."

Referring to the statute above quoted, it was further said:

"Our Legislature has thought in some cases it might

be necessary to do so, and has provided for it by statute."

The appeal in that case was from an order allowing alimony, and it was said upon that question by CAMPBELL, C. J.:

"We see no difference between this and any other divorce suit, so far as the question of alimony is concerned."

In the present case the bill expressly waived answer under oath. The answer is sworn to by defendant, and it is therefore claimed that the new matter alleged in the answer by way of cross-bill in reference to the Indiana divorce could not be met by general replication, but must be answered or pleaded to, and that, therefore, it appeared that there was no marriage existing between the parties at the time this order for alimony was entered. The reasons, as stated in brief of counsel for defendant, why the order should be set aside, are—

1. That complainant has not in and by her said bill of complaint stated such a case as entitles her to either temporary or permanent alimony; that there is no equity in her bill; that it is contradictory and inconsistent, and sets up no allegations against the marriage relation sufficient to entitle her to any relief.

2. That defendant has filed an answer under oath, denying all the allegations that were material in such bill; that he filed a further answer, in the nature of a cross-bill, in which he pleads a bar in the former suit, declaring the same marriage contract dissolved that existed between these parties, and set up in her bill, more than 30 years before the commencement of her suit, and he asks the court to hold the sam *res judicata;* to which said answer and cross-bill the complainant has never made answer, or denied, or got permission to amend her original bill, or in any way amend her bill under the statute, alleging for cause of divorce the provisions of subdivision 6, above quoted.

The facts stated in the bill, if true, certainly warranted the court in making the order for alimony. It appears

from the bill that the defendant has been guilty of the most extreme cruelty to the complainant, and the allegations in his answer charging her at this late date with criminal intercourse with other men, at a time prior to his marriage to her, does not aid his case, and is deserving, even if true, of the severest censure. If he has pursued such a course towards the complainant as set up in the bill, finally inducing her to come to Michigan, and here lived and cohabited with her as his wife, and then treated her with extreme cruelty, by striking her with his fists, and calling her vile and indecent names, and finally denying that she was his wife or that he was ever legally married to her, it certainly contradicts the assertion made by the defendant in his brief "that there was no equity in her bill."

The fact that the answer was sworn to gives it no greater effect than though it had been filed without oath, as the answer under oath was expressly waived by the bill.

The new matter set up in the answer relative to the Indiana divorce is not such as required the complainant to answer to, for, even admitting it to be true that the courts of Indiana had jurisdiction to grant the divorce, and a valid divorce was obtained by the defendant, yet it was one of the causes for divorce given to the complainant by the statute. She did not set that ground up in her bill as a cause for divorce, and the defendant, under the statute, could not be permitted to plead it as a bar to her further proceeding under her bill upon the facts stated therein.

We think the court justified in holding the defendant guilty of contempt, and his order and decree therein must be affirmed, with costs.

The other Justices concurred.

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ELIZABETH A. MERRITT v. HENRY E. STEBBINS.

Evidence—Conversations.

In a suit involving the ownership of a colt, the mother of which the plaintiff testifies to having purchased, and to being the sole owner of the same, evidence of conversations between the vendor and third parties, not in plaintiff's presence, tending to show that the sale was not made to the plaintiff, is inadmissible.

Error to Hillsdale. (Lane, J.) Argued May 15, 1891. Decided June 5, 1891.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

E. J. March and *W. C. Chadwick*, for appellant.

C. A. Shepard, A. St. John, and *S. F. Dwight*, for defendant.

MCGRATH, J. Plaintiff, the wife of John W. Merritt, brings replevin against defendant, for the recovery of the possession of a sucking colt, taken by defendant as constable upon an execution against George W. Merritt.[1]

Defendant testified that he took the colt upon an execution from plaintiff's possession, and plaintiff testified that she owned the mother of this colt, and bought her from Thomas C. Filson in 1885; that she had been the sole owner from that time down to the time of the trial; that the mother of the colt was served at her expense and by her direction; and that the colt was her property.

Counsel for defendant then called a witness, who was

[1] George W. Merritt was a brother of plaintiff's husband.

permitted to testify, under objection, to a conversation between George W. Merritt and Mr. Filson with reference to the purchase of the mother of the colt, and to a conversation between George W. Merritt and the witness in which said George W. Merritt told witness that, if he got the mare, he would let witness use her on the road selling pumps. Defendant also called William H. Filson, a son of Thomas Filson, who was allowed to testify, under objection, to a conversation between George W. Merritt and said Thomas Filson, with reference to the purchase of the mare in question. It appeared that this witness was not present at the time the mare was actually purchased, and the witness stated that he did not know to his own knowledge who purchased the mare. Plaintiff's counsel moved to strike out the testimony, but the court refused. It was not claimed that plaintiff was present at any of these conversations. The record abounds with testimony of this character, which was clearly inadmissible.

The plaintiff, after the defendant had rested, undertook to show by Thomas Filson himself that he sold the mare to plaintiff, and took back from her a chattel mortgage to secure the purchase price; but the court refused to admit it, on the ground that it was not proper rebutting testimony.

The judgment is reversed, and a new trial ordered, with costs of this Court to plaintiff.

The other Justices concurred.

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MARGARET ARGUS v. THE VILLAGE OF STURGIS.

Municipal corporations—Defective sidewalk—Contributory negligence.

1. This Court has frequently held that knowledge of the existence of a defect is not conclusive evidence of the plaintiff's negligence.
2. It is not necessary, in a suit to recover damages for injuries received by reason of defects in a sidewalk, for the plaintiff to show that the municipality whose duty it was to keep the walk in repair either constructed it or ordered its construction.[1]

Error to St. Joseph. (Loveridge, J.) Argued May 15, 1891. Decided June 5, 1891.

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

R. R. Pealer and *Charles A. Sturges,* for appellant, contended:

1. If it appears that the plaintiff's own negligence contributed to her injury, she cannot recover; citing *Drew v. The Chesapeake,* 2 Doug. 33; *Railroad Co. v. Van Steinburg,* 17 Mich. 99; *Railroad Co. v. Miller,* 25 Id. 274; *Daniels v. Clegg,* 28 Id. 32; and, the facts touching her negligence being undisputed, it became a question of law for the court; citing *Mynning v. Railroad Co.,* 67 Mich. 677; *Haas v. Railroad Co.,* 47 Id. 401.

T. C. Carpenter (*T. R. Sherwood,* of counsel), for plaintiff, contended:

1. Defendant was organized by special act of the Legislature in 1855, and reorganized under the general law of 1875 for the incorporation of villages, of which acts the Court will take notice, and under which the village council had power to establish sidewalks in public streets, and to control the same, and to require them to be constructed, and the ordinances of

[1] See *Lombar v. East Tawas,* 86 Mich. 15 (head-note 5), and cases cited in foot-note.

the village in force at the time of such reincorporation were adopted by the 1875 act. It therefore appears that the law applied to all walks then in the village, if erected in streets, no matter when or by whom built, and that from the time the act of 1875 took effect such walks should have been kept in repair by defendant.

2. The question of the negligence of the parties was for the jury. The time and place of the injury, and its extent, and the defect in the walk, were all proved, and that it had existed for at least 14 months; citing *Lowell v. Watertown*, 58 Mich. 568; *Dundas v. Lansing*, 75 Id. 499; *Tice v. Bay City*, 78 Id. 209.[1]

McGRATH, J. The plaintiff brought this suit to recover damages for injuries received by a fall upon a defective sidewalk in said village, and recovered judgment, from which defendant appeals.

The accident occurred in November, 1888, between 8 and 9 o'clock in the evening. The plaintiff was on her way to see her daughter. She testified that she knew of the defect in the walk, and had passed and avoided it frequently. She testified as follows:

"I am generally in the habit of walking very quickly, but this evening, I don't know, I was walking quite slowly, and thinking I must hurry home as quick as I could get through, and all of a sudden I thought I must be careful of this sidewalk,—I must be near the broken sidewalk,—and the thought wasn't any sooner in my head than my foot slipped into the hole. I had my shawl over my head, and my hands were wound in this way. My hat was up stairs, and I had my shawl in this way, and my arms were rolled up in it tight around me. It was chilly, and that was one reason why my arms were foul, as to helping myself in this position. When my foot went down I gave myself a sudden jerk, and fell over. * * * I was thinking I must be near the broken sidewalk at the time, and all of a sudden my foot went out. I was very careful. * * * I was always careful about going over there. I generally walked on one side, and I didn't think I was so close to it as I was at the time."

[1] See *Roux v. Lumber Co.*, 85 Mich. 519, and foot-note.

She further stated that the night was cloudy, and the moon obscured.

Defendant's counsel requested the court to instruct the jury as follows:

"The plaintiff's own negligence forbids her recovery. She knew of the defect, if it existed, had passed it many times, and generally passed it by walking by on the east half of the walk, and could have done so the evening she claims to have been injured, but, instead of doing so, walked on the inside quite near the fence, with a shawl over her head, with her arms folded in it, so that she was unable to use them in any way for her protection.

"It has not been established by sufficient evidence that the sidewalk in question was put down by the village authorities or authorized by them, or that they were in any way responsible for the condition of the walk, and therefore plaintiff cannot recover."

These instructions were properly refused. The question of contributory negligence of plaintiff was fairly and properly submitted to the jury. This Court has frequently held that the knowledge of the existence of a defect is not conclusive evidence of plaintiff's negligence. It is not necessary to show, in this class of cases, that the municipality either constructed or ordered the construction of the walk in question. The statute fixes defendant's responsibility, and makes it its duty to see that its walks are in a condition reasonably safe for travel.

The judgment will be affirmed, with costs.

The other Justices concurred.

ALICE B. BAHAN v. HERBERT E. TURNBULL.

Fraud—Cancellation of deed.

In this case the Court find, from the testimony, that the complainant was deceived by false representations and by the falsification of the abstract of title of the land taken in exchange for the land conveyed by her to the defendant, and the decree of the court below, setting aside her deed, is affirmed. The questions involved are purely questions of fact.

Appeal from Wayne. (Reilly, J.) Argued May 19, 1891. Decided June 5, 1891.

Bill to set aside a deed. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Jay Fuller, for complainant.

E. H. Sellers, for defendant.

CHAMPLIN, C. J. The complainant filed her bill of complaint in the circuit court for the county of Wayne, in chancery, where she obtained a decree declaring that the deed executed by Alice B. Bahan to Herbert E. Turnbull of the premises described in the bill of complaint as lot No. 17, of outlot No. 25, Labrosse farm, is fraudulent and void; said deed bearing date April 9, 1889, and recorded in the office of the register of deeds in Liber 338 of Deeds, on page 213. From this decree the defendant appeals.

The record contains over 400 printed pages, and the questions involved are purely questions of fact. We have carefully scrutinized the testimony, and are clearly of the opinion that the conclusions reached by the circuit court are correct, and ought to be affirmed. It would serve no

useful purpose to restate the testimony upon which we are forced to the conviction that the complainant was deceived by false representations and falsification of the abstract of title of the land taken in exchange for the land conveyed by the deed executed by complainant to defendant.

It is sufficient to say that the complainant made out a plain case for the relief prayed for, and the decree is affirmed, with costs.

MORSE, LONG, and GRANT, JJ., concurred. MCGRATH, J., did not sit.

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JOHN COSTELLO v. CHARLES TEN EYCK.

Torts—Bailment—Sunday contract—Pleading.

1. It is the duty of an agister who takes horses for pasture to know their condition as to health; and if he has knowledge of the prevalence of a distemper among them of a contagious character, and fails to inform a customer of the fact, whose horse takes the distemper from contact with the diseased horses, in consequence of which the animal dies, the owner is entitled to recover its value in an action on the case, notwithstanding the contract for such pasturage is void because entered into on Sunday.
2. How. Stat. § 2015, avoids Sunday contracts, which cannot be ratified upon a subsequent week-day; citing *Adams v. Hamell*, 2 Doug. 73; *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Id. 355; *Brazee v. Bryant*, 50 Id. 141; *Railroad Co. v. Chappell*, 56 Id. 194.
3. Declarations in justices' courts are to be liberally construed, and, though informal, when they fairly apprise the defendant of the claim made against him, may be held sufficient; citing *Wilcox v. Railroad Co.*, 43 Mich. 584; *Fletcher v. Bradford*, 45 Id. 349.

4. A declaration in a plea of trespass on the case, claiming $100 damages, and, while informal, evidently intended by the pleader to claim damages for defendant's wrongful act in permitting plaintiff's horse to be turned into a pasture, with knowledge of the existence of disease among the other horses therein, is held a declaration in case, and not *assumpsit*.

Error to Wayne. (Hosmer, J.) Argued May 20, 1891. Decided June 5, 1891.

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

George H. Prentis, for appellant.

Brennan & Donnelly, for plaintiff.

LONG, J. This action was commenced in justice's court against defendant and one William Ten Eyck, where plaintiff had judgment. The cause was removed to the circuit court for the county of Wayne and there tried before a jury, which rendered a verdict against the defendant Charles Ten Eyck, for $75. The court directed the jury that no verdict could be taken against the other defendant. Judgment was subsequently rendered against the defendant Charles Ten Eyck in favor of the plaintiff, the other defendant having judgment for costs against the plaintiff. Defendant Charles Ten Eyck brings the case to this Court by writ of error.

The declaration was filed in justice's court, and sets up that—

"John Costello, plaintiff, complains of William Ten Eyck and Charles Ten Eyck, the defendants herein, in a plea of trespass on the case:

"For that, whereas, the plaintiff, on, to wit, on or about the 1st day of October, 1888, at the township of Dearborn, in said county, delivered to the defendants a certain horse, being of a dark sorrel, of the plaintiff (at the time of delivery of said horse to defendants said horse was well and sound), to pasture at the rate of three

dollars per month, and the defendants well knew at the time of the plaintiff's delivery of the said horse for pasturing that there was disease among the horses in the pasture in which the plaintiff's horse was left by said defendants; that the said horse thereafter, about five weeks, by reason of such disease among the horses and pasturage, and by the defendants not supplying water for said horse, the said horse died, to the damage of the plaintiff one hundred dollars, and therefore he brings suit."

The plaintiff on the trial introduced evidence tending to show that defendant, Charles Ten Eyck, was in the business of taking in horses to pasture for hire, and that on September 30, 1888, plaintiff, by his brother, sent the mare in question to defendant to pasture, under an agreement to pay therefor three dollars per month. The mare remained there about three weeks, when plaintiff learned of the fact that the horses in defendant's pasture were afflicted with distemper. Testimony was also given tending to show that during the months of August and September of that year the defendant's pasture was infected with disease; that certain persons having horses therein took them out by reason of this disease; and that defendant had knowledge that these horses were taken out by reason of being diseased before the time plaintiff's horse was turned into pasture, and that he gave plaintiff no notice of that fact, but permitted his horse to remain there, with full knowledge of the diseased condition of the pasture and the horses therein. It also appears that this disease was highly infectious.

Defendant introduced testimony tending to show that he had no knowledge that any distemper existed there in the pasture, or among the horses there at pasture.

Several defenses were interposed on the trial of the cause in the court below, and several questions are presented to this Court as reasons why the judgment and verdict of the court below should be reversed. It appears

that the horse was put into the pasture, and the contract made for its keeping, on September 30, 1888, which was upon Sunday. It is contended by defendant that plaintiff could not recover in this action, because it was a Sunday contract for the keeping of the horse; and that, inasmuch as the contract is void, no recovery could be had. Counsel cites in support of this proposition many cases from this Court and the courts of other states holding Sunday contracts void.

The statutes of this State (How. Stat. § 2015) provide that—

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor to the solemnization of marriages."

The penalty for the violation of this statute is by fine. This statute has been passed upon many times by this Court, and it has been held that contracts made upon Sunday are absolutely void, and that such contracts could not be ratified upon a week-day thereafter. *Adams v. Hamell*, 2 Doug. 73; *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Id. 355; *Brazee v. Bryant*, 50 Id. 141; *Saginaw, etc., R. R. Co. v. Chappell*, 56 Id. 194.

Under this statute and these decisions, and the decisions of courts in other states passing upon similar statutes, cited by defendant's counsel in his brief, it is contended that the court should have directed the jury to return a verdict in favor of the defendant for the reasons:

1. That the action is *assumpsit*.
2. That, whether it is in *assumpsit* or is an action on the case, it cannot be sustained without the aid of the

contract, and, that contract being void, there is nothing left upon which to base the action.

The action, as before stated, was commenced in justice's court. The declaration was evidently drawn by the plaintiff without the aid of counsel, but it was evidently intended by the pleader to claim damages in the action for the wrong in permitting his horse to be turned into pasture, the defendant knowing of the existence of disease there. It is a plea in trespass on the case, and claims damages in the sum of $100, and we think the declaration is one in trespass on the case, and not in *assumpsit*. Declarations in justices' courts are to be liberally construed, and, though informal, where they fairly apprise the defendant of the claim made against him, may be held sufficient. *Fletcher v. Bradford*, 45 Mich. 349; *Wilcox v. Railroad Co.*, 43 Id. 584.

It does not necessarily follow that an action cannot be maintained because the contract for the pasture, being made on Sunday, was void. The defendant took the horse into his possession, and it continued in his possession for the three weeks following. At the time of its being turned into pasture, and during the subsequent time that it remained there, the defendant knew that it was subject to the disease then prevalent among the other horses in the pasture. Having taken the horse into his possession, though under a void contract, he yet owed a duty to the plaintiff to exercise some degree of care over it. He was bound to give the plaintiff notice of the disease, so that the plaintiff might have removed the property, or have taken some precaution himself, or to have refused to put the horse in the pasture there.

Generally no person can be compelled to become a depositary without his own consent; but there are cases where a person may be subject to the duties and liabilities of a depositary without any intention on his part to

enter into any contract, or to assume any liability in regard to the property in question. The finder of property of a person unknown is not bound to interfere with it. He may pass by, if he please, and has then no responsibility in relation to it; but if he takes it into his possession he becomes at once bound, without any actual contract, and perhaps without any actual intention to bind himself, to the owner of the property, for its safe-keeping and return. *Smith v. Railroad Co.*, 27 N. H. 86.

In *Brazee v. Bryant*, 50 Mich. 136, plaintiff sued to recover for money paid by him to defendant for a horse, on the claim that the horse was not what the defendant had recommended it to be. On the trial the parties were permitted to go into evidence respecting the warranty of the soundness of the horse, and whether the warranty was broken. The contract of purchase appears to have been made on Sunday. The plaintiff was permitted to recover in that case because of the Sunday contract. The defendant attempted to recoup damages, and the court instructed the jury that, there being no contract in the case, there was nothing to rescind, and nothing to constitute a basis for recoupment. It was said by Mr. Justice COOLEY in that case:

"If plaintiff, while the horse was in his hands, misused it, or failed to observe any duty implied from his assuming the position of bailee, the defendant will be entitled to his proper remedy. But no right of action for such misconduct or neglect could be made use of as a defense to an action for money had and received."

It is claimed that the court was in error in directing the verdict in favor of the plaintiff against one of the defendants alone; that, if any recovery could be had in the case, it should have been a joint judgment

against the two; but, as we have said, the action is not in *assumpsit,* but in tort, for wrongfully taking the horse to pasture, and permitting it to remain there, knowing that the pasture and the other horses therein were diseased, and giving no notice to the plaintiff of that fact. It being a tort, the court very properly held that a recovery could be had against the person committing the wrong, and was not in error in directing that no recovery could be had against William Ten Eyck.

It is further contended by defendant's counsel that there was no competent evidence that the horse died by disease, and that, even if she did die of this distemper, there was no competent evidence tending to show that she contracted it in defendant's pasture. There was some competent evidence tending to show these facts, and it is not for this Court to say what weight shall be given to the evidence. That is a question solely in the province of the jury.

Error is also assigned upon the following portion of the charge of the court to the jury:

"It is unquestionably the duty of Mr. Ten Eyck to know as to the condition of the horses that he had in pasture. No doubt he did know. He testified that he examined into their condition, and that, knowing the condition of the horses—If you find in this case from the testimony that horses in the pasture with the defendant Charles Ten Eyck were afflicted with the distemper, immediately before or at the time the plaintiff's horse was brought there and was received by the defendant, and that the disease was likely to be or might be communicated to the plaintiff's horse, and if you find that the disease was there at the time that the plaintiff's horse was taken to Charles Ten Eyck's, and that the defendant Charles Ten Eyck knew, or ought to have known, that the disease was prevalent in his pasture, then it was his duty to have informed the plaintiff's agent of that fact; and, if the plaintiff's horse took the distemper

at the defendant's place, from contact with diseased horses or by infection, and in consequence thereof died, plaintiff is entitled to recover what, under the judgment of the jury, under the evidence in the case, the horse was fairly worth."

We find no error in this ruling. Under the circumstances of the case the law was properly stated by the court, and we think, under the testimony of the defendant, that he did know that there was disease among the horses in his pasture at the time the plaintiff's horse was turned in there. He testified that there was a common disease among the colts in the pasture there, called a "distemper," all along during the summer before, and that he took from the pasture one of the horses, put it into the barn, and cared for it until it got well.

There is some question also as to whether the court properly instructed the jury that they might find that William Ten Eyck acted as agent of Charles Ten Eyck in relation to this pasture. There was some evidence in the case tending to show this fact, and the court was not in error in leaving the question to be determined by the jury.

There is also error assigned upon the ruling of the court in admitting testimony as to the value of the horse. We find no error in these rulings, and shall not discuss the other questions raised.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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PERCY T. COOK, ADMINISTRATOR, ETC., v. WILLIS H. BERTRAM.

[See 32 Mich. 518; 37 Id. 124; 44 Id. 396.]

Ejectment—Title—Evidence—Estoppel—Parties—Substitution.

1. Possession under a warranty deed, executed by one in peaceable possession and claiming title at the time of its execution, is *prima facie* evidence of title in the grantee as against an intruder who shows no better title in himself; citing *McFarlane v. Ray*, 14 Mich. 465; *Gamble v. Horr*, 40 Id. 562; *Bennett v. Horr*, 47 Id. 221; *Covert v. Morrison*, 49 Id. 133; *Johnson v. Johnson*, 70 Id. 65; *Shaw v. Hill*, 79 Id. 86.
2. A defendant in ejectment cannot defeat a recovery by a plaintiff, who shows a *prima facie* title to the land, by the introduction of a government patent, under which he claims no rights, but which he seeks to introduce for the sole purpose of defeating such recovery by showing an outstanding title; citing *Bennett v. Horr*, 47 Mich. 221.
3. A defendant in ejectment who obtained possession by collusion with the assignee of a land contract which he had concluded to abandon, and who claims no rights under said contract, is not in a position to raise any questions that might be raised between the vendee and the plaintiff.
4. The record of the order for subpœna, order *pro confesso*, final decree and order of sale, and order confirming sale in a foreclosure suit, and copies of the mortgage and assignment, with evidence of the calendar entries, are competent evidence where the original files are lost, and sufficient to show jurisdiction and the regularity of the proceedings.
5. A verdict and judgment in an ejectment suit in favor of the plaintiff's administrator, who was admitted to prosecute the case, will be amended on appeal, the defendant not being prejudiced, as under such verdict and judgment the *real* title is in the heirs, subject to the payment of debts and expenses of administration.

Error to Lenawee. (Lane, J.) Argued May 19 and 20, 1891. Decided June 5, 1891.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion, and in the former reports of the case.

A. L. Millard, for appellant.

C. E. Weaver and *L. E. Knappen,* for plaintiff.

GRANT, J. This is an action of ejectment, and is now in this Court for the fourth time. 32 Mich. 518; 37 Id. 124; 44 Id. 396. We refer to those cases for a full statement of the facts, and shall here only refer to those which are necessary to a determination of the errors alleged.

1. Plaintiff introduced the following evidence of title: A mortgage on a part of the land, executed in March, 1854, by one Birdsell and his wife; a mortgage of the entire land executed in October, 1854, by one Brown to Mr. Birdsell; assignment of this mortgage to George Cook in October, 1854; assignment of the former mortgage to one Warn in December, 1858; warranty deed from Brown to one Hathaway, executed in January, 1856, subject to these two mortgages,—Brown at the time being in possession, and claiming title; surrender of possession by Brown to Hathaway, and his continuance in possession until the foreclosure of the above-mentioned mortgages; foreclosure proceedings by George Cook in 1860, resulting in a commissioner's deed of the land; surrender of possession by Hathaway; possession of land by George Cook through Addison P. Cook, his agent, until July 9, 1864, when George, by warranty deed, conveyed the land to Addison P. Cook; a contract for the sale of this land, executed by Addison P. Cook, January 10, 1867, to one Hollenbeck; non-performance on the part of Hollenbeck, and an abandonment of the premises by him. These facts show a *prima facie* title in fee as against one show-

ing no better title in himself. *McFarlane v. Ray,* 14 Mich. 465; *Gamble v. Horr,* 46 Id. 562; *Bennett v. Horr,* 47 Id. 221; *Covert v. Morrison,* 49 Id. 133; *Johnson v. Johnson,* 70 Id. 65; *Shaw v. Hill,* 79 Id. 86.

To defeat this title defendant introduced two tax deeds for the taxes of 1859 and 1868, and the record of a patent from the United States government to one Comstock, dated September 15, 1835. Defendant claimed no rights under this patent, but introduced it for the sole purpose of defeating plaintiff's right of recovery by showing an outstanding title. This is ruled against defendant by *Bennett v. Horr,* 47 Mich. 221. The court below was therefore correct in instructing the jury that plaintiff had established a title in fee in himself, and the defendant had failed to show any title in him.

2. The defendant's tax titles were void under the repeated decisions of this Court. The defendant's counsel, neither in his brief nor in his oral argument, discussed the objections to their validity, but raised only the point that they were not within the class of objections allowed to be made by the statute then in force. Comp. Laws 1871, § 1130. It would be of no value to any one to discuss here questions which have been repeatedly decided. The tax titles being void, the defendant was, under the evidence in this case, an intruder, and by the verdict and judgment of the court has obtained the benefit of improvements to which he was not entitled.

3. One Spear had obtained an assignment of the land contract from Hollenbeck, and was in possession of the land. When Spear had concluded to abandon the contract he colluded with the defendant and his father to abandon possession to defendant. Defendant claims no rights under that contract, but rather in hostility to it. He is not, therefore, in position to raise any questions

that might be raised between Hollenbeck and plaintiff, or his intestate. But if defendant originally had had any such right this was completely cut off by the written demand of possession and notice to quit, which were served upon defendant by Addison P. Cook shortly after he had obtained possession by his collusive arrangement with Spear.

4. Error is alleged upon the introduction of evidence as to the value of improvements. Under the defendant's own testimony he was not entitled to the benefit of any improvements:

1. Because his entry was obtained by collusion, and in fraud of the rights of Addison P. Cook.
2. Because the improvements were mostly made after the commencement of this suit.

The jury allowed him $2,500 for improvements, and also fixed the value of the land, aside from any buildings or improvements, at $3,900. The plaintiff, under the statute, elected to take this value. It therefore becomes unnecessary to consider this alleged error.

5. The files in one of the chancery foreclosure suits were lost. Secondary evidence of their contents was therefore competent. Plaintiff introduced the record of the order for subpœna, the order *pro confesso*, the final decree and order of sale, the order confirming report of sale, and copies of the mortgage and assignment, and evidence of the calendar entries in the suit. These were all competent, and were sufficient to show jurisdiction in the court and the regularity of the proceedings.

6. Upon the death of Addison P. Cook during the pendency of the suit plaintiff was admitted, as his administrator, to prosecute it. Defendant's counsel insists that in any event the administrator has no title, and that therefore this suit cannot be maintained in his name. This is technical, and, if correct, the verdict and judg-

ment would be amended in this Court. The defendant is not prejudiced, and under the verdict and judgment the real title is in the heirs, subject to the payment of debts and expenses of administration.

There is no error upon the record, and the judgment is affirmed.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. MCGRATH, J., did not sit.

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EDWARD E. WOOLLEY v. EDGAR A. CRANE.

Writ of error—Appointment of administrator.

Proceedings for the appointment of an administrator cannot be reviewed on writ of error. *Brinsmade's Appeal,* 52 Mich. 538.

Error to Kent. (Burch, J.) Argued May 21, 1891. Decided June 5, 1891.

Petition for appointment of administrator. Contestant brings error from judgment affirming order of probate court. Writ of error dismissed. The facts are stated in the opinion.

Smiley & Earle, for appellant.

Fletcher & Wanty, for petitioner.

LONG, J. Mary Adele Crane died intestate, April 18, 1890, at Grand Rapids, Kent county, this State. She left no mother, brother, sister, child, or issue of a deceased child surviving, but left a father, who resided in Clinton county at the time of her death.

She left some personal estate, and, no proceeding hav-

ing been taken by the heirs at law within the 30 days provided by How. Stat. § 5849, as amended by Act No. 68, Laws of 1889, Edward E. Woolley petitioned the probate court for Kent county on May 24, 1890, for the appointment of the Michigan Trust Company as administrator of her estate. The proper notice was given of the hearing of this petition, and the contestant, Edgar A. Crane, appeared in probate court, and objected to the appointment of an administrator for the reasons:

1. That deceased at the time of her death was not a resident of Kent county, but resided in and was an inhabitant of Kalamazoo county.
2. That the petitioner was not at the time of making the petition a creditor of her estate, nor in any way interested therein.
3. That the deceased left surviving her, as her only heir at law, her father; and that since her decease the heir at law sold and assigned his entire right, title, and interest in the estate to the contestant; and that, previous to the filing of petition, the contestant paid and satisfied all claims against the estate, so far as he was informed there were any claims, or arranged satisfactorily to the claimants to pay them.
4. Because the court had no jurisdiction of the subject-matter.
5. Because there is no one before the court, as petitioner or otherwise, seeking the assistance of the court, who has any right or interest in having the estate probated.
6. Because Edgar A. Crane is the only person interested in the administration of the estate, and when the same is probated he will insist on naming the administrator.

Upon the petition the Michigan Trust Company was appointed administrator, and Mr. Crane appealed from that order to the circuit count for the county of Kent, setting up as grounds for the appeal the reasons stated here, and also that the Michigan Trust Company is not one of the parties entitled by law to be appointed administrator. A hearing was had in the circuit court before

a jury, and upon special questions put to them they found:

1. That the deceased was at the time of her death a resident of Kent county.

2. That Mr. Woolley, the petitioner, was a creditor of the estate at the time of filing the petition for the appointment of an administrator.

The court thereupon entered a judgment affirming in all things the order made in the probate court. Mr. Crane, the contestant, brings the case to this Court by writ of error.

Upon the hearing here it is contended by the attorneys for the petitioner that the case is improperly in this Court, that it is not a proceeding according to the course of the common law, and therefore the writ of error is not the proper remedy. We think this position well taken. It was said by Mr. Justice CAMPBELL in *Brinsmade's Appeal*, 52 Mich. 538:

"That a writ of error is only allowable to bring up such controversies and questions as are according to the course of the common law. * * * Where no such issue is involved as could ever be a common-law question, the relief must be had by some other process."

The appointment of an administrator, and the questions involved in such a contest, cannot be said to be a proceeding according to the course of the common law. The case is so fully ruled by *Brinsmade's Appeal, supra*, that we need discuss none of the other questions involved.

The writ of error must be dismissed, with costs to the appellee.

MORSE, MCGRATH, and GRANT, JJ., concurred. CHAMPLIN, C. J., took no part in the decision.

WALLACE W. MUNGER, GUARDIAN, ETC., v. THE JUDGE OF PROBATE OF KALAMAZOO COUNTY.

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Incompetent persons—Appointment of guardian—Notice—Jurisdiction—Order.

1. Notice by publication is authorized by statute in certain cases, but when given without such authority it is of no value.
2. Under How. Stat. § 6798, which authorizes a judge of probate, in the absence of a statute directing the manner of giving notice of proceedings in probate court, if notice is required by law or by him deemed necessary to be given, to order it to be given in such manner and for such length of time as he shall deem reasonable, a valid notice may be given by publication to non-resident heirs of an application for the appointment of a guardian for an alleged incompetent person.
3. The object of notice to the heirs of an alleged incompetent person of an application for the appointment of a guardian is principally to protect such person in his rights; and while such heirs ought to have notice, because of their presumptive interest in the estate of the alleged incompetent, such notice to non-resident heirs is not absolutely necessary to the jurisdiction of the court, where a majority of those thus interested are residents of this State, and are duly notified of the proceedings.
4. The language used in the cases of *In re Bassett*, 68 Mich. 348, and *In re Myers*, 73 Id. 401, which may seem to warrant the assumption that some kind of a notice must be given to all of the next of kin or presumptive heirs of such incompetent person in order to confer jurisdiction to make such appointment, must be considered in reference to the facts of those cases.
5. The probate court will not be ousted of jurisdiction in proceedings for the appointment of a guardian for an incompetent person because of the failure to serve notice upon the guardian of two minor heirs, whose name and place of residence is not shown in the record, where one of said heirs is of age when the case is heard in the appellate court, and the guardian of the other appeared on the hearing in the probate court, and testified to the incompetency of the alleged incompetent, although not served with notice, which was served on both of the minors.
6. The omission of the name of the person appointed guardian of

an incompetent person from the decree is a mere clerical error, which the probate court can correct at any time.

7. A statement in an order for the appointment of a guardian for an incompetent person, that it satisfactorily appears to the court that such person is mentally incompetent to have the charge and management of his property and person, and that a guardian should be appointed for the reason that he is mentally incompetent to have the charge and management of his person and estate, is a sufficient adjudication of such facts.

Certiorari to review proceedings resulting in an order declaring petitioner's appointment as guardian of an alleged incompetent person void. Argued May 7, 1891. Decided June 5, 1891. Order reversed. The facts are stated in the opinion.

Volney H. Lockwood, for petitioner.

O. T. Tuthill and *Osborn & Mills*, for respondent.

MORSE, J. Wallace W. Munger was appointed guardian of Edmond Chase, an alleged incompetent person, by Hon. Allan M. Stearns, judge of probate of Kalamazoo county, on the 30th of July, 1888, and duly qualified and acted as such guardian without question until November 14, 1890, when the alleged incompetent filed a petition in the probate court of said county, setting forth that he was never mentally incompetent to have the charge and management of his property, which was acquired by his own exertions, and remained to him after deducting the necessary expenses by him incurred in rearing a large family of children; that "he is informed and believes" that the proceedings before the probate court in appointing said Munger his guardian "were so defective that they are wholly vicious and void, and that no jurisdiction was ever acquired by the court in said matter," and that said Munger was never legally appointed his guardian.

The petition set forth the names and residences of all his next of kin, to wit, his wife, one son, and four daughters, residing in Kalamazoo county, Mich., and three sons, residing, respectively, in Kansas, Missouri, and Nebraska; also one grandson, heir of a deceased son, residing in Kalamazoo county, Munger being his guardian; and a grandson and granddaughter residing in the same county, heirs of a deceased daughter; and a grandson, heir of another deceased son, living in Chicago, Ill.

The petitioner prayed that the proceedings before Judge Stearns might be set aside, and that he be permitted to resume the management and control of his property, averring that he was fully competent to manage and control the same, and that he be decreed mentally competent to have the charge of his estate; that a hearing be appointed, and notice of the time and place of the same be given to all his presumptive heirs and their legal representatives.

Hon. James M. Davis, the present probate judge of said county, on receiving and filing the petition, appointed a day of hearing, of which personal notice was given the heirs in this State, and ordered that notice be given by publication to the non-resident heirs by publishing a copy of the order for hearing in the Kalamazoo Weekly Telegraph for three successive weeks previous to the day of hearing, which was done.

No special defects in the proceedings before Judge Stearns were pointed out in the petition, nor does it appear from the record that any question was raised upon the hearing as to the jurisdiction of Judge Stearns, except the want of notice to some of the next of kin of the alleged incompetent, more especially the non-resident heirs. The probate judge held the appointment of Munger void, and made an order accordingly. The order

determines that the proceedings to appoint Munger guardian, and declaring Chase an incompetent,—

"Were taken and had without jurisdiction or authority, because of want of notice to all the next of kin of said Edmond Chase of said proceedings, and were and are null and void; and it further appearing to the court that it is therefore unnecessary for the present disposition of the matter of said petition to determine upon this hearing whether the said petitioner is now mentally competent or not."

In his return to the writ the probate judge says that upon the hearing—

"Considerable proof was introduced upon his [Chase's] part tending to show that he was not then mentally incompetent, but was, in all respects, sane and mentally competent, and entitled to have the care and management of his property and effects, and that, on the other hand, considerable testimony was also introduced in behalf of said guardian, and all others interested in opposition to said petition, tending to show that, at the time of the hearing, said Edmond Chase was not mentally competent to have the care and custody and management of his estate, but that it was proper that a guardian of his person and estate should be continued for that purpose."

It is plain from this return that it was not clear to the mind of the judge of probate, from the whole testimony, that Chase, at the time of the hearing, was mentally competent to have his estate restored to him.

It is contended by the counsel for the defendant in *certiorari* that, under the decisions of this Court, some kind of notice to all the next of kin or presumptive heirs is absolutely essential in order to confer jurisdiction upon the judge of probate to entertain proceedings to declare a person mentally incompetent to manage his estate, and to appoint a guardian of his person and estate, and we are cited in support of this contention to

the following cases: *In re Bassett,* 68 Mich. 348; *In re Myers,* 73 Id. 401; *North v. Joslin,* 59 Id. 625.

While the language of the opinion in some of these cases may seem to warrant this assumption, it must be remembered that in both the Bassett and Myers cases no notice was served upon the next of kin residing in the immediate neighborhood of the alleged incompetent, and within the jurisdiction of the probate court; and the language of those opinions must be considered in reference to the facts of the particular case in hand when the opinion was written, and to which it referred.

In Bassett's case, his wife, presumably under the law as much interested in his estate as any one, was not mentioned in the petition, nor did she have any notice of the proceedings. It was held that the petition should show all persons who would be affected by the action sought to be taken, and that this would manifestly include the presumptive heirs at law and distributees. There can be no fault found with the petition in the present case in this respect. It set out the names of all the presumptive heirs at law, and gave their places of residence. The court was fully informed as to the persons liable to be interested in the proceedings.

In the Myers case, the order of the probate judge directed that notice of the hearing should be given the next of kin, in effect, as it provided that such next of kin be required to appear at said hearing, and show cause, if any, why the prayer of the petitioner should not be granted. The petition was made by a daughter of Mrs. Myers, the alleged incompetent, and notice was served only on Mrs. Myers and a daughter, Mahala Curtis. There were living in the same county three sons of Mrs. Myers, one of them residing in the same township with the petitioner and Mahala Curtis. The petition was open to the same objection as in the Bassett case, as

it gave the court no information that any one save the petitioner had any interest in the matter to be adjudicated by the court. It was there held that Mrs. Myers, if an incompetent person, could receive no protection from a notice served upon her, and that she was entitled to have her next of kin notified of the proceedings, although the statute in terms did not require such notice or provide for it. In saying, as we did in that case, that the presumptive heirs were entitled to notice, we had reference to the case in hand. The parties interested were all within the jurisdiction of the probate court, and could have been personally served with notice.

In the case now before us, the petition was made by the wife of the alleged incompetent, and the following persons were notified of the hearing: Charles Chase, a son of Edmond Chase; four daughters, Mary Jane Munger, Julia A. Hoag, Frances R. Stevens, and Elsie A. Smith; Walter Chase, a grandson; and Randall Rumery and Sylvia Rumery, grandson and granddaughter. These persons represented, with the wife, the interests of said wife and seven out of eleven parts of the estate if it should descend to the children, and the heirs of the children, of Edmond Chase, as the statute, in the absence of other disposition, would place it at his death. Three sons, residing, respectively, in Kansas, Missouri, and Nebraska, and one grandson, living at Chicago, were not notified of the proceedings.

We think, under the circumstances of the case, that the probate court acquired jurisdiction in the premises, and that it was not necessary to notify these non-resident heirs. If these heirs had wholly composed the next of kin of Edmond Chase, the case would have been different; but, as it is, everybody interested in the case, within the State of Michigan, received notice, and at least seven adult persons, interested presumably in the

estate, being presumptive heirs at law, had personal knowledge of the proceedings.

The statute only provides for a notice to be given the supposed insane or incompetent person of the time and place of hearing the case, not less than 14 days before the time so appointed. How. Stat. § 6314. In the cases heretofore under consideration as to notice, the persons entitled to the same were within reach of the court by personal service. There are but two ways by which the heirs at law in this case residing outside of the State could be notified,—one by sending such notice by mail or messenger, and the other by publication, as was done in the proceeding before us, to vacate Munger's appointment. There is no statute in this State or practice authorizing the first mode of service. If sent by mail and not received, it would not be valid, and the sending of a messenger could hardly be required. Notice by publication is authorized by our statute in certain cases, but it is good for nothing in a case where it is not authorized. The statute relating to this proceeding does not authorize it in this case, as it only provides for notice upon the supposed incompetent; but there is a general statute which provides that—

"When notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the judge of probate, and the manner of giving the same shall not be directed by any statute, the judge of probate shall order notice of such proceedings to be given to all persons interested therein in such manner and for such length of time as he shall deem reasonable." Id. § 6798.

By virtue of this statute, if it were necessary to notify non-resident heirs, the judge of probate could undoubtedly authorize notice by publication, which would be valid. But the publication of such notice would in fact, in many cases, give no notice at all to such non-resident heirs,

and would only be notice because the law declares it to be a substituted service of notice.

The object of notice to the heirs, as said *In re Myers, supra,* is principally to protect the alleged incompetent in his rights; and while the heirs at law ought also to have notice, because of their presumptive interest in the estate of such incompetent, we do not think it absolutely necessary that non-resident heirs should have such notice, where a majority of those interested in the alleged incompetent and his estate are residents of this State, and duly notified of the proceedings. There was no showing before Judge Davis that any fraud, wrong, or oppression to the incompetent, or any of his heirs, was employed in the appointment of Mr. Munger, or even that any single heir has ever objected to his guardianship, nor that any reason exists why he should not continue in such guardianship, if a guardian is necessary.

The judge of probate returns that, although Randall and Sylvia Rumery were served with notice, they were each under the age of 21 years at the time, and under guardianship, and their guardian was not served with notice; but it appears from the record that George W. Smith, who is now, and presumably was then, the guardian of Randall Rumery, appeared at the hearing before Judge Stearns, and testified that Edmond Chase was incompetent to do business; and it also appears that Sylvia Rumery is now of age. She was therefore old enough at the time of the proceedings before Judge Stearns to know what the notice was, and we are not inclined to hold that the judge of probate obtained no jurisdiction to entertain the proceedings because the guardian of the minors was not served with notice, when the record fails to show the name and place of residence of such guardian.

The omission of the name of Munger in the decree appointing a guardian is a mere clerical error, which the court is authorized to correct at any time. The petition asked for his appointment, he was appointed, and letters issued to him, his bond filed and approved, and he has been acting and reporting his doings to the probate court for over two years. He cannot be ousted on a mere technical omission to fill his name in a blank in the printed form of a decree.

Many other objections are raised here to support the order of Judge Davis, which do not appear to have been raised or to have influenced his decision in this case, as he has taken pains not only to record his reasons for his action in this order, but also in his return. From these it appears that he declared the appointment void solely upon the ground of want of notice of the hearing to all of the next of kin. We should not consider these objections in order to find a reason for sustaining the order, and we notice them only to prevent further litigation.

Mr. Munger is still guardian and entitled to hold his trust, unless it can be shown that Edmond Chase is now competent to manage his own affairs, or that Munger is unfit or incompetent to retain the place. The fact that he tendered his resignation cuts no figure in the case. Before it was accepted he withdrew such resignation, which he had a perfect right to do.

It is also contended that the order appointing Munger is open to the same objection as in the North and Bassett cases, in that the order did not adjudge Edmond Chase insane, or mentally incompetent to have the charge and management of his property. This is not so. The order expressly declares that it appears satisfactorily to the court that said Chase—

"Is mentally incompetent to have the charge and management of his property and person, and that a

guardian should be appointed for the said Edmond Chase for the reason that he is mentally incompetent to have the charge and management of his person and estate."

This is a sufficient adjudication.

The order of the probate court, decreeing that the appointment of Munger as guardian was null and void, is reversed and vacated, with costs of this Court to said Munger, to be paid out of the estate of said Edmond Chase.

The other Justices concurred.

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LOUIS P. CAMPAU v. THE BOARD OF PUBLIC WORKS OF THE CITY OF DETROIT.

Municipal corporations—Plats—Mandamus.

1. A writ of *mandamus* to compel the board of public works of the city of Detroit to vacate its approval of a plat of land adjoining those owned by relator is denied, because—
   a—Neither the makers of the plat, nor the purchasers of lots as established by the plat, are before the Court.
   b—After its approval and adoption of a plat, the respondent has no power to vacate it, and can only change it by a resolution of the common council, passed by a three-fourths vote of its members.
   c—Relator has no such interest as would entitle him to the writ.
2. Where a land-owner has complied with the statute in making a plat, and the streets thereon correspond with the general plan of the other streets of the city of Detroit, as made and adopted by the board of public works, *mandamus* will lie to compel the approval of the plat by said board.
3. The board of public works of the city of Detroit has no power to direct where a land-owner shall establish an alley when platting land; and the fact that the city assumes the burden

of cleaning and caring for such alley affords no legal excuse to the board of public works for declining to approve the plat.

Mandamus. Submitted May 19, 1891. Granted in part June 5, 1891.

Relator applied for *mandamus* to compel respondent to approve a plat of certain land, and to vacate the approval of a plat of adjoining lands. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson, for relator.

John J. Speed, for respondent.

GRANT, J. The relator petitions for the writ of *mandamus* to compel the respondent to approve a plat of certain land owned by him, which he has duly executed, and to vacate the approval of a plat of adjoining lands made by Homer W. and William R. Candler. The Candler plat was approved by the respondent, and recorded.

The writ must be denied, in so far as it prays for the vacation of this plat, for three reasons:

1. Neither the Candlers nor other persons who are shown by the return to have purchased lots as established by this plat are before the Court. Their interests would obviously be affected by granting the order asked.

2. The respondent has no power to vacate plats. After plats have been approved and adopted by the board it cannot even change them, unless authorized by a resolution of the common council, passed by a three-fourths vote of the members. Section 304 of charter. *Mandamus* is not the proper remedy in such cases, and especially where the rights of others have become involved.

3. The relator has no such interest as would entitle him to the writ.

The writ must issue, if relator desires, to compel the approval of relator's plat. He has complied with the statute, and the streets upon his plat are made to correspond with the general plan of the other streets of the city, as made and adopted by the respondent. Any owner of lands is entitled to have his plat, when properly executed in accordance with this general plan, approved by the respondent.

The reason given for declining to approve is that the relator's plat shows a public alley on his land 20 feet north of the public alley upon the Candler plat; and that, as the alleys in the city are cleaned and cared for at the public expense, it was undesirable, and not for the public interest, that the alley on relator's plat should be permitted. The city is under no legal obligation to assume that burden. The fact that the city does assume it affords no legal excuse to respondent for declining to approve the plat. The board of public works does not possess the power to direct where an owner of land shall establish an alley. He may establish it where he pleases, so long as he interferes with no public or private right.

No costs will be allowed.

The other Justices concurred.

JAMES W. CONVERSE v. DAVID P. CLAY ET AL.

Mortgage—Foreclosure—Resale.

1. How. Stat. § 6750, which provides that, if any person making the highest bid at a chancery sale shall neglect or refuse to make immediate payment, the officer making the sale may immediately or upon an adjourned day proceed to resell the real estate, affords ample protection against straw bidding, and is construed as follows:

   a—The statute does not contemplate that each bid, whether the highest or not, shall be accompanied with the money, nor is it unusual to allow time within which to produce the amount of the bid.

   b—A party attending such a sale cannot know that he will be the successful bidder, and should not be expected to be ready with the money at the time of making his bid, the amount of which cannot be ascertained until the bidding is concluded.

   c—The statute does not contemplate that the officer making the sale, by an unreasonable demand, shall prevent competition, or a sale of the property in parcels and to the best advantage.

2. A resale of mortgaged premises is held to have been properly ordered where a parcel was struck off to the wife of the mortgagor upon his bid made in her behalf, and upon immediate payment being demanded by the commissioner the bidder announced that he did not have the money with him, whereupon the sale was adjourned for half an hour, at the expiration of which time the bidder announced that he did not have the money, but would produce it by the time the deed was made out, and the commissioner offered another parcel, upon which the mortgagor made a like bid, which was refused unless accompanied by the money, which was not produced, and the entire mortgaged premises were sold in one parcel to a bidder who had been present during the entire sale, after which the mortgagor caused a tender to be made to the commissioner of the amount of his bids, which was refused.

Appeal from Kent. (Grove, J.) Argued May 21, 1891. Decided June 5, 1891.

Bill to foreclose a mortgage. Defendants Heth and Laura A. Clay appeal from a conditional order for resale. Order modified by eliminating conditions, and affirmed. The facts are stated in the opinion, and in head-note 2.

Fletcher & Wanty, for complainant, contended:

1. The sale should have been unconditionally confirmed; citing How. Stat. § 6750; 2 Jones, Mort. § 1640; *Bullard v. Green*, 10 Mich. 268; *Gilbert v. Haire*, 43 Id. 283; *Bank v. Quick*, 71 Id. 534; *Page v. Kress*, 80 Id. 85.

E. S. Eggleston, for appellant Clay.

G. A. Wolf, for appellant Heth.

McGRATH, J. Complainant filed his bill to foreclose a mortgage upon certain lands, consisting of several parcels. Decree was had, and a sale made, on which the property was sold in bulk for $6,200. Defendant Heth excepted to the commissioner's report of sale, and asked for a resale upon the following grounds:

"1. That, as appears from the commissioner's report of sale, the premises described in the bill of complaint herein were sold in one parcel on December 27, 1890, to Noyes L. Avery, for the sum of sixty-two hundred dollars ($6,200).

"2. That said property consists of five separate lots, of fifty feet front each, two of said lots fronting on Canal street, and three on Kent street, in the city of Grand Rapids, and that one of said Canal-street lots is covered by a good and substantial frame building, two stories high.

"3. That defendant purchased said property in October, 1886, from defendant D. P. Clay, for the sum of $17,500; that said property was then worth at least that sum, and that said property is worth at least that sum to-day.

"4. That this defendant understood and expected that said property would be sold in separate parcels, and believes that it would sell for more in that way than sold in a lump.

"5. That at said sale said D. P. Clay, in behalf of Laura A. Clay, demanded that said property be sold in parcels, and the commissioner first offered for sale the lot covered by said building, and struck the same off to said Clay for $2,300; that immediately after said sale said Clay tendered to the commissioner the sum of $2,300 in money, and the commissioner refused to receive the same, or give a deed to said Clay.

"6. That at said sale, after the said lot had been struck off to said Clay, and the amount of his bid not being produced on the spot, the said commissioner refused to offer said property in parcels, and refused to receive any bids from the said Clay, and struck off the whole in one lump to Noyes L. Avery for $6,200.

"Your petitioner asks that said sale be set aside, at least as to the four vacant lots, and, if a resale is ordered, agrees to bid and pay in cash at least two thousand dollars for the Canal-street vacant lot, and at least fifteen hundred dollars each for the Kent-street lots, and will deposit money enough to pay the costs if he fails to bid and pay said sums."

Defendant Laura A. Clay also excepted, and asked for a resale, setting forth, among other things, the following:

"3. For that said report does not set forth the fact that at said sale Laura A. Clay, through her husband, David P. Clay, bid for lot numbered 297 of the Kent plat, so called, the sum of two thousand and three hundred dollars, and the same was by said commissioner struck off to said Laura A. Clay, and afterwards, without sufficient just, legal, or equitable cause, he declared said bid off, and refused, upon tender of the sum of money bid therefor, to convey said lot to said Laura A. Clay.

"4. For that at said sale the commissioner put up for sale lot number 298 of Kent plat, part of said premises, and the said Laura A. Clay bid for said lot the sum of five hundred dollars, which said bid the said commissioner refused to receive or entertain, and afterwards, the money being tendered to him for said lot, refused to convey the same to said Laura A. Clay.

"5. For that the said commissioner, disregarding his duty in that behalf, and against the express protest of

said Laura A. Clay, put up said two lots, together with the other three lots described in said decree, in one body, and sold the same to Noyes L. Avery for the sum of sixty-two hundred dollars, being a sum at least six thousand dollars less than the fair market value of said lot.

"6. For that said commissioner unjustly and illegally allowed one of the solicitors of said complainant to so unjustly, illegally, and inequitably control said sale as to absolutely prevent the said Laura A. Clay from buying any of said property at its fair market value or at any price whatever, and so as to enable the said Noyes L. Avery to buy said premises in one block, and at a price less than one half its actual value."

Upon hearing said petitions the court ordered—

"That the sale in this cause, made on the 27th day of December, 1890, be set aside, and the premises described in the report of sale and in the decree in this cause be resold in the following order: Lot 297, 298, 296, 299, and 286, unless the debtor shall request a different order as to three last named lots, after due notice according to the practice of this court, on condition that the said petitioners deposit with the register of this court the sum of $2,800 in money within ten days from this date, $2,300 of which is on said resale to stand as the opening bid on Lot No. 297, and $500 of which is to stand on said resale as the opening bid on Lot No. 298, and that the petitioners also deposit with the register of this court within ten days from this date a bond in the penal sum of $8,000, to be approved by this court on two days' notice to complainant's solicitors, conditioned that the whole of the premises described in said report of sale, and in the bill of complaint and decree in this cause, shall on said resale bring the total amount of the lien and interest of Noyes L. Avery, who purchased said premises at said sale, and the total amount of the decree in this cause, together with interest on said decree and lien, and all costs in this cause and the costs of said resale; and it is further ordered that, if said money and bond are not deposited as above ordered within ten days from this date, said sale made on the 27th day of December, 1890, stand confirmed."

The defendants Heth and Clay appeal from said order.

The purchaser at said sale was present during the entire proceedings.

How. Stat. § 6750, provides as follows:

"In case any person making the highest bid upon such sale shall neglect or refuse to make immediate payment of the sum so bid, such officer or person may immediately, or upon some other day to which he may, in his discretion, adjourn such sale, proceed to resell such real estate: *Provided*, that, if such adjournment be for a period of one week or more, notices shall be published as provided in section three of this act."

This statute affords ample protection against straw bidding. It does not contemplate that each bid, whether the highest or not, shall be accompanied with the amount thereof, and it is not unusual to allow time within which to produce the amount of the bid. A party attending such a sale cannot know that he will be the successful bidder, and therefore should not be expected to be ready at the time of the bid with the money, the amount of which cannot be ascertained until the bidding is concluded. The statute does not contemplate that the officer making the sale, by an unreasonable demand, shall prevent competition, or a sale of the property in parcels and to the best advantage.

The court properly ordered a resale of the premises, but the conditions imposed are an unreasonable burden upon the appellants. The order will be modified by striking out the words, "on condition that the said petitioners deposit," and all of the words and figures following said words contained in the body of said order, with costs to the appellants, and the record will be remanded for further proceedings in accordance herewith.

MORSE, LONG, and GRANT, JJ., concurred. CHAMPLIN, C. J., did not sit.

GEORGE W. ROSS v. JAMES B. BARBER, RECORDER OF BAY CITY.

Municipal corporations—Change of boundaries—Offices—Vacancy.

The provision of the charter of Bay City that the office of alderman shall become vacant on the removal of the incumbent from his ward applies to a removal effected by a change of the boundaries of the wards by the Legislature as well as to a voluntary removal of the alderman.

Mandamus. Submitted June 9, 1891. Denied June 10, 1891.

Relator applied for *mandamus* to compel the drawing of an order in his favor for salary as an alderman of the Fifth ward of Bay City. The facts are sufficiently stated in the opinion.

James Van Kleeck (*Hatch & Cooley*, of counsel), for relator.

John C. Weadock, for respondent.

PER CURIAM. The present Legislature changed the boundaries of the wards of Bay City.

Previous to such change, relator was an alderman of the Fifth ward, and a resident therein. By the change of boundaries relator is no longer a resident of the Fifth ward, but now resides in the Fourth ward, as reconstructed by the Legislature, which is separated from the Fifth by the Eighth ward. The office of alderman, by the charter, becomes vacant by the removal of the alderman from his ward.

We think the removal provided for applies to removals by change of boundaries by the Legislature as well as a

voluntary removal by the alderman. The reasons apply equally to either mode of removal. In either case the office is vacant.

We do not determine the right of the mayor to fill the vacancy by appointment. *Stow v. Common Council,* 79 Mich. 595.

WASHINGTON G. WILEY v. WATSON BEACH, CIRCUIT JUDGE OF TUSCOLA COUNTY.

Taxes—Decree for sale—Appeal—Mandamus.

An appeal is authorized by the tax law of 1889 from a decree for delinquent taxes, and *mandamus* will not lie to compel the circuit judge to review such a decree, and allow the landowner to answer, he alleging in his petition that the tax is illegal, and that he was not served with subpœna, but not that the petition and tax list were not published.

Mandamus. Submitted June 9, 1891. Denied June 10, 1891.

Relator applied for order to show cause why *mandamus* should not issue to compel respondent to allow him to file an answer to the petition of the Auditor General for sale of delinquent tax lands. The facts are sufficiently stated in the opinion.

F. S. Wheat, for relator.

PER CURIAM. Relator states that certain drain taxes were laid upon his lands that are illegal; that they were returned to the Auditor General, and are included in the proceedings to sell under the law authorizing proceedings

by petition of the Auditor General in chancery; that the land lies in Tuscola county, and that relator resides in Lansing; that no personal service of subpœna was had upon him, and that a decree was made and the land sold in 1890, and that he did not know of such fact until March, 1891. He asserts that the drain tax is illegal, and asks for a *mandamus* to compel Hon. Watson Beach to review the decree, and give him leave to answer, etc.

The statute authorizes an appeal. There is no allegation that the petition and list of lands were not duly advertised. Without now passing upon the question of the validity of the proceedings,—because they are not involved,—we think the remedy by *mandamus* is not proper.

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MELVIN L. GRAY AND DAVID K. FERGUSON, EXECUTORS, ETC., v. MARY E. FRANKS ET AL.

Mortgage—Foreclosure—Parties—Examination of witnesses—After-acquired title—Will—Foreign executors.

1. The failure to allege that the children of a mortgagor, who are joined as defendants in a suit to foreclose the mortgage under an allegation that they claim rights as subsequent purchasers, incumbrancers, or otherwise, are his heirs at law, will be remedied by amendment in the appellate court.
2. A demand for the examination of the witnesses in a chancery suit in open court, not made within ten days after the cause is at issue, is of no force.[1]
3. A defendant who has failed to make such a demand is not entitled to the benefit of one made by a co-defendant, who may have waived it, or as to whom the suit has been discontinued.

[1] See Chancery Rule No. 124.

4. An action brought by foreign executors before the will is probated in this State is made good by subsequent probate before hearing. *Richards v. Pierce*, 44 Mich. 444.
5. The statute providing for the probate of foreign wills does not require any bond on the part of the executor.
6. A mortgage was executed by the parties in the full belief that it covered, in addition to three small lots worth only a small portion of the sum secured, adjacent hotel property, which constituted the chief value of the supposed security, and of which the mortgagor was, and for many years had been, in the actual possession, claiming title, which failed, and he secured a quitclaim deed of the premises, perfecting his supposed title; which subsequently acquired title is held to have inured to the benefit of the mortgagee under his mortgage.

Appeal from Mackinac. (Steere, J.) Argued April 24, 1891. Decided June 20, 1891.

Bill to foreclose a mortgage. Defendant Mary E. Franks appeals. Decree affirmed, except as to order of sale. The facts are stated in the opinion.

Watts S. Humphrey (*Oscar Adams*, of counsel), for complainants.

Ed. E. Kane, for appellant, contended:

1. The heirs, being the owners of the equity of redemption, were necessary parties; citing *Abbott v. Godfroy's Heirs*, 1 Mich. 180, 181; *Insurance Co. v. Brown*, 11 Id. 265, 274; *Reed v. Marble*, 10 Paige, 413; 2 Jones, Mort. § 1414; and their interest and relation to the mortgagor should be shown by proper averments.
2. The general allegation under Chancery Rule No. 91 is not sufficient to put in issue rights paramount to the mortgage; citing *Wurcherer v. Hewitt*, 10 Mich. 454; and can only be used when the facts of being a subsequent purchaser or incumbrancer appear of record; citing *Dawson v. Bank*, 15 Mich. 495; *Comstock v. Comstock*, 24 Id. 39; *Summers v. Bromley*, 28 Id. 126.
3. Foreign executors cannot, by virtue of the foreign appointment, sue as such in this State; citing *Thayer v. Lane*, Walk. Ch. 202; *Vickery v. Bier*, 16 Mich. 53; *Sheldon v. Rice Estate*,

30 Id. 301; *Dickinson v. Seaver*, 44 Id. 629; *Mower's Appeal*, 48 Id. 447; *Reynolds v. McMullen*, 55 Id. 568.

4. The mortgage contains no covenants of warranty, and there is the same distinction between mortgages with and without such covenants as between warranty and quitclaim deeds as to subsequently acquired title; citing Jones, Mort. § 679; *Tefft v. Munson*, 63 Barb. 37, 57 N. Y. 97; and in this State, if the mortgage does not contain such covenants, it does not cover lands the title to which is afterwards acquired by the mortgagor, and in which he had no legal or equitable title when the mortgage was given; citing *McClure v. Holbrook*, 39 Mich. 43; *Brown v. Phillips*, 40 Id. 265; *Frost v. Society*, 56 Id. 69; *Brennan v. Eggeman*, 73 Id. 659.

GRANT, J. This is a bill filed by complainants as executors of the will of one Ralph Sellew, to foreclose a mortgage executed by Edward A. Franks and Mary E. Franks, his wife. Decree was rendered for complainants, and the defendant Mary E. Franks alone appeals.

Several objections are raised to the right of the complainants to maintain the suit, which will be first considered.

1. Edward A. Franks, the mortgagor, died before the commencement of this suit. His children were made parties defendant, but the bill did not allege them to be his heirs at law. It alleges that they and other persons mentioned "have or claim to have rights and interests in the premises described in said indenture of mortgage, or in some part or parts thereof, as subsequent purchasers or incumbrancers or otherwise." The appellant is not in position to raise this question. Her rights are not affected, even if the allegation were necessary. The real defendants, however, who might raise this question, could not be misled, and, even if such a formal allegation were necessary, the amendment would be allowed in this Court.

2. The defendant contends that she was entitled to a hearing upon proofs taken in open court. She made no

demand herself, but two of the defendants, who were made parties on account of supposed subsequently acquired interests, did demand the examination of witnesses in open court. The bill, as to them, was subsequently dismissed by consent, and the case was then referred, by an order made in open court, to a circuit court commissioner to take the proofs.

This position of the appellant is not tenable for two reasons:

1. The demand for such an examination was not made within 10 days after the cause was at issue, and therefore was of no force. How. Stat. § 6647.

2. Having made no demand herself, she is not entitled to the benefit of such demand by another, who may have waived it, or as to whom the suit has been discontinued.

3. Mr. Sellew lived in St. Louis, Mo., where he died, and where his will was probated; and the complainants accepted the trust, and became duly qualified. The bill was filed before this will had been proved in Michigan. Subsequently, and before the hearing, the will was duly proved in the probate court of the county Mackinac, and an exemplified copy of such probate put in evidence. Appellant insists that complainants could not bring suit before a probate of such will in Michigan. This point, we think, is ruled by the case of *Richards v. Pierce*, 44 Mich. 444. It was there held, citing numerous authorities, that an action brought *before* probate is made good by subsequent probate before the hearing.

4. It is next insisted that the probate proceedings in the probate court for Mackinac county are void for several reasons, only one of which we deem it important to notice, viz., that no bond was given in Michigan by the executors.

The statute providing for the probate of foreign wills

in this State does not require any bond on the part of the executor. It would be a wise precaution on the part of probate courts to require it. The letters issued to complainants in this State recite that they have given a bond. Such a bond is not necessary to protect the interests of the defendants in this case. They could have applied to the court in chancery for security for costs. They are not prejudiced, and we do not think equity requires that such technical errors should, under the circumstances, prevail.

5. The main contest in the case arises over the description of the premises mortgaged. The mortgage was executed December 16, 1868, and the description of the mortgaged property is as follows:

"All the lands and premises situated in the county of Mackinac and State of Michigan, known as the property described and included in a deed made and executed by the American Board of Commissioners for Foreign Missions, November 9, 1855, to the aforesaid Edward A. Franks, and recorded in the office of the register of deeds and mortgages in and for the said county of Mackinac on the 22d day of May, A. D. 1856, in Book 1 of Deeds, on pages 208, 209, 210, and 211, to which deed reference is hereby made as a part of this indenture; except a balance due the aforesaid board of commissioners of the amount of $1,050, and to Coyree & Strong, of the city of Detroit, another claim of $1,000, both of which claims are secured by mortgage on the above premises."

These premises were purchased by Mr. Franks from the American Board of Commissioners for Foreign Missions by deed dated November 9, 1855. In that deed the premises are described as follows:

"Beginning on the shore of Lake Huron, between this lot and a street; thence north, eight degrees and forty minutes east, 610 feet; thence south, seventy-six degrees east (76 degrees east), two hundred feet to unconceded land; thence south, eight degrees forty-five minutes west

(8–45 west), five hundred and sixteen feet and four-tenths of a foot to the shore of Lake Huron; thence along the border of said lake, south, seventy-eight degrees west (78 degrees west), two hundred and twelve feet and nine-tenths of a foot to the place of beginning; reserving one hundred feet in front for the use of a road or public highway; reference for a more particular description being had to a patent to Bonape, and deed from Bonape to the American Board of Commissioners for Foreign Missions, on record in the registry office for the county of Michilimackinac.

"Also a parcel of land situate in the borough of Michilimackinac aforesaid, and being the same lot which is said to have been surveyed by Aaron Greeley on the 20th of October, 1810, but the certificate of which survey, as ascertained from the books of the land-office at Detroit, bears date the 20th of October, 1819, as having been made on claim of Baptiste Bertrant, containing one hundred and three thousand six hundred and fifty-two square feet, as recorded in Book B, page 200, in a deed from William M. Ferry and wife to said American Board, in the registry office for said county of Michilimackinac; reference being thereto had.

"Also the following lands in said Michilimackinac, bounded as follows, to wit: Westerly on a lot belonging to Mrs. Mary Fisher; northerly on land of the United States; easterly by lands patented to Daniel Bonape; southerly on a road laid down in the borough plat, which separates this lot from the claim reserved to Joseph Valencoer. This lot was surveyed in 1829 by John Mullet, and on which survey a patent issued, and to which reference is made for course and distance, and is the same purchased from Joseph and Jane Roulette, 25th of August, 1829, and recorded in said county of Michilimackinac in the register's office, in Book B, page 35; reference being had thereto. Together with the Mission House and other buildings, now and lately in the occupation of E. A. Franks, as a public house, and which were erected by the said board, and under their direction, by permit from the United States and their agents at Michilimackinac, and their right to pre-emption under the laws of the United States."

This latter description is the one contained in the decree. Appellant insists that three small lots, numbered

13, 14, and 705, are the only ones covered by the mortgage, which was given to secure the loan of $6,000, but that the adjoining premises, including 16 acres and a large hotel, are not covered by it. These three lots were at the time worth but a small part of the money loaned. Upon receiving the deed November 9, 1855, Franks took possession of these premises, including the hotel, and occupied the same until his death, which occurred January 24, 1881. Some years afterwards it was discovered that the title to the 16-acre tract had never been acquired by Mr. Franks' grantor or by him, but that it belonged to what is known as the "Military Reservation," the title being in the United States. The military authorities upon the island of Mackinac attempted to obtain possession of the premises. This was resisted by Mr. Franks, who finally received a lease from the United States government for the premises upon the payment of the nominal rent of $10 per year. This lease was dated October 20, 1870, and contained the following description:

"Beginning at a post at the north-east corner of the lane; thence north-east fourteen hundred and sixteen (1,416) feet to a fence near Fully Rock; thence south-east two hundred and fifty (250) feet to the shore of Lake Huron; thence south-west along said shore thirteen hundred (1,300) feet; thence north three hundred and thirty-three (333) feet to a post; thence north thirty-four (34) feet to the place of beginning, containing about sixteen acres (16)."

Mr. Franks appealed to Congress, and an act was finally passed authorizing the land to be conveyed to him for the sum of $200. The Secretary of the Treasury, in pursuance of this act, executed to him a quit-claim deed covering this tract, thus securing to him the absolute title to the land.

The question is, did this subsequently acquired title

inure to the benefit of Mr. Sellew under his mortgage? The proofs are convincing that the mortgage was executed by both parties in the belief that it covered these premises, of which Mr. Franks was, and had been for many years, in the actual possession, claiming title. The testimony, both oral and written, including letters which passed between Mr. Sellew and Mr. and Mrs. Franks, and other papers executed by them, leave no doubt upon this point. The chief value consisted in the 16-acre tract and the buildings situated thereon. We see no escape from the conclusion that the subsequently acquired title inured to the benefit of Sellew under his mortgage. It is unnecessary to review the testimony.

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

Some of the land has been sold, and upon the foreclosure sale it must be sold in parcels in the inverse order of alienation.

The other Justices concurred.

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FRANK PUTNAM v. MARTIN V. RUSSELL, ADMINISTRATOR, ETC.

Quitclaim deed—Failure of title—Parol evidence.

A quitclaim deed conveys only the grantor's interest,[1] and the grantee cannot change its terms by proof of a contemporaneous verbal agreement by which the grantor was to refund a proportionate share of the purchase price in case of the failure of the title to ten acres of the land then in dispute, and which afterwards failed.

[1] See *Peters v. Cartier*, 80 Mich. 124.

Error to Shiawassee. (Newton, J.) Argued May 8, 1891. Decided July 3, 1891.

Appeal from decision of commissioners on claims. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Walter McBride, for appellant.

James M. Goodell, for defendant.

McGRATH, J. Henry J. Carlough conveyed to plaintiff, by quitclaim deed, 30 acres of land, the title to 10 acres of which failed.

Carlough died, and plaintiff presented a claim against his estate for $66, the proportion paid for this 10 acres. The proofs clearly showed that at the time of the conveyance it was well understood by both grantor and grantee that Carlough's title to this 10 acres was in dispute, and it was agreed between the parties that if the title to this 10 acres should fail the amount paid therefor should be refunded to plaintiff. The circuit court, upon appeal thereto, admitted all the testimony, and afterwards instructed a verdict for the defendant.

If such an arrangement as is set forth here existed, the plaintiff should have insisted upon a warranty deed. The quitclaim conveyed the grantor's interest only, and the plaintiff should not be permitted to introduce a contract resting in parol, varying the terms of the written instrument, and making it in effect a warranty deed.

A contract resting in parol, and inconsistent with the written instrument, cannot be said to be an independent contract within the authorities, and cannot be sustained.

The judgment below is affirmed, with costs to defendant.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not sit.

JOHN FURMAN v. E. T. FURMAN, HIGHWAY COMMISSIONER, AND CHARLES BRAUGH, CLERK, OF THE TOWNSHIP OF DOVER.

Highways—Discontinuance—Jurisdiction.

Proceedings for discontinuing a highway are void unless it appears from the return of the commissioner that he viewed the premises, and determined the public necessity for such discontinuance.

Certiorari to review proceedings for discontinuing a highway. Argued June 3, 1891. Proceedings quashed July 3, 1891. The facts are stated in the opinion.

Watts, Bean & Smith, for petitioner.

MORSE, J. *Certiorari* to review proceedings taken to discontinue a highway.

The proceedings must be quashed. The record of the commissioner's action, as found in the office of the township clerk, and all the record made as shown by the return of the commissioner, fails to show that he ever viewed the premises, or determined the public necessity of discontinuing the highway. The record shows a meeting at the house of one George Deline, in Dover, and an adjournment. In the record of this meeting, or the adjourned one, there is no statement of any viewing of the premises; and, although the commissioner may have meant to return that he determined the public necessity of a discontinuance of the highway, he has not done so, as will be seen by an inspection of such return, which is given below:

"I, the undersigned, commissioner of highways of the

township of Dover, in the county of Lenawee, do hereby certify and return at the adjournment meeting, held at the house of Geo. Deline, on the 16th day of February, 1891, that in pursuance of the application hereto attached of Geo. H. Deline, I. N. Warren, Levi J. Deline, J. H. Hawkins, S. N. Palmer, Mathew Garrison, Aaron Jones, M. L. Davis, D. H. Warren, Lewis B. Canniff, Arthur Bovee, Hiram Deline, Milo Bovee, Arthur Manchester, and Ephram Palmer, all of whom are freeholders of the said township, for the discontinuing of the highway therein, known and described as follows: Commencing one-half mile south of the north-east corner of section thirty-two (32); running west one mile, to section line between sections thirty-one (31) and thirty-two (32); which application was presented to I. N. Warren, Levi Deline, Henry Hawkins, Geo. Deline, and Stillwell Palmer; that the discontinuing of said highway was necessary and proper, and the same was thereupon discontinued by me.

"E. T. FURMAN,

"Commissioner of Highways of the Town of Dover."

We have repeatedly held that it must appear of record that the premises were viewed by the commissioner, and that he found a public necessity for his action. The return that he laid out or discontinued a highway is not sufficient. That fact does not carry with it the presumption that he determined that there was a public necessity for so doing.

The proceedings are quashed, but without costs.

The other Justices concurred.

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THE PEOPLE v. WILLIAM APLIN.

Criminal law—Jury—Right of challenge—Burglary—Curtilage.

1. Until a respondent has exercised all of his peremptory challenges, he cannot be heard to complain of the retention of an alleged incompetent juror; citing *Sullings v. Shakespeare*, 46 Mich. 408; *People v. Barker*, 60 Id. 277; *Theisen v. Johns*, 72 Id. 285.
2. A barn adjacent to the dwelling-house of the owner, and to which he has access by means of a gate or bars, and which he uses for the better enjoyment of the dwelling-house, as farmers commonly use such buildings in connection with their homesteads, is within the curtilage, and under the law will be regarded as a part of the dwelling-house.

Error to Genesee. (Newton, J.) Argued June 17 and 18, 1891. Decided July 3, 1891.

Respondent was convicted of burglary, and sentenced to the State House of Correction and Reformatory at Ionia for five years. Judgment affirmed. The facts are stated in the opinion.

Ransom C. Johnson, for respondent.

A. A. Ellis, Attorney General, and *John M. Russell*, Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of burglary. Two errors are alleged upon which he asks for a reversal of his conviction:

1. That a disqualified juror sat upon the panel.[1]
2. That the building into which the respondent broke and entered was not within the curtilage.

1. We need not determine the qualifications of the

[1] The juror was challenged for cause, and the challenge overruled.

juror under this record, because the defendant did not challenge the juror peremptorily, nor exhaust his peremptory challenges. Until a respondent has exercised all his peremptory challenges, he cannot be heard to complain of the retention of an alleged incompetent juror. *Sullings v. Shakespeare,* 46 Mich. 408; *People v. Barker,* 60 Id. 277; *Theisen v. Johns,* 72 Id. 285.

2. The dwelling-house was alleged in the information to be that of one John Donnelly. The evidence showed that James Donnelly, a son of John, lived in another house upon the premises, with a lane between the two houses. There were several outbuildings upon the premises, including a barn, which was broken and entered, and certain goods stolen therefrom. Both James and John had property in the barn at this time. The barn stood a short distance from the house. At the end of the house was a little gate, through which was the passage-way from the house to the barn. This gate was about 10 feet from the door of the house, and there was no other fence between the house and the barn.

The circuit judge, upon this branch of the case, charged the jury as follows:

"You will judge whether this barn was cut off from open access by bars or gate from the house to the barn, and from the barn to the house. If you so find, then the barn would not be within the curtilage of the house, and would not be protected as a part of the house, and the respondent could not be convicted. But if you find that the barn was an outhouse adjacent to and used as a part of the homestead of John Donnelly, and there was access by gate or bars from the house to the barn, and that the same was used for the better enjoyment thereof by him, as farmers commonly use such buildings in connection with their homesteads, then such barn would be within the curtilage, and under the law would be regarded as part of the dwelling-house. And you must, gentlemen, be satisfied beyond reasonable doubt that the respondent alone, or by himself and another,

did break and enter the barn of John Donnelly within the curtilage, in the night-time, with the intent to commit the crime of larceny."

The greater part of the personal property in the barn belonged to James, but this is not conclusive that the barn was not in the curtilage of John. James testified that both he and his father had the privilege of using the barn, and that each had grain stored there at the time. We think the charge of the court correctly stated the law applicable to the case.

The conviction is affirmed.

The other Justices concurred.

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CLARENCE B. WARDLE, RECEIVER, ETC., v. EDWARD C. CUMMINGS.

Constitutional law—Mutual fire insurance companies—Appointment of receiver.

1. The petition filed by the Commissioner of Insurance under section 15 of Act No. 82, Laws of 1873, as the foundation of proceedings to wind up the business of a mutual fire insurance company, need not be verified.
2. Proceedings for the appointment of a receiver for a mutual fire insurance company, and for assessments to pay its outstanding debts and obligations, are not rendered invalid by a failure to give *personal* notice to the members of the company of the application for such appointment and of the assessments, they having assented to the provisions of the act under which the company is organized, which does not provide for such personal service.
3. The title to Act No. 82, Laws of 1873, entitled "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," embraces within its

scope the organization of mutual fire insurance companies to insure property in cities and villages *exclusively*.

4. The intent of Act No. 38, Laws of 1877, amendatory of Act No. 82, Laws of 1873, was to authorize the organization of other mutual fire insurance companies than those provided for in the original act, for the insurance of property in cities and villages exclusively.

Error to Ionia. (Smith, J.) Argued February 10, 1891. Decided July 3, 1891.

Assumpsit to recover an assessment made to liquidate the indebtedness of a mutual fire insurance company. Defendant brings error. Affirmed. The facts are stated in the opinion.

George H. Cagwin, for appellant, contended:

1. There can be no liability on a policy where the property insured is a class not authorized by statute to be insured; citing *Wildey v. Insurance Co.*, 52 Mich. 446; and the mill and machinery covered by defendant's policies, being outside the limits of a city or village, could not be insured under plaintiff's own theory that the company was organized to insure city and village property exclusively; citing same case.
2. The court never acquired jurisdiction to appoint a receiver. The petition was not verified, and no notice was given to the defendant or the company or its officers of the application for such appointment. If publishing the petition could in any manner be construed as notice to parties interested, a law authorizing notice of legal proceedings against residents of the State by publication is unconstitutional; citing *State Tax Law Cases*, 54 Mich. 350.
3. The failure of the act to provide for personal notice of the assessments is fatal to its validity; citing *Platt v. Stewart*, 10 Mich. 260; *King v. Harrington*, 14 Id. 533; *Soule v. Hough*, 45 Id. 418; *State Tax Law Cases*, 54 Id. 350.

Davis & Nichols and *McGarry & Ford*, for plaintiff.

McGRATH, J. Wardle, as receiver of the Home Mutual Fire Insurance Company of Ionia, Clinton, and Montcalm Counties, recovered judgment upon an assessment

made by order of court to liquidate accrued indebtedness, and defendant appeals.

The company was incorporated February 5, 1879, under Act No. 82, Laws of 1873, as amended by Act No. 38, Laws of 1877, for the purpose of insuring property in cities and villages exclusively. Section 1 of said act, as amended in 1881, reads as follows:

"SECTION 1. Any number of persons, not less than seven, may associate together and form an incorporated company for the purpose of mutual insurance of the property of its members against loss by fire or damage by lightning, which property to be insured may embrace school-houses, literary and grange halls, churches, agricultural societies' buildings, dwelling-houses, barns, accompanying out-buildings and their contents, farm implements, hay, grain, wool, and other products, live-stock, wagons, carriages, harness, household goods, wearing apparel, provisions, musical instruments, and libraries, being upon farms as farm property, or dwellings, accompanying out-buildings, and such other buildings as are specified in this section, that constitute detached risks in villages and cities, and their contents, as the charters and by-laws of said companies may provide, and belonging to members of said companies."

In 1877 an act to amend the act of 1873 "by adding one new section thereto, to stand as section 22, providing for the organization of mutual fire insurance companies to insure property in cities and villages exclusively," was passed and approved March 29, 1877, and reads as follows:

"SEC. 22. Companies heretofore organized in this State, or which may organize or reorganize hereafter, for the purpose of mutual fire insurance of the property of its members, confined exclusively to cities and villages, may under this act insure any and every class of buildings and contents in cities and villages; such risks being duly classified according to the degree of hazard, as shall be determined by said companies, and which shall be set forth in the charter or by-laws of such companies, and not inconsistent with the Constitution and laws of this

State: *Provided*, that the class of companies set forth in this section shall not insure farm property, and, except as provided in this section, shall be governed by all the provisions of the act to which this is amendatory."

The original act provides for the supervision of companies formed under it by the Commissioner of Insurance; and section 9 makes it the duty of the Commissioner, in certain contingencies,—

"To serve a notice upon the officers of such mutual company, requiring them, at the expiration of sixty days from the date of such notice, to discontinue the issuing of policies, and proceed to wind up its business, unless within that time the directors of such company shall collect assessments and pay such losses and debts."

The act contains these further provisions:

"SEC. 15. If any insurance company organized, or to be organized, under this act shall not, within sixty days after the Commissioner of Insurance shall have given the notice required by section nine, pay up and discharge all outstanding claims against such company, it shall be the duty of the Commissioner of Insurance to file a petition in the circuit court for any county where such company has transacted business, either in vacation or term-time, stating that the sixty days within which such company was required to proceed to wind up its business have expired, and that there are outstanding claims against such company; a copy of which said petition shall be published for three successive weeks in a public newspaper printed in such county, or, if no newspaper is published in such county, then such notice shall be published in any paper published nearest the office of such company."

"SEC. 17. At any time after the publication required by section fifteen of this act, the Commissioner of Insurance may appear in said court, in person or by counsel, and move for the appointment of a receiver for said company, and the said company may also be heard, and upon such hearing the report of such company, filed in the office of the Commissioner of Insurance, shall be conclusive evidence of the facts therein stated, and of the liability of such company, unless such company shall show that they have since paid and discharged the liabil-

ities; and if, upon the hearing thereof, it shall appear to such court that the statements in such petition are materially true, the said court shall appoint a receiver for such company, who shall be, and is hereby, empowered to take possession of all books and papers and personal property of said company."

On the 30th day of April, 1884, the Commissioner filed a petition in the circuit court for the county of Ionia, under section 15, aforesaid, setting forth fully the happening of the contingency contemplated by section 9 aforesaid, averring the giving of notice as required by said section, the expiration of the 60 days named in said section, and praying for the appointment of a receiver.

This petition was published as required by the act; and a copy of the same, together with the notice, entitled in said court, that said Commissioner would, on the 26th day of May following, move for the appointment of such receiver, was personally served upon the president and secretary of the company. On the 26th day of May, 1884, plaintiff was appointed receiver by said court. In February, 1885, the receiver filed a petition setting forth the liabilities of the company, asking leave of the court to make an assessment, and praying the advice and counsel of the court in relation thereto; and thereupon a hearing was had, and an order entered authorizing said assessment. An assessment was accordingly made, and notice thereof published as required by the act.

It is contended that the act is unconstitutional, and the proceedings in the appointment of the receiver and in making the assessment are void, for the following reasons:

1. That the petition filed in the circuit court under section 15 was not verified. But the statute does not require its verification, nor does the act require that it shall contain either a prayer for relief or process. It asks for no preliminary order; and it has frequently been

held that, in the absence of any statute or rule requiring it, a bill in chancery need not be verified, except when preliminary relief is sought. *Atwater v. Kinman*, Har. Ch. 243; *Moore v. Cheeseman*, 23 Mich. 332. The statute makes it the duty of the Commissioner to file this petition, and the hearing is had and the order made upon the motion contemplated by section 17.

2. Because the act makes no provision for the personal service of notice to the members of the company of the application for the appointment of a receiver, or of the assessment. The act provides for the publication of both of these notices, or substituted service, which was had. This is a mutual company, and all of its members, as well as the company, have assented to the provisions of the act, and are bound thereby. The company was duly notified under section 9, and the statute under which it had organized gave notice of what would follow if it failed to comply with the requirements of that section. The act makes no provision for notice of an assessment when made by the company, and under the act the company had power to do just what the receiver is endeavoring to do here, and no notice of the proposed exercise of that power was required. In *Wardle v. Townsend*, 75 Mich. 385, this Court held that the order of court authorizing the assessment, which was proper, was not essential. It is sufficient that the notices required by the act have been given.

3. Because the title of Act No. 38, Laws of 1877, expresses an object different from that expressed in the title of Act No. 82, Laws of 1873; because the title of Act No. 38, Laws of 1877, expresses the object of providing for the organization of mutual fire insurance companies to insure property in cities and villages exclusively, while the body of the act does not provide for the organization of any class of insurance companies whatever; and

because Act No. 38, Laws of 1877, is repugnant to and in conflict with section 1 of Act No. 82, Laws of 1873, and section 1 of said Act No. 82 stands unrepealed.

The Constitution requires that titles shall be truthful indexes to legislation. But an amendment of an act does not necessarily involve the amendment of its title. The title to Act No. 82, Laws of 1873, is as follows:

"An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties."

This title is broad, and embraces within its scope the subject-matter of the amending act. The object expressed in the title of Act No. 38 is not different from that expressed in the title of Act No. 82, but is within the purview of the title of the last-named act; and hence it was unnecessary to amend the title of Act No. 82 upon the adoption of the amendment. Act No. 38, Laws of 1877, added a new section to the statute already existing, which contained all the necessary provisions for organization. The added section must be associated with the act to which it is added. The fact that the title of the amended act set forth the specific purposes of the amendment did not affect the title to the act which it amended, inasmuch as the object of the amendment was within the scope of the title of the original act. The effect of the amendment was to provide for the incorporation of another class of corporations, but the title embraced both classes. Both were to be mutual fire insurance companies, to insure different classes of property. In *People v. Society*, 41 Mich. 67, the amendment introduced a purpose not coming within the title of the original act, and inconsistent with other sections remaining unrepealed; and in *Eaton v. Walker*, 76 Mich. 579, the same difficulty existed. In neither case was the title sufficiently broad to include

the purpose of the amendment, while here the title clearly indicates that the subject-matter of both of these sections, 1 and 22, is covered by the act.

The purpose of the constitutional enactment is to prevent—

1. "The joining in the same act of subjects diverse in their natures, and having no necessary connection."

2. "The insertion of clauses in the bill of which the title gives no intimation," and, as was said in a later case, "for the purpose of preventing the Legislature, as well as the people, from being misled as to their contents." *People v. Mahaney*, 13 Mich. 481; *Bissell v. Probate Judge*, 58 Id. 237; *Northwestern Manfg. Co. v. Circuit Judge*, Id. 381.

There is no diversity of subjects in the act in question. What is inserted is within the scope of the title, and neither the Legislature nor the public could possibly have been misled. The act providing for the formation of fire and marine insurance companies provides for the incorporation of companies for either purpose,—to insure against loss by fire, or against the risks of navigation. It clearly contemplates two classes of companies, or companies taking dissimilar risks. This act was scrutinized, and held valid, in *People v. Insurance Co.*, 19 Mich. 392. The act for the incorporation of manufacturing companies contemplated the formation of companies engaged in different and varied industries. The act was valid, notwithstanding the companies formed under it were engaged in the manufacture of different species of property, and each was restricted to the purpose set forth in its articles. In the present case the purpose of the act is to provide for the formation of mutual companies for either purpose,—to insure farm property or urban property. The members of each company are burdened with the hazard of that class of property which they own and

have insured. The end sought could be reached in no other way, for a classification of risks would have subjected the company to the risks of both classes.

It is contended, also, that the provisions of section 1 of the original act control, and that they expressly prohibit the insurance of the class of property owned and procured to be insured by defendant. The intent of the act as amended is to provide for the formation of other companies for the insurance of property in cities and villages. The company of which defendant was a member was organized to insure city and village property, and the policy upon which defendant is assessed was taken out by him upon village property.[1]

From a careful examination of the record we find no error, and the judgment is affirmed, with costs.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MORSE J., did not sit.

Defendant applied for a rehearing in this case, and on July 28, 1891, the following opinion was filed:

PER CURIAM: Defendant asks for a rehearing, basing his application upon the allegation that the record does not show that the Home Insurance Company was organized under section 22 of Act No. 82 of the Laws of 1873, as amended by Act No. 38 of the Laws of 1877. The record abounds with admissions of the fact of organization under the very section referred to, and counsel for defendant in his brief upon the argument concedes the fact.

The trial court in its findings expressly refers to the organization of the company under this act, and counsel for defendant asks the court to find that Act No. 38 of the Laws of 1877, "under which said company was organ-

[1] The findings of fact show that the property insured was a dwelling-house and a grist-mill and machinery, and that in his application the defendant described the property as within a village.

ized, is unconstitutional and void," and the court expressly refers to this request, and finds that said act was not unconstitutional and void. The record shows beyond any question that the point now made was not raised in the court below, but that the case was tried upon the theory that the company was organized under the act above referred to.

It is intimated that the fact of organization under the act named only appeared by affidavit filed herein upon a former application. But an omission in the record cannot be supplied by an *ex parte* affidavit, and this Court cannot and does not consider such affidavits when filed, except as they relate to the application then made.

The application will be denied.

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JOHN J. SULLIVAN v. PHILIP DEITER, HENRY WILGERMARTH, GEORGE HILLER, AND EDWARD COPPS.

Trial—Misconduct of counsel.

On the re-examination of a witness upon whose credibility, and the weight which the jury should give to his testimony, the whole defense to the action depended, the attorney for the plaintiff objected to the testimony as not re-examination, and added, "I know such things have occurred as a witness going out and getting posted, and then coming back and testifying. I do not suppose any member of this bar would do that." And it is held that such remarks could have had no other than a prejudicial effect upon the jury, in leading them to believe, or in suggesting to them, that the witness might have been tampered with between the time of his examination in chief and his re-examination, and may have led the jury to discard the testimony of the witness, and to give weight and credence to that of the plaintiff, which was directly contra-

dicted by that of the witness, thus influencing the result of their verdict.

Error to Gogebic. (Daboll, J., presiding.) Argued April 21, 1891. Decided July 3, 1891.

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

C. F. Button and *M. M. Riley,* for appellants.

Frank F. Kutts and *Thomas B. Wilson,* for plaintiff.

CHAMPLIN, C. J. The plaintiff, Sullivan, showed to the defendant Copps a mining location in the vicinity of Marenisco, Mich., and entered into an arrangement with him, by which Copps secured a mining option, and he and Sullivan went upon it, and worked together in developing it, as far as it was possible for them to do, and also expended some money, Copps paying out rather more than Sullivan. Copps then wrote to Mr. Deiter, of Chicago, to come up and examine the location, with a view of getting him interested in the option. He came up, and looked over the location, and was satisfied with the prospect, and took some specimens of the ore back with him to Chicago to have them assayed, and in about two weeks he wrote Copps to come to Chicago. He went there with the knowledge of Mr. Sullivan, and entered into an arrangement, which is not shown in the record, with the defendants Deiter, Wilgermarth, and Hiller, under which they were to furnish everything to go on and explore thoroughly, and Sullivan and Copps were to have their living, and have everything furnished. He endeavored to make an arrangement with them by which both he and Sullivan would draw wages, but they refused that, saying that he and Sullivan were to put in their labor against their capital, and were to have a one-eighth

interest each in the option. They were to put in capital to the extent of $10,000 for the purpose of exploring and developing the mine, if one existed there. Mr. Copps states that, on his return from Chicago, he informed Mr. Sullivan of the terms that he had made with the Chicago parties, and that Mr. Sullivan was satisfied with them. Mr. Sullivan testifies that he knew nothing of the arrangement made by Copps with the other parties in Chicago, except what Mr. Copps told him, and that he did not tell him that they were to put in their labor without pay. In the agreement made with the parties in Chicago, the one-eighth interest retained by Sullivan and Copps was to be non-assessable.

The parties went on to develop the mine, and expended $10,000 and upwards. Mr. Sullivan testifies that, when Mr. Copps came back from Chicago, he informed him that he had entered into an arrangement with the other parties defendant to develop the mine, put in their capital, and that he and Copps were to have a one-eighth interest each non-assessable; or, in other words, that nothing should be charged against his interest for exploration until it should become a paying mine. He testifies that Copps claimed to be the superintendent and was representing the company; that he commenced work the next day, which was on the 30th day of August, 1888, and worked until the 14th day of December, 1888. He says that Copps agreed with him that he should receive for his wages $1.25 a day; that he also hired his wife to go to the mine and help work, and agreed that she should have wages at the rate of $40 a month until such time as Mr. Copps' wife arrived, when they should have $20 each a month. He states that he has only received $10 for wages; that he ascertained that his name was not on the pay-roll; that he demanded to be paid wages when the other men were paid who were employed at the mine,

and that Copps told him that he had to pay out so much he did not have enough, but, if he would wait until the next pay-day, he would get it all, but he never received any pay except the $10; that, on or about the 19th day of November, Mr. Hiller came to the mine, when he demanded his pay of Hiller; and Hiller told him that he should not pay him any, and that the arrangement or agreement was that he and Mr. Copps were to put in their labor without wages; and he states that that was the first time he heard of it; that he told Mr. Hiller that he never agreed to do anything of the kind, and demanded his wages right there, and Mr. Hiller refused to pay him; that he continued to work until the 14th day of December, when he sold out his one-eighth interest in the option to Mr. Deiter for $150 cash, and he and his wife left the mine on the 17th of December.

He further testified that his wife commenced work on the 6th day of September, 1888, and worked until the 19th day of October, at $40 a month, and then Mrs. Copps came down, and his wife worked from the 19th day of October until the 17th of December at $20 a month, and that she had assigned her claim against the defendants to him; and in the month of January, 1889, he commenced suit by attachment against all the defendants for the amount which he claimed to be due him and his wife for wages.

Mr. Copps, in his testimony, denies that he hired Mrs. Sullivan to work at all, but says that she did some extra work before his wife arrived, and that he paid the $10 which Sullivan claims was paid on his wages to her for such extra work.

The main question in the case is, to what extent is Mr. Sullivan bound by the arrangement which Mr. Copps made with the parties in Chicago? It is claimed on the part of the defendants that Mr. Copps represented his

own interest and that of Mr. Sullivan in making the arrangement with the Chicago parties, and in regard to such arrangement, as the agent of Mr. Sullivan, and the fact, which is undisputed, that Mr. Sullivan accepted the contract to the extent of retaining a one-eighth interest in the option, and selling it to Mr. Deiter, and realizing money upon it, was a ratification of that contract, for the reason that, at the time he made his sale, he was then acquainted with the particulars of the contract, and that, if he wished to repudiate it and receive his wages, he should have done so, but that he cannot retain his interest, and sell it as an existing interest to Mr. Deiter, and repudiate the contract which they made with reference to his wages and those of Mr. Copps; that, if Mr. Copps made the agreement which Mr. Sullivan claims he did with regard to wages, it was done without their authority and without their knowledge, and that they never had recognized it as binding upon them.

But it appears from the testimony that the defendants, Deiter, Wilgermarth, Hiller, and Copps, constituted the firm of Philip Deiter & Co., and, if they were a copartnership, Mr. Copps, as a member of the firm, would have a right to make any contract which was proper to carry out the objects of the partnership, and the hiring of men and agreeing upon the terms upon which they were to be paid would come within the scope of the partnership dealings, and it would not be competent for the defendants to repudiate his authority to hire the plaintiff to work for the company, although they had agreed between themselves that the plaintiff should work for nothing. The interest which he held in the option would not prevent him from hiring out to the company for wages, nor is there anything in the record which discloses that his retaining such interest would constitute him a partner with the others in prosecuting the work.

According to the plaintiff's testimony, that interest was retained for him as a reward for his discovering the location. Had the agreement which was entered into by and between the defendants been introduced in evidence, we should have been enabled to determine the rights of the parties under it, and it would show whether or not Copps was a copartner with the other defendants, and as such authorized to enter into the contract of hiring declared upon. As a partner, he would also have a right to hire Mrs. Sullivan to labor for the partnership, and there does not appear to be anything contained in the agreement which would militate against his authority to hire her. The record is very indefinite and unsatisfactory, but it rests upon the plaintiffs in error to show that error has been committed.

Error is assigned also upon the conduct of the plaintiff's attorney during the trial of the cause. Upon the cross-examination of Mrs. Copps, counsel for defendant asked this question:

"*Q.* Now, let me see if I understand you. I understood that you made this contract the 5th of September?

"*Mr. Kutts:* You know that the talk had been had with her husband before. What is the use of undertaking to mislead this witness?

"*Mr. Riley:* I object to that. The witness is on the stand on cross-examination. Will your honor note a formal exception to the remarks of counsel?

"*The Court:* Yes; but I do not think it will prejudice you very much."

Again, upon the redirect examination of the witness Copps, he testified that "it was understood on the start that we were not to get wages, and Sullivan never said anything about them.

"*Q.* Did you have a conversation with Mr. Sullivan at any time in which Mr. Sullivan requested you to put the

names of fictitious persons on the pay-roll, so that you and he could get pay?

"*Mr. Kutts:* I object to it, if it please your honor, for at least six reasons. The first is, it is grossly, outrageously, and indecently leading; it is also immaterial."

And thereupon the counsel for defendant excepted to the remarks of counsel in objecting to the question as grossly, outrageously, and indecently leading.

"*The Court:* The proper question to this witness is to ask him if he has given all the conversation that he can remember; I do not think he has said that yet.

"*Q.* Have you given all the conversation between you and Mr. Sullivan that you can remember in relation to his pay?

"*A.* Well, we had a conversation once. He wanted me to put in a bill for their stove.

"*Mr. Kutts:* That is not the question; you are altogether too fresh.

"*The Court:* The question asked you was whether you had given all the conversation you could remember between you and Mr. Sullivan on the subject of his wages.

"*A.* No, sir.

"*Q.* What other conversation did you have with him, and the time it took place?

"*A.* Well, we were talking one day about—

"*Mr. Kutts:* I wish to make the objection here that this is not re-examination. I know such things have occurred as a witness going out and getting posted, and then coming back and testifying. I do not suppose any member of this bar would do that;" to which remarks the said counsel for defendants did then and there except.

"*The Court:* Gentlemen of the jury, you are to decide this case on the evidence, and what the witnesses say, and not what counsel say."

The language of the attorney for the plaintiff during the progress of the trial, as above shown from the record, cannot be justified, especially the objection which he made to the re-examination of the witness Copps. This witness was a material witness for the defendants, and upon his credibility, and the weight which the jury should give to his testimony, depended the whole defense

to the action. His testimony directly contradicted that of the plaintiff, Sullivan, and the remark of counsel could not have had other than a prejudicial effect upon the jury, in leading them to believe, or in suggesting to them, that the witness might have been tampered with between the time of his examination in chief and his re-examination. It may have led the jury to discard his testimony, and to give weight and credence to that of the plaintiff, thus influencing the result of their verdict.

In *Rickabus v. Gott,* 51 Mich. 127, this Court held that "the duty of the trial judge to repress needless scandal and gratuitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully." See, also, as bearing upon this question, *Bond v. Railroad Co.,* 62 Mich. 643; *Cronkhite v. Dickerson,* 51 Id. 178; *Wheeler v. Wallace,* 53 Id. 356, 364; *People v. Hare,* 57 Id. 506.

The jury found a verdict for the plaintiff in the sum of $223.86, which amount exceeds the sum which the plaintiff is entitled to recover under his testimony. He states that he commenced work on the next day after the 29th day of August, 1888, which would be the 30th, and that he worked until the 14th day of December. This would make a total of 107 days, but there should be deducted therefrom 15 Sundays, leaving 92 days, at $1.25 a day,—a total of $115; from which should be deducted $10, which he admits he was paid, leaving $105. According to the testimony, his wife commenced work on the 6th day of September, 1888, and worked until the 19th day of October, at $40 a month, for a month and 13 days, amounting to $54; and she worked from that time to the 17th day of December, at $20 a month, for 1 month and 28 days, amounting to $38.67, making a total of $92.67, which, added to the $105, makes $197.67. If he be allowed interest from the 17th

day of December until the day the suit was commenced, it would amount to $13.23, making a total of $210.90, instead of $223.86, as the jury found. Whether the amount of their verdict be the result of error, or whether they added something which does not appear in the record, cannot be ascertained.

We think that, for the error pointed out with reference to the manner in which the cause was tried, the judgment should be reversed, and a new trial ordered.

McGrath, Long, and Grant, JJ., concurred. Morse, J., did not sit.

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Annie McHugh v. The Estate of Edward O. Dowd, Deceased.

Evidence—Estates of deceased persons—Matters within knowledge of deceased—Waiver by administrator.

1. It is not competent for a witness to testify to the supposed motive which influenced the action of another.
2. An administrator cannot waive the statute of limitations (*McGee v. McDonald's Estate*, 66 Mich. 629); nor can he waive the provisions of the statute which prohibit a claimant against the estate from testifying to facts, tending to support the claim, which were equally within the knowledge of the deceased.
3. A claim against the estate of a deceased person, based upon an open account, should give the items of which it is composed, with the dates when they accrued and the respective amounts.

Error to Wayne. (Hosmer, J.) Argued May 20, 1891. Decided July 3, 1891.

The administrator brings error from the judgment of

the circuit court allowing a claim against the estate on appeal. Reversed, and a new trial granted. The facts are stated in the opinion.

Brennan & Donnelly (*E. F. Bacon*, of counsel), for appellant.

Conely, Maybury & Lucking, for plaintiff.

CHAMPLIN, C. J. The plaintiff presented the following claim against the estate of Edward O. Dowd, deceased:

"1. Work and labor performed by claimant for deceased in his life-time, and board furnished him by claimant, $950.

"2. Money paid by claimant to use of deceased in his life-time to pay interest on and redeem from Hasselbacker mortgage, $780.

"3. Money loaned by claimant to deceased, to wit, in summer of 1883, $400.

"4. Purchase price of land deeded by claimant to deceased in his life-time, to wit, August 7, 1883, said land being lot 6 of the Chas. Moran farm, Detroit, Wayne county, Mich., to wit, $1,000.

"5. To money due claimant from deceased on promise made in consideration of said deed of said land to pay her in money for her past services, and board furnished deceased, said new promise being made on, to wit, August 7, 1883, to wit, $1,000.

"The total sum of the claim sought to be recovered in this proceeding is $1,250."

Upon the trial in the Wayne circuit court before a jury, a verdict was rendered in favor of the claimant for $546.

It appears that the claimant was permitted to testify, without objection, to several material matters which, if true, must have been equally within the knowledge of the deceased. This ought not to have been permitted by the party representing the estate. It has been held that an administrator cannot waive the statute of limita-

tions, and thus charge the estate for a claim which the law presumes to have been paid. *McGee v. McDonald's Estate,* 66 Mich. 629, 630. The defense of the statute was relied upon in this case; but of what avail is such defense if the administrator permits the claim to be established by incompetent witnesses? If the administrator cannot waive the statute of limitations, neither can he waive the provisions of the statute prohibiting a party to testify in support of a claim to facts tending to establish it which are equally within the knowledge of the deceased person. The statute was designed to protect the estates of deceased persons against claims which depend, in whole or in part, upon testimony of a party which cannot be refuted by the testimony of the deceased. To permit such party to testify would be a direct violation of the policy of the statute, and open the door to the perpetration of fraud against the estates of deceased persons, which it was the policy of the law to prohibit.

It was error to permit the witness Mrs. Craib to testify to what she supposed Dowd thought as a reason why he asked her if she knew "how we stand on the board-bill." *Clement v. Cureton,* 36 Ala. 120; *Gorham v. Gorham,* 41 Conn. 242. This error is sufficient to reverse the case; but, in sending it back for a new trial, we desire to call attention to the very vague and general language of the claim. The bill of particulars is no more definite than the claim, and the items are too vague and uncertain to permit proof to be given to charge the estate. If there exists an open account, the items of which it is composed, with the dates when they accrued and the respective amounts, can be given; and this should be required before a new trial is had. The testimony by which the claim is supported is of the same

general uncertain character, owing, perhaps, to the fact that no account current was filed to which it could be confined.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

THE PEOPLE v. BERT ROBINSON AND CHARLES SMITH, ALIAS CHARLES HUGHES.

Criminal law—Evidence—Confessions—Cross-examination of respondent—Trial.

1. Where the question whether the confessions of a respondent to an officer were freely and voluntarily made is fairly submitted to the jury as an issue of fact, under proper instructions (*People v. Howes*, 81 Mich. 396), evidence of such confessions is competent (*People v. Barker*, 60 Mich. 279, head-note 10).
2. Act No. 245, Laws of 1881, permitting a respondent in a criminal case to testify as a witness in his own behalf, repealed Act No. 125, Laws of 1861, permitting him to make an *unsworn statement* to the jury.
3. A respondent who offers himself as a witness, and testifies in his own behalf, is subject to the same rules as to cross-examination as other witnesses.[1]

   So *held*, where the respondent so offering himself was permitted to make an unsworn statement to the jury, and was fully cross-examined thereon.
4. The mere fact that a respondent's counsel is not present when further instructions are given to the jury is not reversible error, where it is impossible to secure his attendance when the jury need further direction, if such instructions are taken down by the reporter and are unobjectionable.[2]

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[1] See *People v. Howard*, 73 Mich. 10; *People v. Pinkerton*, 79 Id. 110; *People v. Bussey*, 82 Id. 49.

[2] See *People v. LaMunion*, 64 Mich. 709.

Error to Kalamazoo. (Buck, J.) Argued June 17, 1891. Decided July 3, 1891.

Respondents were convicted of burglary, and sentenced to the State House of Correction and Reformatory at Ionia. Judgment affirmed. The facts are stated in the opinion.

O. T. Tuthill, for respondents.

A. A. Ellis, Attorney General, and *L. N. Burke,* Prosecuting Attorney, for the people.

LONG, J. The respondents were convicted in the Kalamazoo circuit court before a jury of the statutory offense of breaking and entering a flouring-mill in the night-time with intent to commit the crime of larceny. The case comes to this Court by writ of error.

The claim upon the part of respondents' counsel in this Court is:

1. That there is no competent testimony showing the respondent to have been guilty of the crime of burglary.
2. That the court was in error in permitting the sheriff of the county to testify to confessions made by the respondents after their arrest.
3. That, the respondents having made statements upon the witness stand not under oath, the court was in error in permitting the counsel for the people to cross-examine them upon matters not stated by the respondents.
4. That the court was in error in permitting the jury to be recalled to the court-room after they had retired for deliberation, and giving them further instructions in the absence of respondents' counsel.

There was no question upon the trial but that the respondents entered the mill in the night-time, and attempted to carry away therefrom a quantity of flour. The owners of the mill had been advised beforehand that a burglary would be attempted there that night, and were on the lookout for the parties, with the officers of

the county. The respondents were seen to enter the mill through a basement window, which was shown to have been boarded up at the time the mill was closed on the evening of that day. After the arrest of the respondents, which followed immediately after their coming out of the mill, the boards upon this window through which they had entered were found to have been broken off. The sheriff testified upon the trial that after the respondents were arrested Hughes made a statement to him that, when the respondents reached the mill, respondent Robinson kicked the boards off the window through which they entered. The respondents in their statements denied this, and claimed that whatever statement was made by them was made under promise by the officers of the county that it would be better for them if they would tell how the matter occurred. They each admitted going into the mill on that night through this window, but claimed that it was by arrangement with one Sorenson, who wanted them to go and help him get some flour; that they had all been drinking more or less, and when they arrived at the mill they found the window open, went in, and threw the flour out of the window. It appears, therefore, that there was some evidence by the confession of the respondents that they broke and entered the mill as charged in the information. The claim that this confession was made under any sort of promises or threats is wholly contradicted by the sheriff, and the question was fairly submitted to the jury whether any such promises or threats were made. We therefore find no foundation for the claim made in counsel's first and second propositions.

The people have the same right of cross-examination of the respondents, they having offered themselves as witnesses, as though they had been sworn. The cases

referred to by respondents' counsel, limiting the cross-examination of the respondents when making statements in their own behalf and not under oath, were cases arising prior to the statute of 1881. Act No. 245, Laws of 1881. This act was an amendment of Act No. 125, Laws of 1861, which permitted the respondent in a criminal case to make a statement, not under oath, before the court and jury upon the trial. By the amendment of 1881, permitting the respondent in a criminal case to testify upon oath before the court and jury upon his trial, the act of 1861, permitting a statement to be made by such respondent not under oath, was repealed. The court was not, therefore, in error in permitting the prosecuting officer to cross-examine the respondents the same as though they had been sworn in the case as witnesses, and the rule of cross-examination applied to other witnesses must be applied to the respondents under the statute of 1881, when the respondent himself testifies as a witness in his own behalf.

Counsel for respondents cites us to the case of *People v. Reilly*, 53 Mich. 260, and claims that it was intimated there by Mr. Justice SHERWOOD that the respondent in a criminal case had yet the right to make an unsworn statement before the jury upon his trial. What was said in that case must be treated as mere *dictum*, as it appeared that the respondent was sworn as a witness in his own behalf.

The fourth claim of respondents' counsel must be overruled, as it appears that the further charge of the court to the jury upon their being recalled to the court-room was unobjectionable. The mere fact that respondents' counsel was not present when this further charge was given to the jury is not such error as to call for a reversal of the case. It is very proper that the respondents should

have the benefit of the presence of their counsel if the jury are to be further instructed, and we think it the manifest duty of the court to give the counsel such opportunity, so that the interests of the respondents may be properly guarded; but it sometimes happens that it would be impossible to procure the attendance of counsel for the respondent when the jury might need further direction, and there is no error, under such circumstances, in the court giving the jury further directions, where such directions are taken down by the reporter, so that the whole proceeding may fairly appear upon the record. Unless there is some manifest error in the instructions given, the case will not be reversed.

We find no error in this record, and the conviction must be affirmed.

The other Justices concurred.

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THE PEOPLE v. WILLIAM DEITZ.

Criminal law—Evidence—Duty of prosecutor.

1. In a prosecution for assault with *intent* to do great bodily harm less than the crime of murder, it is competent for the people to show that the prior relations of the parties were unfriendly, and specific threats and acts of violence on the part of the respondent may be given in evidence. *People v. Potter*, 5 Mich. 8; *Dillin v. People*, 8 Id. 357; *People v. Bemis*, 51 Id. 422; *People v. Eaton*, 59 Id. 559.

2. Where, in such a case, the testimony fails to show a present intention of inflicting the threatened injury, but does show that the threat was conditional, depending for its execution upon the action of the injured party, and that it was not executed, and that the parties worked on adjoining farms for three years afterwards, during which time no ill feeling was

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shown to have been harbored by the respondent towards the complainant, evidence of such a threat has no tendency to show the existence of such ill feeling, and should be rejected.

3. If such evidence is admitted, and the respondent, instead of relying upon his objection and exception, goes upon the stand and denies making the threat, it is not competent for the people to show that it was made, on rebuttal, by way of impeachment of the respondent. *People v. Hillhouse*, 80 Mich. 580.

4. It is not correct practice to compel the defense to call witnesses present at the occurrence for which the party is upon trial. *Maher v. People*, 10 Mich. 225; *Hurd v. People*, 25 Id. 415; *Thomas v. People*, 39 Id. 312; *People v. Davis*, 52 Id. 573; *People v. Swetland*, 77 Id. 57.

   So *held*, where the names of certain witnesses, who were shown by the preliminary examination to have witnessed the affray at a distance of from 35 to 40 rods, were not indorsed on the information, and the court declined to require the prosecuting attorney to call them on the request of the respondent's counsel, although present in the court-room, and they were afterwards called and sworn on behalf of the respondent.

5. It is incumbent upon the prosecuting attorney not only to have such witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses; thereby affording the respondent an opportunity of cross-examination without prejudicing his case by the bias of the witness, if he should have any.[1] *People v. Etter*, 81 Mich. 570 (head-note 2).

6. It is incompetent for the prosecuting attorney, after refusing to call and swear a witness who was present at the occurrence for which the respondent is on trial, to comment upon the fact that such witness was sworn upon the preliminary examination, or that he was present in court, and was not called by the respondent.

7. Evidence of experiments and observations made by witnesses two months after an affray, offered to show that certain witnesses who had testified to seeing the affray from the stoop of a neighboring dwelling-house could not have seen it, is inadmissible, unless it is shown that no change had taken place in the surroundings of the location between the time of the affray

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[1] See, as to right of cross-examination after a witness is sworn, *People v. Barker*, 60 Mich. 279 (head-note 11), and cases there cited; *Turnbull v. Richardson*, 69 Id. 401 (head-note 10); *Ireland v. Railroad Co.*, 79 Id. 163 (head-note 1).

and the time when the experiments and observations were made.

Exceptions before judgment from Ingham. (Peck, J.) Argued June 17, 1891. Decided July 3, 1891.

Respondent was informed against for an assault with intent to do great bodily harm less than the crime of murder, and was convicted of a simple assault. Conviction set aside, and a new trial ordered. The facts are stated in the opinion, and in foot-notes.

Q. A. Smith, for respondent.

A. A. Ellis, Attorney General, for the people.

[The points of counsel, and the authorities bearing upon the same, are fully stated and cited in the opinion and foot-notes.—REPORTER.]

CHAMPLIN, C. J. Deitz was informed against in the circuit court for the county of Ingham to the effect that on the 9th day of June, in the year 1890, at the township of Alaiedon, in Ingham county, he made an assault upon one Herman De Long with a large club, which he then and there had, and did strike said De Long several grievous and dangerous blows upon the head and other parts of the body, with the intent him, the said Herman De Long, feloniously, willfully, and maliciously to do great bodily harm, less than the crime of murder. The case was tried in the Ingham circuit court, before the Honorable Erastus Peck, circuit judge, and a jury, and resulted in a verdict of guilty of assault, but not guilty with the intent to do great bodily harm less than the crime of murder. The respondent brings the case here upon exceptions before sentence.

It appears from the record before us that one Dr. L. R. Chaddock, who had retired from practice as a phy-

sician, was the owner of 160 acres of land in the township of Alaiedon, which fronted on a highway running north and south, and that upon each of the 80-acre tracts there were a residence, barns, and other outhouses; that prior to April 1, 1890, one Alfred Barnes, a son-in-law of Dr. Chaddock, had been in possession of the south 80-acre tract or farm as a tenant; that he had been notified by his father-in-law to quit the possession of the premises on the 1st day of April, 1890, and that he soon thereafter removed therefrom, but left upon the premises certain personal property. He claims he had an arrangement with the doctor by which he might remove such property after that date. It appears that there had been some unpleasant feeling between Dr. Chaddock and his son-in-low, Barnes, prior to the 9th day of June, 1890. It also appears that for several years Dr. Chaddock had a man in his employment working upon his farm by the name of William Deitz, the respondent in this case; and that his son-in-law, Barnes, also had a hired servant, who had worked the farm he occupied for several years, whose name was Herman De Long.

Barnes had been taking away his personal property from time to time, and on the 9th day of June, 1890, went with his hired man, De Long, to draw away a load of wood. To reach the wood-lot it was necessary for him first to leave the highway by way of a lane running east and west, passing the barn, and thence proceeding to the wood-lot, which was on the rear of the 80. After he had gone to the wood-lot, Chaddock and respondent, Deitz, went onto a field in the rear of the barn with a team, accompanied by a grandson by the name of Claude Hughson, a lad about 13 years of age, to get a load of stone for the purpose of placing them by a tile drain which Chaddock was constructing. While there Barnes and De Long came towards them from the wood-lot with

their load of wood, whereupon Chaddock and Deitz went to a gate which was at the corner of the barn, and when they arrived there told Barnes to stop his team, and an altercation ensued, Barnes claiming that Chaddock drew a revolver, and, cursing him, told him that he would force him to his knees; that he asked Chaddock to open the gate, and he replied that he could not pass through that gate; that he got off the load, and went to open the gate, and Chaddock flourished the revolver, and threatened to shoot him; that he passed him, and swung the gate open, and told his man to drive through, which he did; that he thereupon went to get upon his load, and the doctor struck him with his revolver, which he warded off with his left wrist. It appears also from Barnes' statement that he had a revolver, and drew it about the time he got off his load to open the gate, so that they were both armed with deadly weapons; that when the doctor struck him with the revolver he seized him, and attempted to disarm him, threw him upon the ground, and in the struggle dropped his own revolver, and while he was upon the ground with the doctor he (Chaddock) called upon the respondent, telling him to "Hurra, Will! Kill him, God damn him!" Thereupon De Long alighted upon the ground, Deitz picked up a club, and struck De Long over the head a couple of times, and then picked up the revolver which Barnes had thrown upon the ground, discharged it at De Long, and then turned and ran. De Long pursued him a short distance, and returned to the wagon, and they got on and drove away.

The doctor and Deitz claim that the doctor went to the gate, and spoke to Barnes, raising his hand, saying, "I wish you to give attention; I don't want you to come on this place any more;" and that Barnes got off the wagon and attacked the doctor with a revolver; that

he threw the doctor to the ground, and beat him across the nose with his revolver, threw his own revolver to De Long, who had descended from the load, and that De Long thereupon attacked Deitz, and that Deitz struck him in self-defense. Deitz says that De Long, when he got off of the load, threw a stick of wood at him, which hit him on the leg; that De Long then started towards Barnes and the doctor, and he (Deitz) told him not to interfere with them; that Barnes threw a revolver to De Long, and told him to shoot, calling him an opprobrious name; that De Long took up the pistol and shot, and he (Deitz) picked up a club, and hit him across the arms, and knocked the revolver out of his hands; that he then made for him (Deitz) the second time, and he (Deitz) struck him over the head; that De Long dropped to his knees, and went for Deitz the third time, swearing that he would kill him; and that he struck him again, and he fell to the ground, dropped the revolver, and Deitz picked it up and ran. The lad called Hughson saw a part of the fracas, but was not in position to see Barnes when he had the doctor down. The affray was also witnessed by some ladies, who were sitting upon the porch of a house standing upon the west side of the highway, at a distance of 35 to 40 rods, there being a hollow or declivity in the intervening space.

In the course of the trial the prosecuting attorney undertook to show that the respondent, Deitz, had some trouble with De Long, about three years before the occurrence narrated, at one Tyler's, where they were threshing. This testimony was offered by the prosecutor as bearing upon Deitz's intent at the time this trouble complained of occurred. Objection was made to the introduction of this testimony, and the court ruled that they might show that there had existed trouble between Deitz and De Long three years before, at the time of

the threshing; but he further permitted the prosecutor to show that a threat was made at that time by Deitz, and that he drew a knife on De Long at that time. On cross-examination of De Long, who had testified that he (Deitz) made a threat and drew a knife, it appeared that there was a party of threshers doing work at Mr. Tyler's with a machine; that De Long was employed in hauling grain from the field; that Deitz was employed upon a table or platform cutting bands, and that he was furnished with a knife for that purpose; that during the threshing Barnes and one Chaddock, a son of Dr. Chaddock, were having a fight with each other; that thereupon they stopped the thresher, and the men gathered round the combatants; that Deitz was standing upon this platform with his knife in his hand when De Long came running up towards the combatants, and that Deitz made a threat to do him bodily harm if he put his hands on the combatants; that he had no intention of laying hands on them; that he was standing upon the ground and Deitz upon the platform when he made this threat; that they had had no trouble or words before that time, and never after, until the occasion referred to on the 9th of June.

It was not error for the court to permit specific acts to be given in evidence. It was competent for the prosecutor to show that the previous relations between the parties were not friendly, or that they had had difficulties with each other, and specific acts of that character may be given in evidence between the respondent and the person assaulted or whose property is injured, where intent is essential to the offense charged. *People v. Potter*, 5 Mich. 8; *Dillin v. People*, 8 Id. 366; *People v. Bemis*, 51 Id. 423; *People v. Eaton*, 59 Id. 559.

A motion was made to strike out the testimony of Mr. De Long relative to the occurrence at the threshing,

but the court denied it. We think he erred in this. The testimony of De Long shows that what happened there did not amount even to an assault. It did not show that Deitz had a present intention of inflicting any injury upon him. The threat was conditional, and nothing came of it. The whole testimony with reference to what occurred at the threshing should have been excluded. Deitz did not draw a knife upon De Long. He stood there with the knife with which he cut the bands in his hands, and merely said to De Long when he came up that, if he interfered, he would do him bodily harm. Whart. Crim. Law, §§ 1241, 1242. It did not tend to show that any ill feeling existed between them, and they had worked upon adjoining farms for three years afterwards, and no ill feeling was shown to have been harbored by Deitz against De Long.

After this testimony had been admitted, the prosecuting attorney asked leave of the court to indorse upon the information the names of three witnesses for the purpose of further proving what occurred at the threshing. The court considered the testimony to be given by these witnesses as material, and upon the defendant's objection he granted the permission to place the names upon the information upon condition that the respondent's counsel should have leave to continue the cause over the term if he was not prepared to meet the proposed testimony, and, after consideration, the respondent elected to continue the cause over the term. The prosecuting attorney thereupon declared that he would withdraw the proposition, and go on with the trial, without introducing such testimony, and the trial proceeded. When the defense came to introduce their case, they placed Mr. Deitz upon the stand as a witness, and the respondent's counsel, instead of relying upon the exceptions which he had taken to the introduction of the

threshing-machine episode, examined Mr. Deitz upon that topic, who admitted that there was a fight there between Chaddock and Barnes; that he had a knife in his hand which he used for cutting bands; that De Long was present; but denied that he made any threats to do him bodily harm. After the defense closed their testimony, the prosecutor placed two of the witnesses, whose names he requested to have indorsed upon the information, upon the stand for the purpose of proving what took place at the time of the threshing, between Deitz and De Long. Respondent's counsel objected to the testimony, but the court permitted it, on the ground that the prosecutor could put on witnesses to deny what Deitz said about it.

We think the court erred in this. As before stated, what occurred at that time was entirely immaterial, as shown by the witness De Long, and when Deitz was brought upon the stand, and simply denied it, it should have rested there. The prosecutor could not introduce such testimony by way of impeaching Deitz. The testimony, if admissible at all, should have been introduced as a part of his affirmative case, and could not be brought in by way of rebuttal, if it was material testimony, nor by way of impeachment, if it was immaterial. *People v. Quick*, 58 Mich. 321; *People v. Hillhouse*, 80 Id. 580.

The next error to which attention is called is the refusal of the prosecuting attorney to examine Claude Hughson, an eye-witness of the affray, and to elicit what he knew of the transaction. Claude Hughson was not at first called by the prosecuting attorney, and, upon the suggestion of counsel for the respondent that it was the duty of the prosecuting attorney to place all eye-witnesses of the affray upon the stand, the prosecutor called Claude Hughson, and he was sworn, and some questions asked him by the circuit judge, but nothing as to the circumstances of the affray. The prosecuting attorney

declining to examine him upon that point, the court informed counsel for respondent that he could examine the witness if he chose to. He declined to do so at that time, and alleges error upon the ruling of the court, claiming that the prosecuting attorney should have found out from the witness all that he knew about the transaction.[1]

Defendant's objection may be considered also with reference to the further errors alleged, that the prosecuting attorney declined to call Dr. Chaddock, Sarah Bennett, Rhoda Bennett, and Jennie Bennett, who, it was claimed, were eye-witnesses of the transaction, Dr. Chaddock being present and taking a hand in the affray, and the other persons, it is claimed, witnessing the affray from the stoop of the Bennett house. It appears that these witnesses were all present in court, and that the prosecuting attorney declined to call them.[2] They were all competent

[1] The boy was 13 years of age, and his name was not indorsed on the information, and the examination by the court was preliminary, and evidently designed to test his competency, and at its conclusion the following colloquy occurred between the court and the counsel, as shown by the record:

"*The Court:* You may examine him.

"*Prosecuting Attorney:* I don't think I care to ask him any questions, if the court please. I want to treat the case entirely fair, but I would not have put the boy on the stand even, if I had not been compelled to do it. He is a bright, competent boy, but I don't care to ask him any questions.

"*The Court:* You may examine him if you care to.

"*Respondent's Counsel:* I want to insist that the prosecuting attorney should try this case fairly, and get from this boy, Claude Hughson, what he knows of this transaction.

"*The Court:* He says he has no questions to ask him. I cannot compel him to ask him questions. Under the circumstances you may examine him.

"*Respondent's Counsel:* I will waive cross-examination of him at present, but I want to save an exception to the refusal of the prosecuting attorney,—to the holding of the court to compel the prosecutor to ask the witness such questions as will elicit from him fairly what he knows about the matter.

"*The Court:* That is all, young man."

[2] The record shows the following discussion between the court and counsel:

"*Respondent's Counsel:* The return of the examination taken before the justice shows that Dr. Chaddock, Claude Hughson, Sarah Bennett, Rhoda Bennett, and Jennie Bennett were all wit-

witnesses. It is true that Dr. Chaddock had been complained of, but he was not jointly complained of, nor informed against with the respondent, Deitz. We have heretofore held that it is not correct practice to compel the defense, and not the prosecution, to call witnesses present at the occurrence for which the party is upon trial. *Maher v. People,* 10 Mich. 225; *Hurd v. People,* 25 Id. 415; *Thomas v. People,* 39 Id. 312; *People v. Davis,* 52 Id. 573; *People v. Swetland,* 77 Id. 57. It was said in *Wellar v. People,* 30 Mich. 22:

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nesses of this transaction, outside of the parties called, and they are present in court. I am not aware that the prosecuting attorney has made any effort to get them.

"*The Court:* There is no evidence here yet to show that the witnesses Bennett were very near the parties.

"*Prosecuting Attorney:* The evidence shows that they were 40 rods away.

"*Respondent's Counsel:* They were examined, and gave their evidence as to this affray, and were very much nearer than the one you did call, and saw a great deal more.

"*The Court:* I think it the duty of the prosecuting attorney to call the young man. I don't think it is his duty to call Dr. Chaddock. The reasons for it already appear; that the doctor, the prosecution is pending against him for taking part in this affray, and that he is present in court, and sitting by counsel for the defense, and has been prompting him in this examination, all of which is proper. So that you may act upon that suggestion."

After the examination of Claude Hughson, and his dismissal from the stand, as shown in the preceding foot-note, the following proceedings were had regarding the other proposed witnesses, whose names were not indorsed upon the information:

"*Respondent's Counsel:* I want, if the court please, before leaving this branch of the case, to ask the court to require the prosecuting attorney to call Dr. Chaddock, and I suppose the ruling is the same.

"*The Court:* I have already ruled on that.

"*Respondent's Counsel:* I save an exception to that. And I also ask that the prosecuting attorney be required to call all witnesses of this affray,—Sarah Bennett, Rhoda Bennett, and Jennie Bennett, who were all witnesses of this transaction, as appears by the testimony of the return.

"*The Court:* From your statement of the testimony, I understand it to be this: That they were not at the immediate place of the occurrence, but were some 35 rods, you say, about, from it?

"*Respondent's Counsel:* Yes, sir.

"*The Court:* And saw it from that distance?

"*Respondent's Counsel:* Yes.

"*The Court:* I will decline to order them called by the prosecuting attorney."

"The fact that the name of a witness is indorsed upon the information does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined."

And it was said that, where a person is present at the time the offense was committed, and there is no dispute about the fact of presence, the only objection then will be that he may not be favorable to the prosecution. But this is no answer to the people's not calling him as a witness, any more than it would be if the subscribing witness stood in a similar position. The public prosecutor is not the plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has not the right to suppress testimony, and the fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. And it was further said:

"And, if such a witness need not be called by the prosecution, the defense cannot impeach him, and must either call him, and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts."

We think the better rule is that it is incumbent upon the prosecutor not only to have the witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses. It affords the defense an opportunity to cross-examine without prejudicing their case by the bias of the wit-

ness, if he should have any. In this case respondent was compelled to call such eye-witnesses of the transaction as the prosecutor declined to call, and he placed upon the stand and examined Dr. Chaddock, Sarah and Rhoda Bennett, but did not place upon the stand Jennie Bennett. With respect to this witness, the following appears in the record, Mr. Day being the prosecuting attorney:

"*Mr. Day:* Are you going to call Jennie Bennett?

"*Mr. Smith:* Well, I have not.

"*Mr. Day:* I would like to have this return in evidence, so far as the testimony is concerned that I called Dr. Chaddock's and the boy's attention to, and also as showing that Miss Bennett was sworn as a witness on the examination on behalf of the respondent, and gave testimony there. Do you object?

"*Mr. Smith:* I think I shall, as incompetent and immaterial.

"*The Court:* What does the objection go to? What particular statement?

"*Mr. Smith:* It goes to the statement as to their attendance there?

"*The Court:* As to that part of it, I shall sustain the objection.

"*Mr. Day:* It already appears from the testimony in this case of Mrs. Bennett that Jennie Bennett is present here in court.

"*Mr. Smith:* I want to object. If the counsel wants to state anything in that regard, he can state it to the court. His making a statement of that kind is improper, and I want to except to it.

"*Mr. Day:* The testimony here shows from Mrs. Bennett that Jennie is here attending this trial in the court-room. This return says she was sworn as a witness. The testimony shows she was present with these people on this place that afternoon when they claim to have seen this transaction. They do not call her. I want to have this shown here, so that I can comment on that in the argument of the case. This fact ought to appear, and what her testimony is.

"*Mr. Smith:* I want to except to this statement of the prosecuting attorney, and ask the court to say to the

jury that it is improper for him to make such a statement.

"*The Court:* If the witness is here, she may be called by either side, if either side wants her. I do not think that I ought to admit evidence that she has given upon the examination to be read or commented upon. The other part of the statement I will. The statement of what the return contains of testimony given by witnesses who had been sworn, and which their attention has been called to, I will admit in evidence."

We think it was incompetent for the prosecuting attorney to comment upon the fact that Jennie Bennett had been sworn as a witness upon the examination, or was there in court, and was not called by the respondent. As before stated, if she saw anything of the affray between the respondent and De Long, it was the duty of the prosecuting attorney to call her, and his omission to call her or examine her was as much a subject for comment as the respondent's not calling her.

Another error assigned is the ruling of the court in permitting the witness Alexander Ferguson and others to testify concerning observations made from the Bennett house nearly two months after the affray. It appears that some two months or more after the affray this witness Ferguson and other witnesses went to the place and made observations, and some of them stationed themselves upon the stoop of the Bennett house, while others went across to the barn, put the wagon into position where Barnes said it was at the time of the affray, and then two of them lay upon the ground. The witnesses testified that from the stoop they could not see them on the ground on account of obstructions, consisting of fences, the wagon, woods, and other things; and that they also asked Mrs. Bennett as to the location of the wagon at the time she observed the affray, and that she designated its position. This testimony was offered for the purpose of showing that the witnesses who testified

to seeing the affray from the stoop could not possibly have seen it. To make such testimony admissible as impeaching evidence, it must first be shown that the location and all the surroundings were in the same identical condition they were in when the occurrence about which the witnesses testified happened. This foundation was not laid in this case. Such testimony was commented on in *Klanowski v. Railway Co.*, 64 Mich. 279. We think the testimony of these witnesses should have been excluded, for the reason that it was not shown that no change had taken place in the surroundings of the location between the time when the affray occurred and the time when these observations were made.

Errors are also assigned upon the charge of the court. We do not deem it necessary to discuss them, as the charge was eminently fair and proper, and stated the rules of law correctly.

The other errors assigned are overruled. They are not of sufficient importance to discuss.

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

The other Justices concurred.

THE PEOPLE v. EDWIN R. MOORMAN.

86 433
127 88

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131 1257

Druggists—Regulation—Constitutional law—Physicians.

1. A physician cannot claim to have any vested right to compound or sell drugs and medicines to one not his patient, contrary to Act No. 134, Laws of 1885, entitled "An act to

regulate the practice of pharmacy in the State of Michigan."

2. Sections 6 and 7 of said act do not authorize the pharmacy board to fix the license fees arbitrarily, but the same must be uniform, and apply to all persons of each of the designated classes alike.
3. Whether the provisions of Act No. 196, Laws of 1887, limiting the exemption of retail dealers of patent and proprietary medicines from the operation of the pharmacy act, as contained in the original act, to dealers of three years' standing or more, is constitutional, *query;* but, if not, the remainder of the act would not be invalidated, and the law of 1885 would remain in force.

Exceptions before judgment from Ionia. (Smith, J.) Argued June 17, 1891. Decided July 3, 1891.

Respondent was convicted of a violation of the pharmacy law. Conviction affirmed, and the circuit court directed to proceed to judgment on the verdict. The facts are stated in the opinion.

John C. Dooling and *F. C. Miller,* for respondent.

A. A. Ellis, Attorney General, for the people.

MORSE, J. October 30, 1890, at the village of Belding, in Ionia county, James H. Kinnane, employed by the State Board of Pharmacy to prosecute violations of the pharmacy law, went into the drug-store of Spencer Bros., and asked for a half ounce of aloes and myrrh, which was furnished him by the respondent. Neither of the Spencer Bros. was present, nor was a registered pharmacist or a registered assistant pharmacist in the store, at the time this tincture was put up. A short time afterwards, and on the same day, Kinnane again went into the store, and called for an ounce of tincture of iodine and one ounce of carbolic acid, the same being, in the language of the record, "drugs, medicines, and

poisons." The tinctures were put up for him by the respondent. Kinnane afterwards saw respondent, and asked him if he was a registered pharmacist or registered assistant, and he said he was not; that he was a practicing physician, and registered as such, and considered that he had a right to dispense such drugs without being registered as a pharmacist, and that the laws of Michigan would protect him in so doing. The court refused to direct a verdict of not guilty on these facts, upon a trial of the respondent in the Ionia circuit court upon appeal from justice's court, where he was tried and convicted of violating the pharmacy law.

The respondent, Moorman, in his defense, admitted the facts above stated, and showed that he was a reputable physician of 3 years' practice, now registered in Ionia county; that he had 10 years' experience as a pharmacist years ago; that he sold the drugs without any willful intent to violate the law, but relying upon his right to do so because of being a registered physician; that Kinnane was not his patient, and he did not furnish him the drugs as a patient. He testified that any reputable physician should be able, and is able, to compound medicines and poisons, and prepare his own prescriptions and the prescriptions of any other physician, and that the sale of patent medicines is no part of the business of a practicing pharmacist. In this he was corroborated by the testimony of Henry Tremaine, a practicing physician for 15 years, residing at Ionia, who also testified that the tincture of iodine and carbolic acid are not used in coloring and in tanning. Charles Thompson, a registered pharmacist, residing at Ionia, testified that the sale of patent medicines was not necessarily any part of the business of a pharmacist; that any one who could read could sell them as well as a person who had three years' experience, or any other term of years; that pro-

prietary and patent medicines are usually kept in pharmacies. This is the substance of all the testimony.

The counsel for the respondent, at the close of the evidence, requested the court to direct a verdict of not guilty, on the ground that the law is unconstitutional and void. This request was refused, and the court instructed the jury that if they found that respondent sold the tincture of iodine and carbolic acid, and that the same were not used for coloring and tanning, then they should find a verdict of guilty. The jury returned a verdict of guilty, and the case comes here upon exceptions before judgment.

It is admitted by the counsel for the defendant, in his argument in this Court, that a law regulating the practice of pharmacy in this State is needed, and the right of the Legislature to pass such an act is not denied. The constitutionality of the present law is, however, attacked upon several grounds. We shall take them up in the order named in defendant's brief.

1. The law provides that no person shall vend patent or proprietary medicines by retail unless he has been in the business of vending and retailing such medicines three years or more. 3 How. Stat. § 2287*c*8, p. 3204. It is claimed that the selling of such medicines is not necessarily any part of the business of a pharmacist; that the confining of the sale of patent medicines to pharmacists and retail dealers of three years' experience grants a monopoly to a favored few, and for no adequate reason; and that it is also an object in the law not embraced in the title, which reads "An act to regulate the practice of pharmacy in the State of Michigan." See *State v. Donaldson*, 41 Minn. 74 (42 N. W. Rep. 781).

There is much force in both of these objections to this provision of the law; but it is not shown that the respondent was charged with vending patent or proprietary

medicines, or that the drugs sold by him were such medicines. If this provision were eliminated from the act, it would have no effect whatever upon the conviction of the respondent, as the remainder of the act would not be invalidated thereby. Under the law as originally enacted, in 1885, the sale of patent and proprietary medicines was expressly excepted from the act. In 1887 the law was amended so as to exempt only those retail dealers in these medicines who had sold them for three years or more. If this amendment should be declared unconstitutional, it would leave the law of 1885 in force.

2. It is claimed that the law authorizes the pharmacy board to fix the license fees arbitrarily, and to make a distinction, in their discretion, between different individuals. We do not think the act is open to this objection. It is provided by section six of the act (3 How. Stat. § 2287*c*4) that—

"The said board may grant, under such rules and regulations as it may deem proper, at a fee not exceeding one dollar, the certificate of registered assistant to clerks or assistants in pharmacy not less than 18 years of age."

Section 7 of the act provides for a yearly fee to be paid said board, which shall not exceed one dollar for a pharmacist and fifty cents for an assistant, such registration fee to be fixed by the board. Neither of these sections contemplates that the board may charge one person one cent, and another one dollar, as contended by respondent's counsel. The fee must be uniform, applying to all persons of each class alike; and there is no evidence in the record that the practice of the board has been otherwise.

3. The main objection to the act, and the only one which in this case concerns the respondent, is that the law deprives a registered physician of the right to compound, put up, and sell drugs and medicines, which it

must be considered from the nature of his profession he is thoroughly competent to do. It is also claimed that he has a vested right to do this, which the Legislature cannot destroy.

So much of the act as applies to physicians reads as follows:

"Nothing in this act shall apply to or in any manner interfere with the business of any practicing physician *who does not keep open shop for the retailing, dispensing, or compounding of medicines and poisons*, or prevent him from supplying to his patients such articles as may seem to him proper." Section 10, Act No. 134, Laws of 1885; 3 How. Stat. § 2287*c*8, p. 3204.

Under this act, if a physician wishes to keep open shop, or, in other words, a drug-store, he must come under the same regulations as other persons; and he has no more right than any other person to step into a drug-store, and to compound or sell drugs, medicines, or poisons to one not his patient. It may be that he is as competent to do this as a registered pharmacist or his registered assistant, but he has no vested right to do so. The law, as I understand it, does not interfere with him in the legitimate practice of his profession, in which he is registered. If he wishes to do more than this, he must comply with all the reasonable regulations of the pharmacy act.

The right to regulate the practice of pharmacy, certainly, rests upon as good reason and as sound principle as the right to regulate the practice of medicine. This latter right was sustained by this Court in *People v. Phippin*, 70 Mich. 6, and in that case a law was upheld which must be said in its provisions to be much more arbitrary and unreasonable than the one now before us. And in that case it was substantially held that no person, no matter how long he had been in the practice of his

profession, had a vested right to practice medicine in Michigan. Consequently, a physician, having no right to practice his own profession in this State unless registered, and conforming to the regulations prescribed by the Legislature, cannot claim to have any vested right to compound or sell drugs and medicines to one not his patient, contrary to the will of the same body. This must be now considered the settled law of this State. The question of the wisdom of such legislation is now relegated to the people; the courts have no concern with it.

It is also claimed that the law is unconstitutional because it prohibits an assistant pharmacist, though registered, from owning or carrying on a drug-store on his own account, or from managing a pharmacy. This is also a provision that does not concern the respondent in this case, and one which, if unconstitutional, would not destroy the balance of the act. It is not necessary, therefore, to express any opinion as to the validity of this prohibition.

The verdict of the jury must be sustained, and the circuit court of Ionia county is directed to proceed to judgment upon such verdict.

The other Justices concurred.

86 440
94 646

THE PEOPLE v. JOSEPH J. HUBBARD.

Criminal law—Receiving stolen property—Venue—Satisfaction—Sentence—Certiorari.

1. The satisfaction which a receiver of stolen property is permitted to make under How. Stat. § 9143, upon his first conviction, and thereby escape imprisonment in the State prison, may be made by the respondent individually, or by any one in his behalf; but it must be made for the purpose mentioned in the statute.

   So *held*, where the respondent, prior to his conviction, loaned one of the thieves money with which to pay the owner for the stolen property, taking security for such loan, which is held not to be a compliance with either the letter or spirit of the statute.

2. A receiver of stolen property, in order to avoid imprisonment in the State prison under How. Stat. § 9143, must make a showing to the circuit judge before sentence that it is his first offense, and that he has made satisfaction to the injured party.

3. Where a larceny is committed in one county, and the stolen property is delivered to a receiver in an adjoining county, and within 100 rods of the line dividing the two counties, the receiver may be prosecuted in the county where the larceny was committed.[1]

4. Whether *certiorari* is the proper process to bring up for review the alleged wrongful action of a circuit judge in sentencing a receiver of stolen property to State prison who, as claimed, had made satisfaction to the injured party under the statute, is not decided, but, the circuit judge having made return to the writ, the Court dispose of the errors assigned upon such return.

Certiorari in aid of writ of error to Allegan. (Arnold, J.) Argued June 18, 1891. Decided July 3, 1891.

[1] How. Stat. § 9418, provides that where an offense is committed on the boundary of two counties, or within 100 rods of the dividing line between them, it may be alleged in the indictment (information) to have been committed, and may be prosecuted and punished, in either county; and section 9520 provides for the indictment, trial, and conviction of a receiver of stolen property in any county where he received or had such property, notwithstanding the theft was committed in another county.

Respondent was convicted of receiving stolen property, etc., and sentenced to State prison. Judgment affirmed. The facts are stated in the opinion and foot-note.

O. T. Tuthill, for respondent, contended:

1. It was respondent's first offense, and, while this does not appear, it is so presumed unless otherwise charged in the information; citing *People v. Caulkins,* 67 Mich. 488.
2. The statute under which relief is claimed from the sentence is remedial, although connected with a criminal statute, and must be liberally construed, which can mean nothing else than, as far as possible with consistency, to favor the respondent, and give him the benefit of the right and remedy provided after his conviction to save the disgrace and punishment of sentence to State prison; citing *Alvord v. Lent,* 23 Mich. 371; *Toll v. Wright,* 37 Id. 101; *Saterlee v. Stevens,* 11 Ohio, 420; *Pollock v. Speidel,* 27 Ohio St. 86; *State v. Harmon,* 31 Id. 250; and the strict letter of the statute may be restrained to avoid injustice or a defeat of the object of the law and the intent of the law-makers, and a construction that will lead to great inconvenience is to be avoided; citing *Watkins v. Atkinson,* 2 Mich. 154; and construction should favor equities, rather than technicalities; citing *Johnson v. Ballou,* 28 Mich. 392.
3. It has certainly been held by this Court that, if the receiver did make restitution and return of the stolen goods, he could not be sent to State prison; citing *In re Franklin,* 77 Mich. 615.

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

CHAMPLIN, C. J. Hubbard was convicted of the offense of having received stolen goods, knowing them to have been stolen. The case is brought to this Court by *certiorari* after sentence.

The errors assigned are as follows:

"1. The said Judge Arnold sentenced the defendant, J. J. Hubbard, to the State prison at Jackson for two years, well knowing—

"*a*—That it was the first conviction of defendant for receiving stolen property.

"*b*—That, without any proof to the contrary, the conviction of defendant for said offense would be presumed his first offense of the crime as charged.

"*c*—That the act of stealing the property as charged was, as claimed and charged to be, only a simple larceny, and not a compound or aggravated one.

"*d*—That full restitution for all property the aggrieved party, Horace G. Bingham, claimed to have been received by deponent as stolen from him, he (the said aggrieved party) had received full restitution and satisfaction for from deponent, or in his behalf.

"2. For the reason that said circuit judge imposed said sentence of imprisonment in the State prison for two years on said Hubbard when it was defendant's first conviction of receiving stolen property, when the act of stealing the clover seed, buckwheat seed, and bags received by defendant was a simple larceny, and when defendant had made and caused to be made restitution of all the stolen property to said Horace G. Bingham, the aggrieved party.

"3. Because said circuit judge sentenced said defendant to State prison when he was a judge of Allegan county, and not of Van Buren county, where the proof showed in the case he received the property and had it, and did not have or receive it in Allegan county at all, and of which offense the said circuit judge imposing said sentence had no jurisdiction to hear, try, or sentence for.

"4. Because the information in this cause does not allege the value of the property stolen, claimed to be received by deponent, whether it was of any value at all, and is fatally defective, and gave the court no jurisdiction."

Without deciding upon the propriety of the process of *certiorari* to bring the matters alleged in the assignments of error before the Court, the circuit judge having made his return to the writ, we shall dispose of the errors assigned upon such return, from which it appears that testimony was introduced tending to show the value of the property stolen to exceed the sum of $25, and that before the conviction of respondent the owner was paid for the property stolen by one Fred Hayes, who was one of the thieves who committed the larceny. Hayes testified that Hubbard wanted him to go and settle it up, and said that by going and buying the seed it would straighten the thing up; that he (Hayes) told him he had not the money; and Hubbard said he would get him the money, and take his steers as security. The testimony of two other witnesses tended to show that Hayes borrowed the money from Hubbard, and gave him a yoke

of steers as security, and with the money Hayes paid and satisfied the owner of the property for the amount stolen. These facts were also testified to by the respondent, who was sworn in his own behalf.

It does not appear that any effort was made after Hubbard's conviction to satisfy the trial judge that this was Hubbard's first offense of the crime charged, or that he had returned the property stolen, or made restitution. But his counsel claims that the evidence given upon the trial shows that restitution was made, and that Hubbard advised it to be done, and furnished the money therefor, and that he is entitled to the same benefit of the satisfaction made by Hayes as if made by himself. He contends that the object of the statute is to make the owner whole, and to allow the receiver of the stolen property to escape sentence to State prison; and therefore it can make no difference who makes the restitution; the object and purposes of the statute are accomplished if made by any one.

The statute provides that upon a first conviction of any person for receiving stolen property, when the act of stealing the property was a simple larceny, if the party convicted of receiving such stolen property shall make satisfaction to the party injured, to the full value of the property stolen and not restored, he shall not be imprisoned in the State prison. The circuit judge, in his return to the writ of *certiorari*, certifies that—

"No claim was made, either upon the trial of said cause or afterwards before sentence, by or in behalf of said Hubbard before me, that he (said Hubbard) had ever made satisfaction for or restoration of the stolen property received by him, nor at all by any one, to my knowledge, until the writ of *certiorari* in this cause was served upon me."

It thus appears from the record before us that the respondent did not claim that he had made restoration,

and the only evidence that any such restoration was made appears from the testimony upon the trial, which, as before stated, shows that the respondent loaned the money to Hayes, and that he made such restoration or satisfaction as was made.

It was undoubtedly the object of the statute to permit a respondent who had been convicted of receiving stolen property for the first time to escape the punishment of being imprisoned in the State prison by making a restoration or satisfaction to the party injured; and this satisfaction may be made by the respondent individually, or by any one in his behalf, if made for the purpose, and the fact of such satisfaction being brought to the attention of the court before sentence. But in this case it does not appear from the testimony upon the trial that the respondent made satisfaction, or that any person made such satisfaction in his behalf. He simply loaned the money to one of the thieves who had stolen the property, and had taken satisfactory security to himself for the repayment of such money; so that it does not appear to come within either the letter or the spirit of the statute. And we think, further, that, where such satisfaction is made for the purpose of escaping imprisonment in the State prison, a showing should be made of that fact to the circuit judge before sentence, in which it should appear that it was his first offense, and that he had made satisfaction to the injured party.

This not having been done, we do not see how the respondent can avail himself now, after sentence, of the facts appearing upon the trial, in order to reverse the sentence of the court below; and we think, upon the record appearing in the return of the circuit judge, that the judgment in the court below must be affirmed.

It was conceded upon the argument of the case before us that the respondent resided in Allegan county, where

the larceny was committed, and it was also conceded that the respondent lived within 100 rods of the county line between Allegan and Van Buren counties; the record showing also that the respondent's farm and residence adjoined the county line.[1] This being so, the circuit court of Allegan county had jurisdiction, under the statute, to try the respondent for the crime charged, and to impose the sentence prescribed by law.

The other Justices concurred.

THE PEOPLE v. JEREMIAH DRENNAN.

86 445
d155 2410

Liquor traffic—Illegal sales—Information—Charge to jury.

1. An objection that the complaint and warrant against a liquor-dealer for engaging in the business without paying the required tax do not negative his being a druggist, etc., cannot be raised upon the trial, where the information contains such negative averment, but should be made by a motion to quash the information before pleading.
2. The burden of proof is upon the people to show beyond a reasonable doubt that the respondent was engaged in the business, and had not paid his tax, and a refusal so to instruct the jury is error.

Exceptions before judgment from Wayne. (Hosmer, J.) Argued June 18, 1891. Decided July 3, 1891.

Respondent was convicted of engaging in the business of selling liquors without having paid the tax required

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[1] Respondent's house was in Allegan county, and his barn, where he *received* the stolen property, was in Van Buren county, and both buildings were within 100 rods of the line dividing the two counties.

by Act No. 313, Laws of 1887. Conviction reversed, and new trial ordered. The facts are stated in the opinion.

George W. Coomer, for respondent.

A. A. Ellis, Attorney General, for the people.

MORSE, J. The respondent was convicted in the Wayne circuit court upon the charge that he was engaged on the 28th day of May, 1889, at the city of Wyandotte, in the business of selling, by retail, malt, brewed, fermented, and intoxicating liquors, without having paid the tax required by law upon such business; he not being then and there a druggist, etc.

It seems that the complaint and warrant upon which respondent was arrested and held to trial did not negative that Drennan was a druggist. Respondent pleaded to the information, which contained the proper averment that he was not a druggist, etc. When the first witness was sworn on behalf of the prosecution, defendant's counsel objected to the introduction of any testimony, for the reason that the complaint and warrant did not charge any offense known to the law. The objection was overruled, and the trial proceeded. We think the objection came too late. This question should have been raised by motion to quash the information before pleading.

But the court erred in not giving the following request, asked by respondent:

"In this case, as in all other criminal cases, the law presumes every one to be a law-abiding person, and the guilt of the accused must be fully proven, to the exclusion of all reasonable doubt."

The circuit judge made no reference whatever to the matter of reasonable doubt. He said, in substance, that there was evidence tending to show that the business was being carried on, and that the statute provides

specifically that all persons who are engaged in the sale of, or keeping for sale, any of the liquors mentioned in the act, whether as owner or clerk, agent, or servant or employé, shall be equally liable as principals for any violation of the act; referring to Act No. 313, Laws of 1887; and further said:

"It is a stringent provision, gentlemen of the jury, but still it is law upon the statute books, which the Legislature has, in its wisdom, passed. Now, gentlemen of the jury, if you find from the evidence in this case that Mr. Drennan, under that provision of the act, *or under any other provision of the act,* has been guilty, either as owner or as clerk for his brother,—and, when I say clerk, I mean that any one who voluntarily offered any assistance would come within the provisions of the act, equally as one who was hired,—why, then, gentlemen of the jury, you will return a verdict of guilty."

The evidence in the case on the part of the people was—

1. The testimony of Richard Tregaskis, who had charge of the record of liquor taxes in the county treasurer's office, that respondent had paid no liquor tax for the year 1889, on the 28th of May in that year.

2. The city marshal testified that respondent kept a grocery in Wyandotte; that there was on said 28th day of May, 1889, a saloon in the same building; that he went there that day, and drank a glass of beer, which was given him by the respondent. He could not swear that he had seen the respondent sell any liquor at any other time on that date or since. Had seen him in the saloon, but a young man named Marsh was attending the bar.

Drennan was sworn in his own behalf, and testified that he was not engaged in the liquor business on the 28th day of May, 1889, and that his brother William, since deceased, was running the saloon, and had been since the 1st of January, 1888, until his death, in October, 1889. It was shown on his cross-examination that

in his brother's life-time respondent began suits in his own name for the collection of bar-bills, and since the 28th of May, 1889. But on redirect he said that one of these suits was for liquor sold four or five years ago, and that none of the bills so sued were contracted since May 28, 1889, to his knowledge. The prosecuting attorney asked him the following question:

"Have you ever attended bar during the life-time of your brother and sold liquors, except this time that Mr. Thon testifies to?

"*A.* I guess I have, in his absence, and none of his bar-tenders were there. I would go in and assist when I was not in the post-office in evenings, or something like that, or in the day when I was not busy."

Respondent was acting as postmaster there for nearly four years. It will be seen that the evidence not only fails to show that William Drennan had not paid his tax up to the 1st of May, 1889, for the year before, but there is no evidence that he had not paid the tax upon this business for the year commencing May 1, 1889. Respondent, therefore, could not, as the proofs stood, have been convicted under the information as a clerk of his brother, but only as the owner of the business.

It may be truly said that there was some evidence tending to show that it was his own business, but upon this he was entitled to the benefit of all reasonable doubts. It was not sufficient to show that the respondent sold one glass of liquor, and had not paid the tax, when he gave testimony tending to show that he sold this liquor for his brother, and that his brother, and not himself, was engaged in the business. The burden of proof is upon the people, and that beyond a reasonable doubt. It was the duty of the prosecution in this case to show beyond a reasonable doubt that respondent was engaged in the business, and had not paid his tax, or

that he sold liquor for his brother, who had not paid the tax upon the business at this particular place. Under the evidence, the whole theory of the charge was wrong.

The verdict must be set aside, and a new trial granted.

The other Justices concurred.

THE PEOPLE v. HARRY HULL.

Criminal law—Homicide—Trial—Charge to jury—Viewing premises—Misconduct of juror—Intoxicating liquors.

1. A jury in a criminal case, while going to, viewing, and returning from the premises where the offense was committed, should be kept under the supervision of an officer, so that no person can communicate with them, or express any opinion or give any direction in their hearing.
2. It is reversible error for a juror in a criminal case, while viewing the premises where the offense was committed, to drink liquor procured at a bar thereon owned by the principal witness for the prosecution, whether furnished by him in person or not.
3. The lengthy examination by the court of the principal witness for the prosecution, after he had been cross-examined by the respondent's counsel, coupled with the remark, in answer to an objection by respondent's counsel to certain questions, that it was made because the facts would be prejudicial to respondent, are held objectionable, as tending to prejudice the rights of the respondent, and as conveying to the jury the idea that, if the facts were drawn out as proposed by the court, they would be injurious to the respondent's case.
4. A portion of a charge in a criminal case which is argumentative, and tends to impress the jury that, in the opinion of the court, the respondent has not testified truthfully, is objectionable.

Exceptions before judgment from Wayne. (Reilly, J.) Argued June 18, 1891. Decided July 3, 1891.

Respondent was convicted of murder in the first degree. Conviction reversed, and a new trial ordered. The facts are stated in the opinion.

John G. Hawley, for respondent.

A. A. Ellis, Attorney General, and *S. W. Burroughs,* Prosecuting Attorney, for the people.

[The points of counsel are fully stated in the opinion. —REPORTER.]

LONG, J. The respondent was convicted in the Wayne circuit court, before a jury, of murder in the first degree. The case is brought up on exceptions before sentence.

The claim of respondent's counsel in this Court is:

1. That the court erred in not charging the jury that under the evidence the respondent could not be convicted of murder in the first degree.
2. That there was no evidence on which the respondent could have been justly convicted, and the court should have so instructed the jury; that the court should have granted the motion to quash, and limited the information to one for manslaughter.
3. That the circuit court improperly restricted the cross-examination of the witnesses for the prosecution.
4. That it was a violation of a constitutional right of respondent to take the jury to view the premises in the absence of the respondent.
5. That the jury, or some one of them, was guilty of misconduct in drinking intoxicating liquors while viewing the premises.

In order to get a complete understanding of the claims made, it will be necessary to state somewhat in detail the circumstances surrounding the transaction by which the deceased came to his death, as well as some of the cir-

cumstances occurring immediately preceding that time.

The respondent at the time the alleged crime was committed was about 21 years of age, and about a year before that had moved to the village of Highland Park, some 5 or 6 miles from the city of Detroit, upon a subdivision of land owned by his father. Prior to that time he had resided with his parents in the city. Just at the northern extremity of the village of Highland Park is an hotel kept by Mr. Beatty, called the "Highland Park House." On the 21st day of November, 1890, respondent had been in the city of Detroit, and on his way home was accompanied by one Ambrose Jones, who also lived at the village of Highland Park. They reached the Highland Park House in the evening of that day, and together entered the bar-room, where liquors were kept. Mr. Dubois, the deceased, was the hostler and general man of all work about the hotel. Mr. John A. Duncan was the bar-tender there, and George Johnson was employed about the hotel. These parties were all present when Hull and Jones reached there that evening, between 6 and 7 o'clock. Mr. G. W. Beatty, the proprietor and manager of the hotel, testified upon the trial that when he came out from supper he found the respondent and Jones in the saloon of the hotel, and that he talked with respondent about arranging to pay a bill for liquors which the respondent owed him, and in the course of the conversation he and respondent went out upon the back porch; the respondent leaning against the outer post of the porch, and the witness standing near the door. While they were in that position, and so talking about this bill, the respondent promised, if Mr. Beatty would come over the next morning, to let him have some chickens in payment of the bill. While the talk was going on between Beatty and the respondent, the deceased came out of the door, and said:

"I don't see what in hell is the use of going over there again. I went over there once, and I don't want to do it again. I don't suppose we would get any chickens if we went."

The respondent was talking about the subdivision of land upon which he lived, when the deceased said to him:

"I don't think you care whether you pay what you owe or not. You don't care much about paying your debts. I pay my debts. I haven't any subdivision, but I pay my debts, and that is more than you do."

The witness then described what took place thereafter, as follows:

"At that, Dubois started down the steps, and he tripped on the mat and fell against Hull. Hull stood with his back to the railing, and fell over, and Dubois threw his arm around the post, and caught Hull by the leg or coat, and let him down. Hull lit on his face and hands. The last thing I saw of him was his heels on the banister. He began calling names under the steps, and there was quite a racket, and Dubois started to run down. I was afraid there might be some trouble, so I ran down, and stepped between the two, and took Dubois away, and led him over to the barn."

This seems to have been the first difficulty between these parties, except that two or three months prior to that time they had had some words, in which it was claimed by Dubois that respondent had abused his dog.

It appears that, after Beatty had led Dubois to the barn, Johnson and Jones went down the steps, and assisted the respondent to get up, when, as Johnson claims, respondent took a revolver from his pocket and exhibited it to Johnson, saying, "If Dubois bothers me, I will do him up." The respondent returned to the bar-room, followed by the witnesses Beatty, Johnson, and Jones. He there requested a drink, but was refused by Mr. Beatty. Being refused, he told Mr. Beatty that he

would not pay the debt, and he could not have the chickens, and said he would go home. He started out of the door leading upon this porch, and passed in the rear of the hotel eastward, towards his home. Mr. Beatty says that, a few minutes after, Dubois came in at the side way, sat down a few minutes by the fire, and then got up and went into the kitchen; that, shortly after, he heard somebody halloo, looked out, and saw the respondent standing north of the hotel; that, a few minutes after, Dubois came out through the back gate in the beaten path that leads to the barn, and when he got just past the respondent he turned, quickened his pace, and went towards him; that Hull made some remark which he could not hear, but Dubois did not stop, and, when within probably 10 feet, Hull fired, and he saw the sparks fly from the cigar which Dubois was smoking; that he turned round to make a remark to Jones, but, before there was much time to say anything, Dubois ran towards the respondent, who backed up until he got opposite the other porch (being the side porch of the hotel), when the second shot was fired by Hull, and Dubois fell at the respondent's feet; that the respondent backed up 20 or 30 feet before the second shot was fired, Dubois following him up. Beatty ran down the steps, and took hold of the respondent, and took the revolver away from him. Respondent went back to the saloon of the hotel, and remained there until he was turned over to the care of an officer. Mr. Beatty's testimony was corroborated in a measure by the testimony of Johnson and Jones, though they contradicted each other in a measure as to where they stood at the time the shot was fired.

The respondent testified that as he and Beatty stood talking, out upon the back porch, Dubois came to the door, and said:

"'Why in hell don't you pay your debts?' Said he always paid his debts, and wanted to know why I didn't pay mine. I told him again that I did not know that it was any of his business. Dubois stepped quickly towards me, across the veranda, and called me several names, and then went back again. When I told him I did not know it was any of his business, he jumped at me, struck me in the chest, and knocked me over the railing. He then came running down at me, and Mr. Beatty took him towards the barn."

After being in the bar-room for a time, the respondent said that, when he went out of the back door, he started for home; that he went through the lane, as it was a half a mile nearer to his home; that when he got near the red house, where Dubois lived, he heard a noise that sounded like rocks being thrown, and thought to himself that he would not have any trouble, and would go back, and come around by the road; that he started back, got in between the hotel and the barn, and saw Dubois come out of the gate in the back fence, coming towards him on a run; that he hallooed then to Mr. Beatty, as he did not want any trouble, and thought he would take him off; that, when Dubois got to within 15 or 20 feet of him, he thought of his revolver, and thought he would take it out and scare him; that he called to Dubois, and said, "I have a revolver and want you to keep away from me;" that Dubois did not stop, and he shot the revolver off into the air; that he was then running backwards, and Dubois running very fast after him, and, overtaking him, Dubois struck him, knocking him down, and was on top of him when he (the respondent) fired the last shot. Respondent says:

"I don't know, and I can't say, whether I shot it on purpose, or whether I did not; but I suppose I did. I was very much excited, and don't know how the revolver went off. I was lying there, and he was on top of me and pounding me, and all of a sudden I felt him grow

limp, and knew that something had happened. I shoved him off of me, and Beatty came up, and I gave him my revolver. I did it because I had to protect myself."

The theory of the defense upon the trial was that those in the hotel, having seen the trouble between Dubois and the respondent, by which Hull was either accidentally or intentionally pushed over the railing by Dubois, and knowing that Hull was afraid of Dubois, had got one of their number to throw something after him to frighten him back, and when he was coming back they told Dubois that he was coming back, and going to do him up. There was no direct evidence given of this upon the trial, and nothing to show upon this record this fact, except, as defendant's counsel claims, from the circumstances which are to be gathered from the facts proven, and the talk of the parties there that evening.

It appears upon the examination of Mrs. Dubois, the wife of the deceased, that Dubois, after returning from the barn, where Beatty had taken him after his conflict with Hull, came into the kitchen, and armed himself with a poker and a club, and said that he had put Hull over the railing, that he had never done anybody a dirty trick, and he was not going to be done up. When he left the kitchen, Mrs. Dubois says he took the poker, but did not say what for. This was an iron poker with a wooden handle. She says that he was gone out for a few minutes, when he came in again, and threw the poker down, and again went out of the kitchen; that this was the last time she saw Mr. Dubois alive.

Mrs. Beatty was also called, and testified that she was in the kitchen when Mr. Dubois came in, and said that he would allow no man to do him up, and called Mr. Hull a bad name, and said that he threw him over the railing, and said, "I fixed him;" that the witness asked him how it was, and he shook his head, closed his lips,

and said, "Never mind; I fixed him;" that he then went around by the stove, got the poker, and went towards the door, and just before he opened the door he shoved the poker under his right sleeve, then opened the door, and went out; that she called Mrs. Dubois' attention to it. After Dubois had left the kitchen, Mrs. Beatty went up-stairs, when she heard Dubois come in, and drop the poker and the club on the table. The poker and the club were afterwards found upon the kitchen table.

The respondent testified, also, that his face was a mass of bruises and scratches which he got from Dubois while he was on top of him, and before the second shot was fired. There was evidence given upon the trial tending to show that when he arrived at the jail his face was scratched and bruised. There was also evidence on the part of the prosecution, in rebuttal of this, tending to show that at the time he was taken from the Highland Park House by the officer there were no scratches or bruises on his face, and that the scratches looked as if they might have been made with the fingers. There were two scratches three or four inches long, and about an inch apart.

The evidence also tended to show that the deceased was a violent and dangerous man, but all of the witnesses who testified to this also state that they never communicated this fact to the respondent. The prosecution gave evidence tending to show that the deceased was not a dangerous and violent character. The respondent also introduced evidence showing his good character prior to the time of the homicide. The prosecution also gave some testimony to show that after the first affray between the respondent and Dubois, by which respondent was thrown over the railing of the porch, respondent came into the bar-room of the hotel, and in a sportive manner

struck one or two of the parties there with his hat. The physician who made the *post mortem* examination of Dubois testified to the direction the ball took in passing through his head; that its direction was upward from the point where it entered the face.

Shortly stated, these are the main facts and circumstances surrounding the transactions there that night by which Dubois came to his death, and from which respondent's counsel claims that, if any offense was committed by the respondent, it could be no higher degree than manslaughter.

Felonious homicide is divided by our statute into three degrees,—murder in the first degree, murder in the second degree, and manslaughter. How. Stat. chap. 317. All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree. All other kinds of murder shall be deemed murder of the second degree. The statute does not attempt to define the offense, but leaves the definition as it stood at the common law.

The court charged the jury that—

"Murder is defined as where a person of sound memory and discretion willfully and unlawfully and unreasonably kills any creature in being, against the peace of the State, with malice aforethought, express or implied. Under the statutes of this State, all murders which shall be perpetrated by means of poison, or lying in wait, or any other means of unlawful, deliberate, and premeditated killing, or which shall be committed in the perpetration of any arson, rape, robbery, or burglary, shall be deemed murder in the first degree. All other murders shall be deemed murder in the second degree. If one, without cause, inflicts a wrong upon another, we call him 'wicked and malicious.' So, when one, without any legal provo-

cation, justification, or excuse, intentionally kills another, he is called a 'murderer.' The law implies from such unprovoked, unjustifiable, or inexcusable killing the existence of that wicked disposition which the law terms 'malice aforethought.' Thus, if the respondent intentionally killed Mr. Dubois without provocation, justification, or excuse, your verdict should be, 'Guilty of murder.' The intention may be inferred from the use of the deadly weapon in such a manner that the death of the person assaulted would be the inevitable consequence. If you come to the conclusion that the respondent is guilty of murder, it will be your duty to determine whether he is guilty of murder in the first or second degree. Our statute provides, as I have stated, that all murders which shall be perpetrated by means of poison or lying in wait, or any other kind of unlawful or premeditated murder, shall be murder in the first degree. In order to convict the respondent of murder in the first degree, you must be satisfied that he intended to kill Dubois, and that the killing was willful, deliberate, and premeditated."

The court further stated in that connection:

"It is not necessary that any particular time should have elapsed between the forming of the purpose and the intention to kill, and the killing. If the respondent had, previous to the shooting of Dubois, determined to kill him, and, to carry out his determination, willfully and deliberately killed him, he would be guilty of murder in the first degree. If the killing was done under a sudden impulse, then respondent would be guilty of murder in the second degree. If you are not satisfied beyond a reasonable doubt that the killing was murder in the first degree, your verdict should be, 'Guilty of murder in the second degree,' if you find him guilty of murder at all. If a man kill another suddenly, and without provocation, the law implies malice, and it is murder. If the provocation was such as must have greatly provoked him, the killing would be manslaughter only. The instrument with which the killing was done must be taken into consideration. If inflicted with a deadly weapon, the provocation must be great, to make it manslaughter. The amount of resentment must bear a reasonable proportion to the provocation, to reduce the offense to manslaughter. To make it manslaughter, it is also necessary that the killing be done immediately upon the happening of the

provocation. If sufficient time elapses for passion to subside and reason to interpose, the killing is deliberate, and the crime murder, no matter how great the provocation. Under the information in this case, the respondent may be convicted of murder in the first degree, of murder in the second degree, or manslaughter, or acquitted upon the grounds that the killing was justifiable, depending upon your view of the testimony."

These are all the instructions which the court gave to the jury by which they might be guided in their determination as to whether the offense committed was murder in the first degree, in the second degree, or manslaughter.

The claim of the people, as shown by the testimony introduced upon the trial, certainly justified this charge; and we think it a very full and fair exposition of the law upon the state of facts as presented and claimed by the people. The different degrees of the offense charged in the information are fairly distinguished; and the court, under the circumstances, was warranted in leaving the question to the jury to determine the degree of the crime; and, if the jury believed that the killing was willful, deliberate, and premeditated, they were justified, under the circumstances and charge of the court, in so finding. The court carefully guarded the rights of the respondent under his claim and theory of the case.

The court charged the jury upon the question of justifiable homicide as follows:

"Now, gentlemen of the jury, it is for you to say whether this respondent was assaulted in the manner claimed. The law gives to every person the right to protect themselves from unlawful assault. Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended. It is not every assault that would justify a person in resisting by using a deadly weapon. If, however, the person assailed honestly believes his life in danger, or that he may suffer serious bodily harm, he

has the right to resist, even to taking the life of his assailant. The person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time. The defense of self-defense necessarily assumes an assault. There can be no self-defense by a person until he is assailed by another. It is for you to say, from all the evidence in this cause, whether the respondent honestly believed he was in danger of losing his life, or in danger of great bodily harm, and that it was necessary for him to fire this fatal shot in order to save himself from such apparent and threatened danger. Although you may not be satisfied that the respondent, in committing the act, acted in self-defense, still, if the testimony in this case creates in your mind a reasonable doubt as to whether or not the act was done in self-defense, the respondent is entitled to the benefit of the doubt, and it will be your duty to acquit him."

This was a correct statement of the law.

From a careful reading of the record, we are satisfied, however, that certain proceedings took place upon the trial which had the tendency to prejudice the rights of the respondent, and that he has not had that fair and impartial trial to which he is entitled, and we are further satisfied that the court was in error in certain portions of his charge when referring to the respondent, and his claim of injuries received at the hands of Dubois.

It appeared that when Mr. Beatty, the principal witness in the case for the prosecution, was upon the stand, and was being cross-examined by respondent's counsel, he was asked if a certain man by the name of Jones was there at the hotel, and also a colored man; and the witness testified that they were there. He was then asked:

"*Q.* When Hull started out to go home, did these men go out immediately afterwards?

"*A.* I think they did.

"*Q.* How long were they gone before they came back in?

"*A.* I remember them coming back. They were gone, probably, about five minutes.

"*Q.* Did they come back into the saloon, and say, 'Hull is coming back?' [This was objected to, but permitted to be asked, and the witness answered.]

"*A.* I don't remember whether they made that remark or not.

"*Q.* Did they say they had thrown something at him, or in front of him, to turn him back, when they came back in there? [This was objected to and excluded.]"

The court thereupon commenced the examination of the witness himself, and asked:

"*Q.* Were you examined by the magistrate below?

"*A.* Yes, sir.

"*Q.* Have you talked with any one since that examination with reference to the facts in this case?

"*A.* Oh, yes; it was the talk of the hotel for a few days after that.

"*Q.* Have you talked with any one since that examination with reference to the testimony you were to give on this trial?

"*A.* No, sir.

"*Q.* Will you read the first 8 pages of your examination, as returned by the magistrate? I want to ask you a few questions."

Hereupon the witness took the magistrate's return, and read the first eight pages of his examination to himself, but not aloud, as directed by the court; after which the court continued as follows:

"*The Court:* I call your attention to what took place. Will you go on and state the conversation that you had with Mr. Hull, the respondent, before you went out on the verandah, as near as you can recollect it?

"*Respondent's Counsel:* We object to that. That is what your honor excluded before.

"*Court:* I said that time that we wanted all the facts, and everything that took place there.

'*Respondent's Counsel:* In addition to that, I make an objection to what appears to be the intention of the examination by the court.

"*Court:* I suppose I have the right to examine the witness for the purpose of ascertaining the proof.

"*Respondent's Counsel:* Yes, your honor.

"*Court:* That is all I want. I want all the facts in this case, and that is what I shall try to ascertain in this case, as in all cases.

"*Respondent's Counsel:* There is nobody wishes your honor more success than I do; but it seems to me that your honor has taken a tone or manner which is hostile to the respondent, and I desire an exception to that. As to the research as to the facts, I have no objection.

"*Court:* If it is because the facts may be prejudicial to you, if they came out—

"*Respondent's Counsel:* I desire an exception to that remark.

"*Court:* I don't know as I can change my manner to suit you. I ask these questions, and want the facts; that is all. If you could photograph it, it might bear the interpretation that you put upon it. I don't know."

Thereupon follows six pages of examination by the court of the witness Beatty, in which he went over with the witness, by question and answer, what took place between the respondent and Dubois upon the porch; of respondent's starting for home, and his return; the meeting between Dubois and the respondent, up to and including the time when the shooting took place.

We think this examination by the court, and the remarks of the court that the objection of counsel was made because the facts would be prejudicial to his client, had the tendency to prejudice the rights of the respondent, and convey to the jury the idea that, if the facts were drawn out as the court proposed to draw them out, such facts would be injurious to the respondent's case. The case was a peculiar one in many of its details, and the court could not be too careful in the conduct of the examination to conceal from the jury his views as to the importance and bearing of the testimony tending to establish the guilt of the respondent.

Some complaint is also made by respondent's counsel that the court improperly limited his cross-examination of the people's witnesses. We think the respondent,

under the circumstances, should have had a full and fair opportunity of cross-examination under his theory of the case, and that to a certain extent the court did put restrictions upon the cross-examination. As we have said before, it was the theory of the defense that those in the hotel, knowing that Hull was afraid of Dubois, had got one of their number to run after Hull, or throw something after him, to frighten him back, and, when he was seen coming back, they told Dubois that he was coming back to do him up. Respondent's counsel sought to draw out of the witnesses Johnson and Jones, who were introduced by the people, that something of this kind was said. This was excluded by the court. We think the court should have permitted the respondent to show all that took place, and all that was said and done in the hotel by Johnson and Jones, as well as Beatty and Dubois, after the respondent had left the hotel, and before his return there, at the time the shooting took place; and that the court should have permitted respondent's counsel to show the whereabouts of Dubois, as well as of Beatty, Jones, and Johnson, during that time, as there appears to be great conflict in the testimony of Jones and Johnson as to where they were, and where Dubois was, during that time.

We think the court was also in error in stating to the jury in his general charge:

"If the respondent had been knocked over the railing of the porch as claimed, and struck upon his head and face, would not the fall have injured him, or left some soreness about the head and shoulders, indicating a fall in the manner claimed by respondent? On the other hand, if, as Beatty supposed, it was accidental, and Dubois grabbed Hull by the legs, letting him down easily, and thus breaking the fall, does the absence of soreness about the head and shoulders tend to sustain the testimony of Beatty as to how it actually occurred?"

This part of the charge was argumentative, and must have tended strongly to impress the jury that, inasmuch as there was no soreness about the head and face of the respondent, the court was of the opinion that Dubois knocked Hull over the railing by accident, and that Hull had not testified truthfully when he claimed that Dubois struck him in the breast and intentionally knocked him over. He may or he may not have received such injuries by being knocked over as to cause soreness about his head; and the fact that there was no soreness might not in the least degree tend to show whether Hull was or was not telling the truth when he said that Dubois struck him in the breast and knocked him over.

The court also charged the jury as to the scratches upon the face of the respondent as follows:

"Now, if there were scratches upon his face as claimed, were they received at the hand of the deceased, or did the respondent with his own hand, after the shooting, and on his way to the jail, or as he was entering the jail, make those marks on his face?"

The evidence tended to show, and it was claimed by the respondent, that his face bore evidence of the scratches and bruises inflicted by the deceased at the time the shot was fired. Mrs. Littlefield testified that, when respondent was brought to the jail the night of the shooting, she saw the scratches on his face. Dr. Mulheron testified to some scratches on his face. Mr. Carmichael, the reporter who interviewed him at the jail, says he saw scratches on his face that appeared as if they had been made with the fingers. On the other hand, the constable and Mr. Raupp, who accompanied him to the jail, testify that there were no marks upon his face at that time. But we think the court, under this evidence, had no right to say to the jury that they could find that the respondent made these marks upon his own

face on his way to the jail, in view of the testimony given by the constable and Mr. Raupp that on the way to the jail he did not meet with any accident.

One other very serious objection is also raised by respondent's counsel upon this record. It appears that, after the evidence had closed in the case, the court directed that the jury should view the premises where the homicide was committed. The jury were accordingly taken out to the premises; the circuit judge, reporter, deputy sheriff, prosecuting attorney, respondent's counsel, and several of the representatives of the daily press accompanying them. During this time the respondent was confined in the jail. On the return of the judge and jurors the court proceeded to charge the jury. It is now contended by counsel for respondent:

1. That the court erred in taking the jury out to view the premises in the absence of the respondent.
2. That the court erred in not keeping the jury together under the supervision of the court, or an officer of the court, while said view was being had.
3. That the court erred in not taking measures to prevent the jury from drinking spirituous liquors while that view was being had.

It is admitted upon the record that the view of the premises was taken in the absence of respondent; that the jury were not kept together during that view, under the supervision of the court, or an officer of the court; and it appears by the affidavit of Mr. Hawley, respondent's counsel, and is not contradicted, that one of the jurors drank whisky at the bar of the hotel while they were viewing the premises.

How. Stat. § 9569, provides that—

"The court may order a view by any jury impaneled to try a criminal case, whenever such court shall deem such view necessary."

The court was not in error in permitting or directing a view of the premises by the jury; but we think it was the duty of the court, in the absence of the respondent, to have kept the jury while on their way to, and on their return from, and in their view of, the premises, under the supervision of an officer, so that no person might communicate with them, or express any opinion or give any directions in their hearing; for anything which took place which was in the nature of testimony certainly could not be given to the jury in the absence of the respondent.

We think, also, that the juror was guilty of misconduct in drinking liquor upon the premises while he was in the line of his duty as a juror, under the direction of the court, to view the premises. It does not appear by the record who furnished this liquor, but it was procured in the very room and at the same bar where all the trouble had arisen between Dubois and the respondent. Whether the liquor was furnished by Beatty, the principal witness for the prosecution, does not appear; but it does appear that it was procured at the house of Beatty, where the tragedy occurred. We think this such misconduct that for this reason the case should be reversed, and a new trial ordered. The reversal, however, is not based upon this error alone, but also upon the other errors which we have pointed out.

We are unable to say upon this record that there were no facts shown, or circumstances, as claimed by respondent's counsel, which would warrant the court in submitting to the jury the question whether the respondent was guilty of murder in the first degree. Had it appeared upon the trial that respondent knew or had been advised that Dubois armed himself with a poker or club, and had made threats to fix him, or that the respondent knew

Dubois to be a violent and dangerous man, it might be claimed, even upon the people's theory, that the respondent did not act with deliberation in firing at Dubois, and that there was no premeditation before the fatal shot was fired. The record does not disclose, although respondent's counsel sought to draw it out upon the cross-examination of Jones and Johnson, that either of those parties or Dubois headed the respondent off at the red house when he started to go home. As the record appears now, we are unable to say that the court should not have submitted the question as to the guilt or innocence of the respondent of murder in the first degree. For the reasons pointed out, however, the verdict must be set aside, and a new trial ordered.[1]

MORSE and MCGRATH, JJ., concurred with LONG, J.

CHAMPLIN, C. J. I concur in reversal on the ground that the court permitted the jury to view the premises unattended, and the misconduct of the jury.

GRANT, J. I concur in the result.

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[1] On July 29, 1891, Mr. Justice LONG, to whom an application had been made to admit respondent to bail, after taking the advice of the other Justices, granted the application, fixing the bail at $5,000.

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ADOLPHUS A. ELLIS, ATTORNEY GENERAL, v. WILLIAM H. LENNON.

Quo warranto—Municipal officer—Qualification—Term of office.

1. The incumbent of a municipal office created by statute, who is elected or appointed in the manner therein prescribed, for a definite term fixed by the statute, and who exercises functions derived therefrom, in addition to those derived from the by-laws of the municipality, must be deemed a public officer within the meaning of How. Stat. § 8635, authorizing proceedings by *quo warranto* against any person who shall usurp, intrude into, or unlawfully hold or exercise any public office, etc.
2. An alderman, who is *ex officio* a member of the common council, cannot, by resigning his office prior to the expiration of the term for which he was elected, render himself eligible to receive the appointment of chief of police, whose salary is paid from the city treasury, where the charter of the city provides that no alderman shall be elected or appointed to any other office in the city during the term for which he was elected, and that no member of the common council shall, during the like period, be appointed to or be competent to hold any office of which the emoluments are paid from the city treasury.

Information in the nature of a *quo warranto* to test the title of respondent to the office of chief of police of West Bay City. Argued June 18, 1891. Judgment of ouster entered July 3, 1891. The facts are stated in the opinion.

C. E. Pierce, for relator.

S. P. Flynn (T. A. E. Weadock, of counsel), for respondent.

MCGRATH, J. Respondent was elected alderman of West Bay City for the term of two years from and after April 10, 1890. He entered upon the duties of said

office, and served till April 13, 1891, when he resigned, and was by the common council appointed chief of police of that city, which office he now holds. The Attorney General has filed an information in the nature of a *quo warranto*, claiming that respondent's appointment was illegal.

Section 15, tit. 3, Charter, provides that—

"The common council shall also appoint, on the second Monday in April, A. D. 1891, * * * one chief of police, and such number of policemen with pay * * * as they shall deem necessary, and shall fix and limit the term of office of the persons so appointed, in accordance with the provisions of this act."

Section 18 of title 5 provides:

"The police force of the city shall consist of a chief of police, and such number of policemen with pay, and such number of policemen and watchmen without pay, as the common council shall appoint, as in this act provided. Each member of the police force appointed by the common council shall, before entering upon the duties of his office, take and subscribe the oath prescribed by the Constitution of this State, and file the same with the recorder. After filing such official oath, the chief of police and each policeman so appointed shall hold his office during good behavior, except as herein otherwise provided."

Section 19, tit. 5, provides that the—

"Police committee shall have power to try and determine all complaints against any member of the police force, and upon conviction of any member of the police force by a vote of a majority of the members of such committee of incompetency, misbehavior, insubordination, neglect of duty, or violation of any of the rules or regulations made by the common council for the government of the police department, such member shall be suspended from duty, and shall be reported by such committee to the common council, together with a report of his conviction; * * * and if by a majority of the members elect of said common council such conviction be confirmed, such person shall be removed from office, and

the vacancy thus made may be filled by the common council forthwith; in case such conviction is not confirmed as aforesaid, such person shall be reinstated. * * * The common council shall have power at any time to diminish the number of policemen and police officers employed by the city, by dismissing and removing any member of the police force, but no member of the police force shall be removed, except as hereinbefore provided, unless two-thirds of the members elect of the common council shall first vote in favor of such decrease in the number of policemen or officers."

At a regular meeting of the common council held April 13, 1891, 12 aldermen, including the respondent, were present. A resolution was adopted providing "that this council now proceed to appoint the city officers in the order hereinafter set forth: Chief of fire department, chief of police," etc.; and the respondent voted in favor of its adoption. At the same meeting two ballots were taken for chief of police. On the first ballot respondent received 6 votes, and one Dunnigan received 5, and on the second ballot respondent received 7 votes, and Dunnigan 4; whereupon respondent was declared elected. But the respondent did not vote upon either of these ballots. A resolution was then offered "that William Dunnigan be, and, is hereby, appointed chief of police;" but said resolution did not prevail, there being 4 yea and 8 nay votes. The respondent, Lennon, voted against the adoption of said resolution. Immediately thereafter the respondent tendered his resignation of the office of alderman, and the same was accepted by the council.

At a meeting of the council held April 20, 1891, at which there were present 11 aldermen, a resolution was offered appointing respondent to the office of chief of police. The resolution was adopted by a vote of 7 to 4. Respondent claims to hold his office by virtue of said appointment.

Two questions are raised:

1. Is the office of chief of police under this charter one which is properly the subject of this proceeding?

The statute provides that an information in the nature of a *quo warranto* may be filed—

"When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in any corporation created by the authority of this State." How. Stat. § 8635.

The incumbent of a municipal office created by the statute, who is elected or appointed in the manner thereby prescribed, having a definite term fixed by statute, and who exercises functions which are derived from the charter in addition to those derived from the by-laws of the municipality, must be deemed a public officer, within the meaning of this statute. Such an officer is a constituent part of the machinery of government, exercising functions prescribed by sovereign authority, and which are independent of local control.

The chief of police of West Bay City is a public officer. The office is created by statute, and his powers and duties are prescribed by the charter, which provides that he—

"Shall have power to serve any summons, subpœna, warrant, order, notice, paper, or process whatever, issued or directed by any justice of the peace, or officer whatever, in the execution of the laws of the State or ordinances of the city for the prevention of crime and punishment of offenders in any part of the State, * * * to serve process for any violation of the city ordinances, and generally shall have and exercise the powers as conservator of the peace which township constables under the general laws of the State possess."

He is required by charter, before entering upon the duties of his office, to take and subscribe the oath prescribed by the Constitution of this State, and to file the same with the recorder. He holds his office during good

behavior, except that he may be removed upon complaint and conviction of incompetency, misbehavior, insubordination, neglect of duty, or violation of any of the rules or regulations made by the common council for the government of the police department. The power given to diminish the number of policemen cannot be construed to confer the power of a summary dismissal of the chief of police.

The case is clearly distinguishable from that of *Attorney General v. Cain*, 84 Mich. 223. In that case the charter provided that the council might, by ordinance, provide for a police force, make rules and regulations for its government, and prescribe the powers and duties of policemen, and empowered the council to remove any policeman at any time. The office held by respondent is therefore within the statute.

2. Was the respondent eligible at the time of his appointment?

The office was created while respondent was an alderman and a member of the council. Before his resignation the council resolved to appoint a chief of police, and respondent voted in favor of such action. Thereupon two ballots were had, and respondent was declared elected. A resolution was offered appointing another to the office, and respondent voted against its adoption. Respondent then tendered his resignation, and at a subsequent meeting, nearly a year before the period for which he had been elected as alderman had expired, he was by resolution appointed chief of police.

The charter provides not only that "no alderman shall be elected or appointed to any other office in the city during the term for which he was elected as alderman," but it contains the further provision that "no member of the common council shall, during the period for which he was elected, be appointed to or be competent to hold

any office of which the emoluments are paid from the city treasury." The mayor and aldermen constitute the common council, and the salary of the chief of police is paid from the city treasury.

The respondent contends that when appointed he had ceased to be an alderman or member of the council; that his "term of office" had therefore expired, and he was no longer ineligible; in other words, that the prohibition is limited to *members* of the council, or *aldermen*. This is a narrow view of the statute, and gives to language used no purpose. Similar provisions exist in nearly all municipal charters. The general law for the incorporation of cities contains the following provision:

"No alderman shall be elected or appointed to any other office in the city during the term for which he was elected as alderman, nor appointed to any other office in the city within one year thereafter."[1]

The Constitution provides that—

"No person elected a member of the Legislature shall receive any civil appointment within this State, or to the Senate of the United States, from the Governor, the Governor and Senate, from the Legislature, or any other State authority, during the term for which he is elected."[2]

The purpose of these statutes is to prevent officers from using their official positions in the creation of offices for themselves, or for the appointment of themselves to place. While the law concedes the right of resignation, it is its policy to take away all inducements to the vacation of office. Statutes should be so construed as to give every word and phrase used its common and approved meaning. If it was the intention of the Legislature to limit the prohibition to the term of actual service, or simply to make members of the coun-

[1] How. Stat. § 2472.
[2] Art. 4, § 18.

cil or aldermen ineligible to other city offices during the term of actual service, the phrases, "during the term for which he was elected," and "during the period for which he was elected," are entirely superfluous. The term for which respondent was elected is clearly defined by the charter, and the language, "the term for which he was elected," has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility, and excludes a construction which would have attached in the absence of that language.

It follows that at the time of his appointment respondent was ineligible, and now holds the office of chief of police of West Bay City without authority, and is guilty of intrusion, and a judgment of ouster, with costs, must therefore be rendered against him.

The other Justices concurred.

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ABRAM L. STEBBINS, EXECUTOR, ETC., v. THEODORE T. STEBBINS ET AL.

Will—Construction.

1. Courts should not seek out technicalities, or arrive at forced or far-fetched conclusions, in order to destroy a will, because of any idea that the testator has done his next of kin injustice, or conveyed his property away from his relatives, and given it to those having no claim upon his bounty.
2. The testator, if of sound mind and not unduly influenced, has a right to dispose of his property as he sees fit; and it is the duty of courts to ascertain his intention from the will con-

strued as a whole, and to harmonize all of its provisions, if possible, to that intent.

3. While a legacy may not be a debt of the testator during his life-time, and while, in the strict sense, there is a difference in the definitions of debts and legacies against his estate after his death, yet both are charges upon the estate, which may be enforced and collected; and, in the use of terms by a layman in drafting his will, the legacies which he has provided for therein may well appear to him as debts against his estate, and be so defined by him in after portions of the will.

   So *held*, where a testator, after providing for the payment of his debts and funeral expenses and for certain legacies, directed that, after all debts and expenses were paid, the balance of his estate should be equally divided between two church boards; and it was claimed that neither of the terms "debts and expenses" could, by the most liberal interpretation, be made to include the legacies before provided for.

4. A testator directed the payment of his debts and funeral expenses out of his "means," which might be in the hands of a designated person, specifying certain notes and other choses in action, and a mortgage, given upon the house and three lots of land on which his brother then lived, to secure a loan of $1,500. The will then provided that the brother and his wife were to hold and enjoy *all of said property* during their natural lives, and that after their decease it should be sold, and the avails divided between certain missionary boards. And it is held that the term "*all* of said property" referred to the $1,500 mortgage, and that the evident intent of the testator was that the mortgagors should have the use and enjoyment of the entire mortgaged premises during their life-time, without being harassed by the mortgage.

Appeal from Wayne. (Reilly, J.) Argued May 13 and 14, 1891. Decided July 3, 1891.

Bill to construe a will. The defendant Emily D. R. Stebbins appeals. Decree affirmed. The facts are stated in the opinion.

Hoyt Post, for complainant, *C. I. Walker*, for defendant American Missionary Association, and *Walker & Walker*, for defendant Harper Hospital, unite in one brief, and contend for the doctrine of the opinion.

B. M. Thompson, for appellant, contended:

1. The will is to be construed as written, and, if incapable of an intelligent construction, must fail for uncertainty; citing *Waldron v. Waldron*, 45 Mich. 350, 353; *Crooks v. Whitford*, 47 Id. 283, 291; *Mackie v. Story*, 93 U. S. 589; *Tucker v. Society*, 7 Metc. 188; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Mason v. Bateson*, 26 Beav. 404; *Taylor v. Maris*, 90 N. C. 619; *Clark v. Clark*, 2 Lea, 723.
2. Force and effect cannot be given to the several provisions of this will without wholly disregarding the ordinary meaning of plain and common words; and the aid of the court is sought, therefore, not to construe such separate provisions, but the will as a whole. All ambiguity and difficulty that confront the court is due solely to the inconsistent and conflicting provisions of the will. This ambiguity is wholly patent, and must be removed, if at all, by construction, and not by the aid of extrinsic proof; citing same authorities.
3. If there is a simple principle of government accepted as true by all civilized people it is this: That the natural objects of every man's bounty are his children and grandchildren; and this principle is recognized by the courts in the interpretation of wills by the rule that the heir is not to be disinherited by conjecture, but only by express words; citing *Wilkins v. Allen*, 18 How. 385.

MORSE, J. The bill in this case is filed to obtain a construction of the will of Nehemiah D. Stebbins, the disposing clauses of which are as follows:

"I desire, as soon as convenient after my decease, that all my debts and funeral expenses be paid out of my means, which may be found in the hands of Jacob S. Farrand, of the city of Detroit, to the amount of $4,700, in one note against H. C. Parke, of two thousand dollars, and another against Parke, Davis & Co., to the amount of twenty-seven hundred dollars; also a certificate of deposit in the Commercial Bank, in the city of Detroit, Mich., to the amount of eight hundred dollars, perhaps some more, which will be found among my papers in the hands of nephew Abram L. Stebbins, of the city of Detroit, Mich.; also a mortgage of fifteen hundred dollars loaned to my brother Theodore T. Stebbins, this mortgage being a security on the house and three lots of land on which he now lives in the city of Dowagiac,

Michigan; and now on file in the clerk's office of said county.

"Item 1. I wish my brother Theodore T. Stebbins, and his wife, Fanny, to hold and enjoy all of said property during their natural life. The interest to be collected, if they wish, after their decease or close of life.

"Item 2. After their decease, I wish the property to be sold, and the avails of said property to be divided between the Foreign Presbyterian Board of Missions and the Home Board of Presbyterian Missions, both expended on the Pacific coast, in California, Oregon, as the board may think best.

"Item 3. I give and bequeath to my son, Theodore W. Stebbins, the sum of five hundred dollars, also the large family Bible, if he desires it; if not, it may be put into the hands of my granddaughter, Emily D. R. Stebbins.

"Item 4. I give and bequeath, as a matter of indebtedness, to my niece, now Eugenia L. Benson, the sum of one hundred dollars.

"Item 5. I give and bequeath the sum of one thousand dollars for the purpose of raising a sum of twenty thousand dollars for the purpose of increasing the facilities for the education of nurses in the Harper's Hospital in the city of Detroit, now under the management of the First Presbyterian Church of said city. If it should not be raised, I direct it to be given to the Detroit missions in the Presbyterian church.

"Item 6. A small note of seventy-five dollars may be found against my brother Fitzallen Stebbins; if so, give it up to him or destroy it.

"Item 7. I give and bequeath five hundred dollars to the American Missionary Society.

"Item 8. After all debts and expenses are paid, give the balance left, in equal sums, to the foreign and home boards of the Presbyterian Church, unless extreme want shall be observed by my executor among my brothers and only living son. In such case I will leave it optional with him to give a portion or the whole, as he shall in his judgment decide what ought to be done.

"Item 9. All my personal effects, such as books or clothing, I desire to be divided among my brothers and their families, giving my granddaughter, Emily D. R. Stebbins, the privilege of selecting from them if it is her wish."

The intent of this will is very plain to me, and it can be gathered entirely from the will itself, without resorting to any other means of construing it; and I think the circuit judge, Hon. C. J. Reilly, of the Wayne circuit court, came to the right conclusion, and the only one that the will is susceptible of. No other conclusion can be reached without making a different will than the testator plainly intended, or by destroying the will, when it is clearly, to my mind, a perfectly harmonious and valid instrument.

Courts should not seek out technicalities, or arrive at forced or far-fetched conclusions, in order to destroy a will, because of any idea that the testator has done his next of kin injustice, or conveyed his property away from his relatives, and given it to those who have no claim upon his bounty. Nor should the will be examined by a microscope to find some ambiguity or some contradiction by which it may be annulled in the interest of the heirs, however deserving or poor the heirs, or any of them, may be. The testator, if of sound mind and not unduly influenced in this case, had a right to dispose of his property as he saw fit; and it is the duty of the courts alone to seek out his intention, and to find such intention from the will construed as a whole, and to harmonize all the provisions, if possible, to that intent.

It is not claimed either that the testator was of unsound mind or that he was unduly influenced by any one; and we cannot listen to the argument that the granddaughter, in whose behalf the appeal to this Court is taken, is poor, and the daughter of one who gave his life for his country during the Rebellion, or that she was beloved of her grandfather. These considerations, while appealing to our sympathy and our respect for her, cannot weigh one feather's weight in the examination of

this will, if we are not swerved thereby from our duty under the law.

It is claimed by her counsel that there are in this will three separate dispositions of all or nearly all of the testator's property, each disposition being entirely inconsistent with the others; that this inconsistency and contradiction in the will cannot be harmonized so as to make the instrument a valid one; and it must therefore be declared null and void. It is contended—

First. That Theodore T. Stebbins and his wife, by items 1 and 2 of the will, take a life-estate in the whole property of the deceased, and at their death the same is to be equally divided between the foreign and home boards of missions of the Presbyterian Church. This is one disposition of the whole property.

Second. The testator then disposes of a part of his property in items 3, 4, 5, 6, and 7, of his will; and, *lastly*, he disposes of the whole of his property again in the eighth item to the above-named mission boards.

The contention that Theodore T. Stebbins and his wife, Fanny, take a life-interest in the whole estate, is grounded upon this language of the first item: "To hold and enjoy *all* of said property during their natural life." It is said that the words "all of said property" manifestly relate to his property which he describes in the first or opening paragraph of his will, before he itemizes his bequests. But this is clearly not so. The phrase "*all* of said property" undoubtedly refers to the property described in the last clause of said paragraph, to wit:

"Also a mortgage of $1,500 loaned to my brother Theodore T. Stebbins, this mortgage being a security on the house and three lots of land on which he now lives in the city of Dowagiac."

The property he is speaking of is this mortgage. He

evidently intended to save their home to them during their natural life. The word "all" was no doubt used to carry the idea that he wanted the house and all the lots to be used by them unincumbered by his mortgage as long as they lived. And the other clause of item 1, to wit, "the interest to be collected, if they wish, after their decease or close of life," is consistent with this wish. What he wanted to do was not to give them this mortgage, or the interest upon it, but to fix it so that they would not be harassed by the mortgage upon their home, or any part of it, as long as they lived. To that end they might, if they saw fit, pay the interest as it fell due while they lived; but, if not, they might let it accrue with the mortgage against the property upon which it was secured. Construed in this way,—and it is a reasonable construction with the whole of the will,—this clause in reference to the interest is intelligible, and means something. Construed as giving a life-estate to them, this clause becomes absolutely meaningless, and item No. 1 is in flat contradiction of every other item in the will, except perhaps the second one.

The counsel for the appellant admits that he cannot explain or reach the meaning of this interest clause, construing the will as intending, in item No. 1, to give a life-estate in the whole estate to his brother Theodore and his wife. It may well be admitted that this interest clause is meaningless, if such construction prevails. It is very evident that the testator did not intend that this interest clause should apply to all his property, which consisted almost entirely of interest-bearing securities. He did not mean that the clause should be read as follows: "The interest to be collected on the notes, certificate of deposit, and the mortgage, if they wish, after their decease or close of life," thereby giving them a life-estate in the whole property, if they wish it; and, if they

do not wish it, then tieing up the whole estate until after their deaths, and then selling the notes, etc., under the second item of the will. A life-estate in his whole property would consist of the use of it, which would be the interest upon the securities of which his estate was composed. But, construing item 1 as I have construed it, it is in perfect harmony, not only with item 2, but with every other item in the will. Then this clause as to interest applied to the mortgage has a meaning, and can be given effect.

But it is argued that the use of the word "property" shows that the testator did not refer to the mortgage alone, but to the whole property. In answer to this, it will be seen that the testator, in the opening paragraph of his will, does not use the word "property" at all. He speaks of his "means," and describes what such means are. It will be admitted, probably without much question, that the term "property" applies just as well, in every sense of its common use, to a mortgage as to a promissory note or a certificate of deposit. When he used the word "property" he evidently had in mind the homestead of his brother, and wished him to hold and enjoy it with his wife as long as they might live; and in the second item he speaks of wishing the property sold, and the avails of the same to be divided between the mission boards, no doubt having in view the fact, which is quite evident to have been in his mind all the time, that when the mortgage was collected the land would have to be sold to make its amount. This thought that the mortgage could not be collected without selling the land accounts for the fact that, while he does not give them anything except the forbearance, if they choose, of the collection of interest while they live, he is careful

that they shall not be disturbed in the property covered by the mortgage.

The main intent of this will, from beginning to end, is to give the bulk of his property to religious societies; and, while the wisdom of this may be questioned, his right to do so cannot be disputed.

It is argued that the testator intended to give all his estate, regardless of the other bequests in his will, to the foreign and home boards of the Presbyterian Church, in the eighth item of his will, unless "extreme want was observed by his executor among his brothers and only living son." This argument is based upon the language:

"After all debts and expenses are paid, give the balance left, in equal sums, to the foreign and home boards of the Presbyterian Church."

It is said that neither of the terms "debts and expenses" can, by the most liberal interpretation, be made to include the legacies going before this item No. 8 in the will, and the dictionaries have been cited to prove this. While a legacy left in a will may not be a debt of a testator while he is yet living, and while, in the strict sense, there is a difference in the definition of debts and legacies against a man's estate after his death, yet both are charges upon the estate, and are liabilities of the estate, which may be enforced and collected; and, in the use of terms by a layman, the legacies that he had provided might well appear to him as debts against his estate, and be so written by him. And the distinction between debts and legacies is but a technical, though a legal, one, and one as well as the other takes money from the estate to pay or discharge it. It is plain enough that he intended this eighth item to be a disposition of the balance of his property, not bequeathed in the other items, except his personal effects. This is,

we think, what would strike the common understanding at once, and courts are not to be so technical as to disregard the plain and common meaning of a word or words used in an instrument, when such meaning is also obvious from the whole context.

It must be remembered that this will was drawn by the testator himself, and not by a lawyer skilled in the use of legal phrases. He used words in the meaning as they appeared to him, and it is not unnatural nor unreasonable to infer that when he spoke of "all debts," not "my debts," he was speaking in reference to the legacies which he had, in the items preceding this eighth one, made charges and liabilities upon his estate. Indeed, this is the natural and obvious interpretation of his language, when the whole will is taken together, as it must be, to get its meaning. It will be also noticed that in the very first part of his will, before he mentions his "means" or gets to the disposition of his property, he desires that, "as soon as convenient after my decease, all my debts and funeral expenses be paid out of my means." This was the first thing to be attended to. It is clear from this, also, that when he speaks of debts and expenses in the eighth item of the will he refers to the liabilities of the legacies and the expenses of administration. But it seems useless to attempt to make that clearer which to me is patent and indisputable.

The only heirs of the testator are his son, Theodore, and his granddaughter, Emily D. R. Stebbins. The estate, in the absence of a valid will, would descend to them in equal shares. No one has appealed from the decree below but the granddaughter, and it is therefore unnecessary to examine the decree of the court below any further than it affects her rights.

It was shown in the testimony that the testator, on being asked if he had not willed anything to his brothers

and his granddaughter, who is the child of a deceased son, replied: "No, they have had their portion of my property, and this money belongs to the Lord, and I want it to be used in His work." This may explain why he made his will as he did; but I have given no consideration to the testimony taken in the case, as the will itself to me is plain as the light of day, and needs no extrinsic evidence to support it, or to gather its intent.

The decree of the court below is affirmed, with costs of this Court to the executor and against the appellant.

The other Justices concurred.

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PATRICK SMITH AND JOHN J. THOMAS, TRUSTEES, FOR THE USE AND BENEFIT OF THE ANCIENT ORDER OF FORESTERS, v. THOMAS PINNEY.

Voluntary associations—Action—Parties—Pleading.

1. The *main* question in this case is whether, under the general laws governing the Ancient Order of Foresters, the trustees for the subsidiary high court are authorized to maintain an action for money claimed to be in an ex-treasurer's hands, without showing his refusal to pay over the same on presentation to him of an order therefor pursuant to the laws of the society; which question is decided in the negative, the only evidence of a refusal to pay pursuant to *any* authority being his refusal to make such payment to the secretary of the subsidiary high court, who demanded such payment pursuant to a resolution of the executive council, but presented no order as required by the laws of the society, and the evidence failing to show that the subsidiary high court authorized the bringing of such suit.
2. The appellate court will regard an amendment to a declaration as having been made after judgment which might have been made before on motion, under the authority of How. Stat. § 7636.

So *held*, where the trustees of an unincorporated benevolent society, in a suit against the treasurer intended to be brought in their representative capacity, inserted in a common-count declaration after their names the words, "trustees, for the use and benefit of" the society, naming it, and in the several counts the promises of the defendant were averred to have been made to plaintiffs. Error was assigned upon the refusal of the court to exclude all of the plaintiffs' testimony on the ground that the added words were merely descriptive, and that the suit was therefore prosecuted in plaintiffs' individual capacity; which assignment is held untenable, the objection being one which could have been obviated by amendment by inserting the word "as" before the word "trustees," and by corresponding amendments in the counts of the declaration.

3. No member or number of members of an unincorporated society can maintain a suit for its benefit to enforce a contract made in its name or for its benefit, or for property belonging to the society, unless there is some warrant or authority for such action on their part in the organization of the society, and the terms and conditions of the agreement by which its members are united.

Error to Wayne. (Hosmer, J.) Argued February 3, 1891. Decided July 28, 1891.

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

George W. Radford, for appellant, contended:

1. The use of the phrase "for the use and benefit of" some person named, other than the plaintiff, in the commencement of a declaration, immediately following the name of the plaintiff, where no assignment is set forth, and no allusion made in the body of the declaration to any other interest or title than such as plaintiff held, has no force to make the issue different than if the phrase had been omitted; citing *Insurance Co. v. Manufacturing Co.*, 31 Mich. 346; *Stobie v. Dills*, 62 Ill. 432.
2. Parties suing in a representative capacity must set the same up specially, or the suit will be personal, and not representative; citing *Barnum v. Stone*, 27 Mich. 332.
3. Where a suit is brought in the name of the promisee for the use and benefit of the assignee of a contract, the promisee is the legal plaintiff; citing *Farwell v. Dewey*, 12 Mich. 436.

4. In a suit brought by a plaintiff in a representative character, the declaration must show an indebtedness to the party represented; citing *Barnum v. Stone*, 27 Mich. 332, *Christopher v. Stockholm*, 5 Wend. 38; *Merritt v. Seaman*, 6 N. Y. 173, and cases there cited.

5. The remaining points of counsel are fully stated in the opinion.

John D. Conely (*Malcolm P. McGregor*, of counsel), for plaintiffs, contended:

1. Plaintiffs had authority to bring this suit under section 1 of article 9, quoted in the opinion, the word "property," as used in said section, covering the funds in defendant's hands, which belong to the society, and are placed in charge of its trustees; and the fact that the society has acquiesced in this suit, and has sent its permanent secretary to testify on the trial, indicates that in its opinion the trustees are the proper parties to bring this action. The succeeding provisions as to countersigning of checks, etc., are for the purpose of securing proper vouchers of the transactions, and do not apply to actions against an ex-treasurer for funds which he does not hold in his official character, but which he undertakes to keep away from the treasury.

CHAMPLIN, C. J. The Subsidiary High Court of the United States of the Ancient Order of Foresters is a voluntary association, composed of delegates from district or from subordinate courts, and is organized for the mutual benefit of the members of the order, and for benevolent purposes. It possesses the general legislative power of the order, and is supreme authority for organizing district and subordinate courts. It holds biennial sessions, commencing on the second Tuesday in August. There is an executive council, which is composed of the officers of the subsidiary high court, whose duties and functions are defined by the general laws of the order. Among the officers of the subsidiary high court there is a treasurer and a permanent secretary.

The general laws (art. 9, § 1) provide for the election of three trustees, as follows:

"There shall be three trustees of the subsidiary high

court, who shall be elected at each session thereof, who shall have charge of the property of the court, and in whose names or the name of the subsidiary high court, as provided in section 1, art. 6, the bonds of the treasurer and secretary shall be given. It shall be the duty of the trustees to investigate and ascertain if the sureties on the bonds of the permanent secretary and high court treasurer are responsible for the amount of their bonds; and they shall invest, subject to the approval of the subsidiary high court, the surplus funds of the court. No money shall be drawn from the treasurer or bank by the trustees unless by special order of a subsidiary high court meeting or the executive council, duly signed, countersigned, and sealed."

Article 33 of the general laws provides for an endowment fund; section 1 of which reads as follows:

"There shall be, in connection with and under the exclusive jurisdiction of this subsidiary high court, a fund to be known as the 'Ancient Order of Foresters Endowment Fund,' having for its object the payment upon the death of a member thereof a sum not exceeding two thousand dollars to the nominee or nominees, widow, children, other next of kin, or legal representatives of such deceased member as may be entitled thereto: *Provided*, however, that up to the time of the member's death he shall have in all things conformed to the laws, rules, and regulations governing said fund."

This fund is raised by assessments upon the members, which are levied through the executive council, and collected through the special courts, and transmitted by the secretary of each court to the executive council. Section 17 of this article provides:

"All money received for and on behalf of this fund shall be deposited in such bank or banks as may be selected by the executive council and trustees of subsidiary high court in the name of the A. O. F. endowment fund. No drafts or checks upon the same shall be drawn or made except for the purpose of this article specified. Such drafts or checks shall be signed by the H. C. R., H. S. C. R., treasurer, secretary, and trustees of S. H. C., and impressed with the seal of this fund. A copy

of this section, together with the signatures of the aforementioned officers and an impression of such seal, shall be delivered by the E. C. to the bank or banks in which such funds are deposited."

In this section the initials "E. C." stand for "Executive Council;" "S. H. C.," for the "Subsidiary High Court;" "A. O. F.," "Ancient Order of Foresters;" "H. C. R.," "High Chief Ranger;" and "H. S. C. R.," "High Sub-Chief Ranger."

Connected with the endowment fund are the endowment management fund and the reserve fund.

Article 6 prescribes the duties of the permanent secretary, section 1 of which declares that "There shall be a permanent secretary of this S. H. C." Section 2 provides that the permanent secretary shall at each meeting of the executive council transfer all post-office orders, checks, drafts, postage stamps, and cash received on account of the order to the subsidiary high court treasurer, and take his receipt therefor. He is also required to give bonds payable, in case of default, to the trustees or the subsidiary high court. The benefits to be paid from the endowment fund are required to be paid by draft or check, payable to the person or persons legally entitled to receive the same, and forwarded through the court's secretary, who shall, on receipt of the same, notify the trustees, and they, with the secretary, shall visit the person or persons entitled to receive the same, and pay it over, taking proper receipts for the same. Article 33, § 16.

Article 12, § 1, reads as follows:

"The funds of the executive council shall be placed in the hands of the subsidiary high court treasurer, who shall give bonds to the trustees, with two or more sureties, for the faithful performance of his duties, and in such a sum as the council for the time being may require, which shall not be less than $20,000."

Section 2 provides that no money shall be drawn from the subsidiary high court treasurer except by order of the subsidiary high court meeting or the executive council, and by order signed by the subsidiary high chief ranger and at least two trustees, or, in his absence, by the subsidiary high sub-chief ranger and two trustees, and countersigned in either case by the permanent secretary.

Article 33, § 28*a*, provides as follows:

"There shall also be, in connection with this fund, a reserve fund, to which shall be transferred all surplus arising from time to time in the endowment fund, which shall be paid over to the high court trustees every quarter, to be invested by them in government bonds, and shall only be used for the purpose of keeping assessments from occurring oftener than fifteen in any one year."

Section 32 of the same article provides as follows:

"All moneys received by the permanent secretary shall be transmitted to the treasurer within three days, taking his receipt therefor;" and section 33 provides: "The treasurer shall, within three days after the receipt of moneys, deposit the same as per section 17 of this article."

The moneys referred to in this section pertain to the endowment fund, and the other funds attached thereto. Section 22 of the same article provides that all remittances for this fund shall be sent by certified check, post-office order, registered letter, or through an express company to the executive council, payable to the high court treasurer. There are other funds belonging to the subsidiary high court, such as the arbitration fund, sick and funeral fund, and general management fund; but it is not necessary to specify particularly in reference to them, as the custody and disposition of them all has already been referred to.

Plaintiffs in this suit are the trustees of the subsidiary high court, duly elected. One of the trustees elected at

the same time resigned, and his place has not been filled. The defendant was elected treasurer of the subsidiary high court, and as such received into his hands considerable sums of money belonging to each of the funds above mentioned. His term of office expired when his successor was chosen at Chicago, at a regular meeting of the subsidiary high court, held in August, 1887. He gave bond to the trustees, as required by the general law. At that time Ezekiel McMurtry was permanent secretary, and after the Chicago meeting the executive council passed a resolution directing Mr. McMurtry to call upon Mr. Pinney, and request him to pay over the balance of money then in his hands. In pursuance of this resolution McMurtry made the demand, and Mr. Pinney declined to pay over the money demanded, but during the conversation expressed a willingness to pay over a portion,—some $2,250. The balance in his hands, as claimed by them, was something over $4,000, and amounted at the time of the trial, including interest at 6 per cent., to $4,953.78. The plaintiffs thereupon brought this suit to recover this money as the property of the subsidiary high court.

The declaration is upon the common counts in *assumpsit*, and the commencement is as follows:

"On the 1st day of November, A. D. 1888, Patrick Smith and John J. Thomas, trustees, for the use and benefit of the Ancient Order of Foresters, plaintiffs herein, by Conely, Maybury & Lucking, their attorneys, complain of Thomas Pinney, defendant herein, of a plea of trespass on the case upon promises, filing this declaration, entering rule to plead, etc., as commencement of suit."

The promises in the several counts are stated to have been made to plaintiffs. The bill of particulars specifies the items as having been paid to defendant by the former treasurer of the association, as follows:

"The following amounts of money paid to said defendant by James Bretherick, treasurer of the tenth executive council of an organization known as the 'Ancient Order of Foresters,' on or about the 17th day of August, A. D. 1885, for the respective funds of said organization, hereinbelow mentioned:

Endowment fund	$563 21
Endowment management fund	91 57
Endowment reserve fund	2,110 00
Arbitration fund	10 70
Sick and funeral fund	56 72
General management fund	13,850 96
Total	$16,683 16"

Then follow several amounts claimed to have been paid to defendant by Ezekiel McMurtry, permanent secretary of the Ancient Order of Foresters, on account of the several funds, naming the amounts. The plea in the case was the general issue.

Upon the trial, after the jury were impaneled, and the counsel had made his opening to the jury, wherein he stated that the plaintiffs sought to recover moneys from Mr. Pinney remaining in his hands as ex-treasurer of the subsidiary high court of the executive council of the Ancient Order of Foresters, counsel for defendant interposed an objection to the introduction of any testimony under the pleadings in this case, and based his objections upon the declaration and bill of particulars, the objection being that the plaintiffs were described as trustees, for the use and benefit of the Ancient Order of Foresters, and that those words were merely descriptive of the persons of Patrick Smith and John J. Thomas, and that the suit was therefore in their individual names, to recover money which in their bill of particulars they allege was paid to defendant by other persons. The court overruled the objection, and received the testimony. As this objection lies at the foundation of plaintiffs' right to recover at all, and is one of the main

grounds relied on by defendant to defeat the action, it should be first considered.

It appeared in evidence that there were in 1889, at the time the suit was brought, some 600 subordinate courts, having a total membership of 60,000 to 65,000 persons. The rule undoubtedly is that the party suing in a representative capacity, where the contract or promise was made to the person he represents, and not to him personally, must set up specially the representative capacity in which he sues. This rule is illustrated by suits brought by executors or administrators and others. If the cause of action accrued or the promise was made to the testator or intestate in his life-time, the executor or administrator must sue as such, and allege the promise to have been made to the person in his life-time whom he represents. If made to him personally after his appointment, although it be a promise to perform some act or pay some debt due to the testator or intestate, the representative may sue individually or in his representative capacity.

In this case the words following the names of the plaintiffs were merely a description of the person, but the objection was one that could have been obviated by amendment by inserting the word "as" before the word "trustees." The declaration would have shown then that the suit was not brought by them in their individual capacity, but in their representative capacity as trustees; and the counts in the declaration might also have been amended to correspond.

Our statute of amendments is very liberal. How. Stat. chap. 264. Such amendments as related to the names of parties have been sanctioned by this Court. *Final v. Backus,* 18 Mich. 218; *Johr v. Supervisors,* 38 Id. 536; *Kimball, etc., Manfg. Co. v. Vroman,* 35 Id. 310; *Merrill v. Kalamazoo,* Id. 211; *McLaughlin v. Wilks,* 42 Id. 553; *Berrien Co. Treasurer v. Bunbury,* 45 Id. 79; *Morford v.*

Dieffenbacker, 54 Id. 603; *Cragin v. Gardner*, 64 Id. 402. See, also, where such amendments have been allowed, the following cases: *Bullard v. Bank*, 5 Mass. 99; *Kincaid v. Howe*, 10 Id. 203; *Sherman v. Connecticut River Bridge*, 11 Id. 338; *Blood v. Harrington*, 8 Pick. 552; *Slater v. Nason*, 15 Id. 345; *Wight v. Hale*, 2 Cush. 486; *Crafts v. Sikes*, 4 Gray, 194; *Lester v. Lester*, 8 Id. 437; *Hutchinson v. Tucker*, 124 Mass. 240; *Smith v. Carney*, 127 Id. 179.

Since it was an amendment which might have been made before judgment on motion, this Court will regard it as having been made after judgment, under the authority of section 7636, How. Stat.

The defendant next contends that the plaintiffs are not entitled to recover under the evidence, for the reason that the general laws and rules of the order do not authorize them to institute the suit; that they have shown no authority from the subsidiary high court to bring it. This question depends upon the organization of the association, and the terms and conditions of the agreement by which its members are united. It appears in evidence that the defendant was and still is a member of the association. Unless there is some warrant of authority, no member of number of members of an unincorporated society can maintain a suit for the benefit of the society to enforce a contract made in its name or for its benefit, or recover property belonging to such society; and the question here presented is whether, under the general laws introduced in evidence, the plaintiffs, as trustees for the subsidiary high court, are authorized to maintain this action.

It must be confessed that the general laws are crude and lamentably wanting in matters of detail. The duties of the officers, of the executive council, and of the trustees are prescribed in the most general terms. There

is no provision stating what the outgoing treasurer shall do with the funds on hand, nor to whom he shall hand over the books and papers in his custody. He is not required to deliver them to his successor, nor in express terms that he shall deliver the books and money to the executive council, which is the managing body when the subsidiary high court is not in session. The only ways provided for drawing money from his custody and control are contained in section 2 of article 12, and section 17 of article 33, both of which have been quoted. If the money is in the endowment fund, it is presumably true that it was deposited in some bank specified or selected by the executive council and trustees, in which case it cannot be withdrawn except by drafts or checks upon the same, as provided for in section 17 of article 33. And if it is in such bank, there is no testimony in this case which shows that the proper officers could not have withdrawn the money from such bank. There is no direct testimony in this case that any bank was selected. It may, however, perhaps be inferred from the testimony of Edmund T. Mack, who testifies that he was cashier of the Citizens' Savings Bank of Detroit, and that it paid out for the benefit of the order, at the Chicago meeting, $15,600. The testimony of Mr. Greening is to the effect that when the accounts were audited in the usual way in August, 1887, just previous to the Chicago meeting, the amount then in defendant's hands was $20,499.69. If any money was in the defendant's hands, and not in the bank and subject to draft or check, as provided for by section 17 of article 33, then it was subject to be drawn out of defendant's hands by virtue of section 2 of article 12. There is no testimony in this regard showing that the defendant refused to pay any money in his hands, drawn in pursuance of section 2 of article 12. The only evidence that he refused to pay the money pur-

suant to any authority was his refusal to pay Mr. McMurtry, when he called upon him in pursuance of the resolution passed by the executive council; but it does not appear that he was presented with any order signed by the subsidiary high chief ranger and two trustees, or the subsidiary high sub-chief ranger and two trustees, countersigned by the permanent secretary, and, until the proper order is drawn and presented to him, it is difficult to see how he is liable to suit for not paying it over. The trustees themselves have no authority to draw the money from his hands, and the subsidiary high court has not directed this suit to be brought by them to obtain the money from Mr. Pinney in this manner. There is no testimony in the case tending to show any recognized custom with reference to the payment over by the retiring treasurer of the moneys in his hands to his successor in office. The general laws of the order have been introduced as containing the only methods by which the money in his hands as treasurer is withdrawn.

We think it was incumbent upon the plaintiffs to show some breach of duty on the part of defendant prescribed by the general laws of the society of which he was a member, before he can be compelled in a suit of this kind to pay over money in his hands. All the members of the association are bound by these general laws. The executive council cannot draw moneys from his hands simply by resolution. It requires an order, signed as provided for in section 2 of article 12, or by section 17 of article 33.

We think the second objection taken to the recovery in this cause is valid, and that the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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DAVID THOMAS v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Negligence—Railroad companies—Injury at crossing.

Plaintiff was injured by defendant's engine at a highway crossing, and recovered a judgment, which is reversed, Chief Justice CHAMPLIN holding that the case should have been submitted to the jury, under all of the facts and circumstances, for them to say, under all of the testimony in the case, whether or not the defendant was negligent, and whether plaintiff materially contributed to the injury by his own negligence. GRANT, J., concurred in the result reached by the Chief Justice. MORSE, J., filed an opinion, concurred in by MCGRATH, J., concurring in a reversal, and holding that if the defendant ran the engine at a dangerous rate of speed without giving the statutory signals before reaching the crossing, and without a sufficient headlight, it was guilty of such gross negligence as entitles the plaintiff to recover; and that, if defendant was not so negligent, plaintiff could not recover, because of his want of care in failing to look and listen, and in not having his team in such a state, as to driving, that he could stop them at once, if necessary.

Error to Calhoun. (Hooker, J.) Argued February 13, 1891. Decided July 28, 1891.

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

Geer & Williams, for appellant.

James M. Powers (*George Huggett*, of counsel), for plaintiff.

[The points of counsel are stated in the opinions.—REPORTER.]

CHAMPLIN, C. J. This action is brought to recover

damages alleged to have been caused by defendant's negligence in running an engine over its road across a highway, and colliding with the plaintiff's wagon, by which he was thrown out and injured.

The case was tried in the court below before a jury, and under the charge of the court the plaintiff had judgment, and the defendant brings the case into this Court by writ of error. Eighteen errors are assigned, four of which relate to the rulings of the court upon the examination of witnesses.

The first error assigned is that the court erred in permitting plaintiff's witness E. M. Hoyt to answer the following question: "Do you think you are sufficiently acquainted with the running of trains to be able to judge the rate of speed?" and in overruling the objection of defendant thereto.

The witness Hoyt testified that he saw the engine pass through the village on the evening of the accident; that he had lived within eight or nine rods of the railroad track for eight years, and had frequently observed trains running by. He further stated that he was "acquainted with the running of trains only just by them saying how fast they would run, and such like." The question excepted to was then asked. The objection was stated to be that "he says he only knows the rate by what others may have said to him about it." The court directed the witness to answer. The witness answered, "I think I could tell pretty near what rate they was running. I think it was running along about 50 or 60 miles an hour." The witness gave the grounds upon which he based his estimate, which were his observing the movement of the trains as they passed by his place for several years, and the speed at which others said they were running. The jury were enabled to weigh the testimony

given by the witness from the grounds upon which he based his estimate.

It was said in *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 104, that—

"Any intelligent man who has been accustomed to observe moving objects would be able to express an opinion of some value upon it the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with time-piece in hand, the motion of an object of such size and momentum, but this would only go to the weight of the testimony, and not to its admissibility."

We think the testimony was admissible, and its weight was for the jury.

The second exception is of like character as the first, and we think the testimony given by the witness Holden was admissible. He stated, "I have timed them lots of times."

The third assignment of error relates to a question asked of Dr. Erastus Berry on his cross-examination, viz., "Did you at that time hear him say anything as to having seen the engine before it struck him?" This question was objected to by plaintiff's counsel as improper cross-examination. Defendant's counsel then added to the question, "If so, what did he say about that?" The court sustained the objection, and the defendant's counsel excepted. The question has reference to admissions or statements made by the plaintiff in the suit upon the evening after the accident, and the testimony should have been admitted.

The fourth assignment of error was based upon the testimony offered by the plaintiff showing the condition of the crossing at the time of the accident, which tended to show that the approaches to the crossing were

not in a safe condition. We think there was no error in admitting this testimony.

The other errors relate to the refusal of the court to charge as requested by counsel for the defendant, and in charging the court upon his own motion.

The first request to charge was as follows:

"This being a country crossing, the question of speed is not material."

In all cases where negligence is alleged on the part of the defendant, it is necessary and proper to take into consideration all of the circumstances respecting the transaction, in order to ascertain whether the party alleged to have been guilty of negligence omitted to discharge some duty imposed upon him by the circumstances surrounding the transaction. This request was therefore properly refused, because the question of speed might be material in considering defendant's negligence, according as the circumstances might show that there was some neglect of duty on the part of the defendant in which the question of speed formed a material part; as, for instance, if the defendant failed to observe the requirements of the statute in giving signals when approaching the crossing, or approached such crossing without a headlight burning, the question of speed at which it passed that point would be a material fact in determining the defendant's negligence.

Another request of the defendant is as follows:

"That negligence is not to be presumed, but must be affirmatively proven by the party alleging it, and in the manner alleged in the declaration in the case. And in this case the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injury complained of, by reason of and in consequence of the neglect charged in the declaration, and that the plaintiff did not contribute towards it."

This request may be considered in connection with the

charge actually given by the circuit judge, in which he instructed the jury as follows:

"If any railroad company, through its own carlessness or negligence, runs a train without a headlight, it is liable for the consequences, because it is gross carelessness; and they can only be relieved from it in a case where there is gross carelessness on the part of the other party, which does not appear in this case."

And again he instructed the jury:

"If, by a preponderance of proof, you are satisfied that there was no headlight, then I instruct you that the plaintiff is entitled to recover."

And again:

"If there was no headlight upon the engine, then your verdict will have to be for the plaintiff."

We think that the defendant's request should have been given. We have always required the party alleging negligence, for which he seeks to recover for an injury caused thereby, to state in his declaration the duty and the neglect of duty upon which he relies, and held that he must be confined in his proof and recovery to the allegations in his declaration. He is not permitted to allege negligence under the circumstances stated in his declaration, and recover for negligence not stated. In the declaration in this case the plaintiff sets out the duty of the defendant in each count substantially as follows:

"That it was the duty of the defendant, in approaching the crossing of the highway over which the plaintiff was driving, to use and employ reasonable care, caution, and diligence in running and driving said train of cars and steam locomotives along and over said railroad, and over and across said public highway, at the crossing aforesaid, and to give due notice and warning of the approach of any such train of cars or steam locomotives to all persons passing along and over said public highway, towards and over said crossing, by sounding the whistle of said

steam locomotive twice sharply at least 40 rods before reaching the crossing of said railroad and said public highway as aforesaid, and, after the sounding of said whistle, to keep the bell of said steam locomotive ringing continuously until said crossing should be passed by said steam locomotive, so that all persons lawfully passing or repassing along and over said highway and railroad crossing might have due warning of the approach of any such train of cars or steam locomotive along and over said railroad crossing."

In some of the counts of his declaration there is added to the duties already stated the further duty—

"To keep proper and sufficient lights upon all such steam locomotives as should be run by said defendant over its said railroad after dark."

Plaintiff alleges, as a neglect to observe the duty stated, that—

On the 18th of January, 1889, at about the hour of seven o'clock in the evening, the plaintiff, together with his wife, Margaret, and his daughter Sarah, were approaching said crossing in said highway from a southwesterly direction, and going in a north-easterly direction, with all proper care and caution on their part, seated in an open two-seated wagon, to which were attached two horses, driven by the said plaintiff at a careful and moderate pace, and upon approaching said crossing, and before attempting to drive over the same, and when near the same, the plaintiff looked carefully along said railroad track in both directions, so far as the same could be seen, and also listened carefully, to ascertain whether any train of cars or steam locomotive of defendant was approaching the crossing from either direction, and upon so looking and listening carefully could neither see nor hear the approach of any train of cars or steam locomotive from either direction, and, supposing it to be safe to do so, attempted to drive the said horses and wagon over and across said crossing, with all due care and caution and without negligence on his part.

Yet the defendant, well knowing the premises, as well as the unsafe condition of said crossing, carelessly, unskillfully, recklessly, and negligently did run and pro-

pel by steam its steam locomotive, with no cars attached thereto, from a south-westerly direction along and over said railroad at a high, reckless, careless, negligent, and dangerous rate of speed, to wit, at the rate of 60 miles an hour, and without sounding the steam whistle or ringing the bell of said steam locomotive, as required by law, at or before reaching said crossing, and without having any proper or sufficient lights on said engine, against said two-seated open wagon, in which were seated the plaintiff, his wife and daughter, traveling over said crossing with all due care and caution upon their part; and that said wagon was then and thereby overturned, broken to pieces, and wholly destroyed, and plaintiff and his wife and daughter were then and thereby, with great force and violence, precipitated, cast, and thrown from said wagon a long distance; and then the declaration sets forth the injury to the plaintiff.

The declaration does not allege in either count that the reckless and negligent act of the defendant consisted alone in running the locomotive engine at a high rate of speed without a headlight burning, but in each instance this negligence, where it is alleged, is coupled with the neglect to sound its steam whistle or ring its bell, as required by statute. It was therefore improper for the circuit judge to single out this act of negligence, and instruct the jury that, if they found there was no headlight upon the locomotive, the plaintiff was entitled to recover. The error is very plain to be seen if we stop to consider what the testimony tended to show on the part of the defendant,—that not only was the steam whistle upon the locomotive sounded at the proper distance from the crossing, as required by statute, but that the bell upon the locomotive was continuously ringing from that time until the crossing was passed by the engine; and what might have been gross negligence if the headlight was not burning, and if no warning had otherwise been given of its approach, would not be if ample and sufficient warning of its presence and approach

at the crossing was given by sounding the whistle and ringing the bell, so as to warn all persons approaching the crossing of its presence there.

The testimony in the case was conflicting as to whether the headlight was burning, and also as to whether the proper signals were given. So, also, was the testimony as to the rate of speed at which the engine was running. We think that the case should have been submitted to the jury, under all the facts and circumstances, for them to say, under all the testimony in the case, whether or not the defendant was negligent, and whether also the plaintiff materially contributed to the injury by his own negligence.

It is urged on behalf of the defendant by its counsel that the second request should have been given, viz.:

"The track itself is a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight,—and, if either cannot be rendered available, the obligation to use the other is the stronger,—and ascertain before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence."

We think this states the law correctly under the facts of this case, and the instruction should have been given to the jury.

There was no error in refusing the third and fourth requests of the defendant. The third reads as follows:

"The doctrine of comparative negligence in actions of this kind, as recognized by the courts of some of the other states, is not adopted or recognized by our Court, and therefore cannot be applied to this case."

There does not appear to have been any necessity for this request; it was immaterial to the issue.

The fourth request reads as follows:

"It is negligent to approach a railroad crossing with a team so closely as to involve apparent danger either of direct collision, or of the team's being so frightened by the passage of a train as to become unmanageable, and likely to go upon the track in spite of an attempt to check them."

The question as to whether it would be negligence to approach a railroad crossing with a team so closely as to involve apparent danger is one which depends upon all the circumstances and facts of the case; and under the testimony appearing in the record it was not involved in the issue in this case.

The fifth, sixth, seventh, eighth, ninth, and tenth requests read as follows:

"5. In this case, if the jury find that the plaintiff could have heard the approaching train by stopping his team and listening before reaching the railroad track, and he failed to stop and listen, he was guilty of contributory negligence, and cannot recover.

"6. If the jury find from the evidence in this case that the engineer on engine No. 25 blew the whistle and rung the bell from the whistling post 44 rods west of the place where the injury happened, then the plaintiff cannot recover, and your verdict should be for the defendant.

"7. If the jury find from the evidence in this case that the plaintiff could have discovered engine No. 25 if he had stopped his team and had looked and listened for it before he attempted to cross the track, then it was his duty to have done so, and, if he failed to do so, he was guilty of contributory negligence, and cannot recover.

"8. If the jury find that the headlight on the engine was burning, or that the engine made such a noise that the plaintiff could have heard it if he had stopped his team and listened before entering upon the track, then it would be contributory negligence for the plaintiff to attempt to cross the track without stopping his team and listening, and your verdict should be for the defendant.

"9. It was negligence for the plaintiff, under the circumstances disclosed by the proofs in this case, not to

have stopped his team before attempting to cross the track, and your verdict should be for the defendant.

"10. Under the proofs and pleadings in the case your verdict should be for the defendant, 'no cause of action.'"

The fifth, sixth, and seventh requests, it is claimed, find support under the following authorities: *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274; *Haas v. Railroad Co.*, 47 Id. 401; *Rhoades v. Railway Co.*, 58 Id. 263; *Mynning v. Railroad Co.*, 64 Id. 93; *Brady v. Railroad Co.*, 81 Id. 616; *Matta v. Railway Co.*, 69 Id. 113. But the facts of this case were such that we do not think that the requests should have been given. There were circumstances which it would have been proper to have called the attention of the jury to in connection with such requests, which would have modified them as general propositions in order to make them applicable to the facts and circumstances of this case. There was no error, therefore, in refusing to give such requests.

We think that the eighth request to charge was properly refused, for the reason that the whole facts and circumstances would be proper to be considered by the jury if there had been no warning of the approaching train required by the statute, and no headlight burning. The jury would then have been called upon to consider whether it would be contributory negligence, in the absence of warning by sound and sight, to have crossed the track without also having stopped his team and listened for the rumbling of the approaching train.

The ninth and tenth requests were properly refused, for the reason that we think there was evidence in the case sufficient to go to the jury upon the fifth, sixth, and seventh requests.

The judgment will be reversed, and a new trial granted.

GRANT, J. I concur in the result.

MORSE, J. In this case there is one count in the declaration alleging gross negligence in the defendant, as follows:

That the said defendant "carelessly, unskillfully, *recklessly*, and negligently did run and propel by steam its certain other steam locomotive, with no cars attached thereto, out of and around the cut and curve aforesaid, from a south-westerly direction, along and over said railroad at a high, reckless, careless, negligent, and dangerous rate of speed, to wit, at the rate of 60 miles an hour, and without sounding the said steam whistle or ringing the bell of said steam locomotive, as required by law, at or before reaching said crossing, and without having any proper or sufficient lights on said engine."

This allegation makes out a case of gross negligence as a matter of law, and, if sustained by the proofs, would entitle the plaintiff to a verdict.

But I think it would take the three elements of negligence combined to constitute gross negligence. There is not any doubt from the record, taking the testimony of all the witnesses, but that the rate of speed was dangerous and negligent, if the engine had no headlight and no alarm was sounded; but there was evidence in the case tending to show that the bell was rung and whistle blown, and a proper light attached to the engine. I am satisfied that the plaintiff was so lacking in ordinary care that he cannot recover unless the defendant is shown to have been grossly negligent. I do not think that he was obliged to stop before he crossed the track, but he was bound to look and listen, and to have his team in such a state, as to driving, that he could stop them at once, if necessary. He should have brought his team down to a walk before crossing, for the purpose of having a better opportunity to look and listen, and also to be in a condition to stop them at once if a train was found to be approaching.

This case seems to me to be in a nut-shell. If the

defendant was negligent in all three of the particulars above stated, it was grossly negligent, and the plaintiff would be entitled to a verdict. If not so negligent, the plaintiff cannot recover because of his own want of care. I concur, therefore, in the reversal of the judgment below.

McGRATH, J., concurred with MORSE, J. LONG, J., did not sit.

STEPHEN COLLAR v. HAMBLIN D. COLLAR.

[See 75 Mich. 414.]

Deed—Parol trust—Statute of frauds—Evidence—Money had and received.

1. An action for money had and received will lie against a grantee for money received on the sale of land conveyed to him under a parol trust to make such sale, and divide the proceeds among the grantors; citing *Collar v. Collar*, 75 Mich. 414.
2. Where, in such a case, it appears that the trust is evidenced and defined by a written agreement, parol testimony regarding its terms should be excluded.
3. A parol agreement for the purchase and disposition of land, while executory, is void under the statute of frauds.

Error to Ingham. (Peck, J.) Argued April 16, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion, and in a former opinion, reported in 75 Mich. 414.

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Q. A. Smith (R. A. Montgomery, of counsel), for appellant.

Parkinson & Day, for plaintiff.

CHAMPLIN, C. J. On a former trial of this case the defendant prevailed, the trial court holding that upon the showing then made there could be no recovery upon any theory, either as for money had and received, or upon an account stated, or upon the special count, unless the contract was proven. Upon a writ of error to this Court the judgment was reversed, and a new trial ordered. 75 Mich. 414.

Another trial has been had, and the plaintiff has recovered a judgment, and we are asked to review the proceedings which led to that result. Thirty-one errors have been assigned, only a few of which demand particular attention in an opinion, although all have been carefully considered. The facts, as developed by the testimony upon this trial, are but slightly variant from those which appeared upon the other trial upon the main issues.

At the conclusion of the testimony, the court stated to the counsel the theories upon which he submitted the case to the jury as follows:

"I think this case should go to the jury upon two theories, both of which there is some tendency, in my judgment, in the proof to support the plaintiff's case, as well as proof having an opposite tendency, and what the truth is about it the jury will determine from the evidence; and the one theory is upon the count for the money had and received. Now, to sustain that,—I make this statement that you may understand generally what the views of the court are previous to the argument,—to sustain the case upon the theory for money had and received, it must appear that the parties in their transactions understood and treated the business of procur-

ing these titles by Hamblin as embracing within it an interest for Stephen; that must have been the understanding all round. Now, whether or no such a condition of things as that existed will be left to the jury to determine under the evidence.

"The plaintiff also claims that an agreement was made on the 18th of May, 1886, by which the defendant, in settlement of the plaintiff's claimed interest in the lands, agreed to pay him $225. Now, to make that a valid agreement, if it is proved to the satisfaction of the jury, it must appear that it was made upon a lawful consideration or a good consideration in law. As applied to this case, it is contended on behalf of the plaintiff that there was consideration for making that agreement in this: That Stephen Collar claimed to have an interest in the lands, and went there to settle with Hamblin for that interest. It is not essential, as has been stated on all hands in the argument, that he should have had a legal interest; if he had such an apparent or claimed interest in the lands as, under the circumstances surrounding the parties, was esteemed by them a thing which it was worth while for Hamblin to settle or consider of value, then, I think, it would be a good consideration. Whether that was the case or not, the jury must determine from the evidence. It is true that, so far as anything appears here, the sheriff's deed had alienated Stephen's interest in the land as a matter of law, and from what appears before me I think that is true. The parties may not have considered that that was so, and if Stephen claimed an interest, notwithstanding that, in the property, and Hamblin yielded to that claim, and, for the purpose of settling it and avoiding a controversy upon it, agreed to pay him $225 in settlement of that claim, I think that would be a good consideration for the agreement.

"While the sheriff's deed would, as a matter of law, have alienated Stephen's interest in the land, there appears to have been in Sylvester at his death not only the interest which was conveyed by virtue of the sheriff's deed, but also such interest, if any, as could be conveyed and was conveyed by Stephen and his wife by quitclaim of the premises. If the parties regarded the interest so acquired by both these conveyances,—although the sheriff's deed may have conveyed Stephen's interest entirely, and I think it did,—if the parties regarded the interest owned by Sylvester at his death and by his heirs

afterwards as embracing some equitable interest in Stephen, represented by the quitclaim from Stephen and his wife, or if they regarded the Secor deed, Secor being the execution creditor, as having been procured in the interest of Stephen, those facts and circumstances should be considered with a view of determining whether or not Stephen did have any equitable interest in the fund."

The defendant's counsel, in the course of their cross-examination of Stephen Collar, attempted to show that the conveyance made by Stephen Collar and his wife to Jacob Thorne, on the 28th day of December, 1874, was fraudulent as to his creditors. The court, however, refused to permit the attorneys for the defendant to go into such inquiry. We do not think that the court erred in excluding this testimony. The creditors of Stephen Collar are not before the court or making any complaint of the conveyance by Stephen Collar to Jacob Thorne, and we do not think that the inquiry is material to the issue before the court.

It appears in the case that Joseph S. Secor, a creditor of Stephen Collar, proceeded by attachment against him, and levied upon his interest in the lands in question, and obtained a judgment against him in the state of New York, and levied upon and sold his interest in said lands by public auction, and by which sale the judgment was fully satisfied. The land was bid off at the sheriff's sale by one Isaac Secor, who in due time received the sheriff's deed therefor. It appears, also, that the proceedings in the attachment suit, so far as service upon the defendant, Stephen Collar, was concerned, was a substituted service, no personal service upon the defendant having been acquired in the state of New York; and it was claimed on the part of the defendant in this suit that the sheriff's deed conveyed to Isaac Secor all the interest which the plaintiff, Stephen Collar, had in such land. The deed of the sheriff bears date the 29th day of

December, 1870, being prior in time to the deed of Stephen Collar to Jacob Thorne; and therefore the defendant in this suit claims that, at the time of the execution of the deed to Thorne, Stephen Collar had no interest whatever to convey, and conveyed nothing whatever by such deed. It appears, further, that Sylvester Collar acquired the interest of Isaac Secor under the sheriff's deed by purchase and conveyance from him to Sylvester, dated the 25th day of April, 1887. He also obtained a deed from Thorne and wife, dated December 6, 1876. Stephen Collar contends that the court in the state of New York obtained no jurisdiction in the suit, and that the sheriff's deed is invalid, and did not extinguish his title to the land.

The circuit judge charged the jury that he was of opinion that the sheriff's deed did extinguish the title of Stephen Collar to the land, but further instructed the jury that, if he insisted that he had a claim upon the land after the sheriff's deed, even after he had conveyed to Thorne and he to Sylvester Collar, such claim would constitute a good consideration for the promise of Hamblin D. Collar to pay him the sum of $225 for such interest.

We held, when the case was here before, that where lands were conveyed under a parol trust to sell and convert into money and divide the proceeds, and the trust had been so far executed by the trustee as to sell the land and receive the money, and such trust had been recognized by him, an action for money had and received would lie to recover such money by the person entitled thereto; and in *Bitely v. Bitely*, 85 Mich. 227, we held that parol evidence was admissibe to prove that land was conveyed to sell and divide the proceeds among the heirs; and in *White v. Cleaver*, 75 Mich. 17, we held

that such a trust was not within the provisions of the statute of frauds.

Such testimony was admitted upon the trial of this case; but upon this trial it appeared upon the examination of the plaintiff that there was a writing having reference to four of the conveyances by the heirs to Sylvester Collar, which the plaintiff signed, and that it was sent by Henry to the heirs in Kent county, and that this writing was for the purpose of fixing up and to sell the place, so as to divide the money with the four heirs, namely, Henry, Cameron, Mary, and himself. When this fact appeared, such writing was the best evidence. It defined the trust, and all parol evidence respecting the trust upon which Sylvester obtained the deeds from such heirs should have been excluded. There was no sufficient showing of the loss of such writing as to permit the introduction of parol evidence of its contents. Such parol evidence, when introduced, was objected to, and, when it appeared later that there existed such writing, such objections became effective.

It appears that such writing did not include or provide for all the heirs, but it did include the plaintiff, and measured the rights of those who were parties to it and Sylvester Collar. The plaintiff also testified that at his talk with the defendant on May 18, 1886, he represented these same four heirs, and wanted to settle only for those four interests. It is very important that it should appear what agreement Sylvester had with those four heirs, and the writing is the best evidence of that.

The parol testimony tended to show that the trust which Sylvester assumed was not a trust in land, but a trust arising out of the disposition of land conveyed to him for a specific purpose. It was a trust arising out of the confidence reposed in him by the heirs in conveying their interest to him without any other consideration to

them than that he should dispose of the land, and divide the proceeds *pro rata* among them. The agreement was executory, and contemplated action on the part of Sylvester. He was to acquire the interests of all the heirs, and sell and convert the real estate into money, and pay over to each his *pro rata* share. So far as the agreement relating to the purchase and disposition of real estate rested in parol, it was void under the statute of frauds. *Wright v. King*, Har. Ch. 12; *Bernard v. Bougard*, Id. 130; *Trask v. Green*, 9 Mich. 358; *Newton v. Sly*, 15 Id. 391; *Cobb v. Cook*, 49 Id. 11; *Pulford v. Morton*, 62 Id. 25; *Shafter v. Huntington*, 52 Id. 310. It was only after Sylvester had proceeded in the execution of the parol agreement, and had obtained title of all the heirs, and converted the real estate into money, that the trust would arise, founded upon equity and good conscience, to pay over the proceeds; and before such trust could be enforced at law, some new promise must have been made, and his duty to pay over must have been affirmatively recognized before an action could be maintained. *Calder v. Moran*, 49 Mich. 17.

But what becomes of the remedy of the heirs so deeding if the grantee dies before performance on his part of those provisions which are void by the statute of frauds, and before the property is converted into personalty, so that a trust can attach? At such time it is not such a trust as equity will lay hold of and appoint a new trustee to carry out the parol trusts, which are void by the statute of frauds. The most that can be said in such a case is that the parties have voluntarily conveyed away their interest in the real estate, and placed it beyond recall. They would have been in the same predicament as if Sylvester Collar, after having obtained absolute deeds of conveyance from all the heirs, had refused to sell or

convey the land, or further perform the parol agreement. The heirs could not have compelled a specific performance, because the parol agreement is void under the statute of frauds. Sylvester Collar died before the parol trust attached, and the rights of the heirs to have a performance died with him.

It was said by Mr. Justice CAMPBELL, in *Bulen v. Granger*, 56 Mich. 208:

"As our statutes have abolished the old doctrine of resulting trusts, a person who deliberately conveys land to a wife or other relative stands in no better condition as to enforcing such a trust than any one else."

The plaintiff could not have maintained this action against the heirs of Sylvester Collar, even though they had sold the 55 acres for $3,000 and received the money. The land was incumbered by no trust when it descended to them. It does not become subject to any trust in the hands of the purchaser from them; nor does such purchaser owe to the heirs any duty arising out of the original parol agreement between Sylvester and the heirs. But if there was an express trust evidenced in writing, other considerations obtain, and what the rights and remedies of the parties would be in such a case depend entirely upon the writing; and until that is produced or established with sufficient certainty, it is impossible to determine whether the present action could be maintained or not.

When the case was here before, the opinion was based upon the statement that—

"In 1880, Sylvester Collar died, not having executed the trust or conveyed said lands, and afterwards the defendant, Hamblin D. Collar, obtained a conveyance of said lands from the heirs of Sylvester Collar, deceased, which included the interest of plaintiff, which had been conveyed to Thorne, and afterwards to Sylvester, *for the*

same purpose. * * * It was also proposed to be shown that the defendant obtained the whole title to this land from the heirs of Sylvester, and that he knew his brother had taken the title to the land for the purpose of thus distributing the proceeds, and that although *he had recognized the rights* of all the other heirs, and paid them off on the basis of the agreement made with the plaintiff of May 18, 1886, he had not paid the plaintiff, and refused to recognize his rights in the fund, though he has the funds representing that interest in his hands."

Such is not the case disclosed by this record. It is not shown that the defendant acquired conveyances from Sylvester's heirs for the same purpose that Sylvester had obtained deeds from the heirs; nor is it shown that he recognized the rights of all the other heirs to a share of the proceeds of the sale of the land. On the contrary, it now appears that the agreement under which Stephen Collar claims an interest through Sylvester was in writing, defining the purposes for which Sylvester received the conveyances entered into between four of the heirs, including the plaintiff; and it was with reference to these same four heirs that the original promise to pay $225 was made on May 18, 1886.

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

The other Justices concurred.

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WILLIAM N. DIXON ET AL. v. THE CITY OF DETROIT ET AL.

Municipal corporations—Public improvements—Contract—Fraud—Equity—Acceptance of work—Discretion of officers.

1. Where a city, acting through its authorized agents, lets a contract for a public improvement for a grossly extravagant price, or permits fictitious items to be included in the sum to collect which an assessment is levied, a fraud is perpetrated upon the property-owners, which may call upon a court of equity to interfere and vacate the assessments, or reduce the amount which the complainants should pay; citing *In re Livingston*, 121 N. Y. 94.
2. This Court has never interfered with the discretion of the authorized agents of municipalities in the exercise of the powers granted by the Legislature, except when there was a want of jurisdiction in the proceedings.
3. It is no defense to the enforcement of an assessment for a public improvement that the work and material were not such as the contract called for; citing *Motz v. Detroit*, 18 Mich. 515; Cooley, Tax'n, 671.

Appeal from Wayne. (Reilly, J.) Argued May 8, 1891. Decided July 28, 1891.

Bill to restrain the collection of a special assessment. Complainants appeal. Decree affirmed. The facts are stated in the opinion.

James H. Pound, for complainants, contended:

1. That *Whitney v. Village of Hudson*, 69 Mich. 189, 202, 206, is an authority for the interposition of the court; and that action was taken in *Twiss v. Port Huron*, 63 Mich. 529, which supports complainants' case.
2. The contract being between the city of Detroit and the defendant Merdian, that he should construct a pavement according to certain specifications and estimates, and according to all conditions and to the acceptance of the city (which

certainly means the legislative and executive branches of the city government), and the acceptance having been vetoed by the mayor, and never passed over it, no tax enforcement proceedings can be maintained or be based thereon.

Edward Minock, for defendants, contended for the doctrine of the opinion.

CHAMPLIN, C. J. William N. Dixon and seven other property-owners, residents upon Myrtle street in the city of Detroit, filed their bill of complaint for and in behalf of themselves and all other property-owners upon said street who should desire to take advantage of the bill and contribute to the prosecution, who were assessed for the improvement of Myrtle street.

The bill of complaint sets forth the history of the steps that were taken pursuant to the charter of the city of Detroit to pave Myrtle street. It does not point out or allege any jurisdictional defect in the proceedings, but charges that the board of aldermen of the city perpetrated a gross fraud upon said complainants in awarding the contract to Henry Merdian for a sum greatly in excess of its worth, and as the result of a corrupt pool among the various firms doing a paving business in the city of Detroit, of which the board of aldermen had notice.

The charge is made that the improvement was not performed in accordance with the plans and specifications which formed a part of the contract; that the materials were not such as the contract called for, nor the work done in accordance therewith; and the bill points out wherein the defects exist, both in material and mode of construction, and states that complainants made complaint from time to time as the work progressed, both to the board of aldermen and to the board of public works, under whose supervision the work was being done, and that no attention was paid to their protests and com-

plaint; that, when the contractor claimed to have completed the job, they protested to the common council, and objected to its being accepted, and also objected to the contractor being paid therefor; that, nevertheless, the board of public works reported the job as having been completed according to contract to the common council, and they accepted the job, and voted to pay the contractor therefor; that the mayor vetoed such resolution, and that one of the complainants filed a bill to restrain such payment, and obtained an injunction, which was afterwards dissolved, and immediately the contractor was paid, reserving $582.84 to repair the street, which since that time has been expended in repairs, besides other moneys appropriated for that purpose. It is charged that the common council made a special assessment district, comprised of property they deemed benefited by making such improvement, to defray the cost and expense thereof.

The bill further alleges as follows:

"And your orators further aver unto this court that in letting said contract of paving to the said Henry Merdian, and in constituting said Myrtle street within the aforesaid limits a local assessment district, the said city of Detroit, by its common council and the board of public works of said city, acted as, and assumed the functions and liability of, trustees for the citizens of said city of Detroit, and as trustees for the property-owners owning property abutting upon said Myrtle street, and within the special assessment district created for the purpose of paving said Myrtle street; and that it was and still is the duty of said city of Detroit, and of the common council thereof, and of its board of public works, to secure to the owners of property fronting or abutting upon said Myrtle street a pavement composed of the best material of its class, and made according to the best workmanship; and that said owners of property abutting on said Myrtle street are entitled to look to the said city of Detroit for guaranty that their money, paid upon assessment under the power of taxation for that purpose,

shall not be invested in any other than good pavement, made in a workman-like manner, and not in an inferior pavement, even at a cheap price; but your orators are informed and believe, and hence charge the fact to be, that said city of Detroit, having paid therefor so far as it could, is now proceeding to enforce the special assessment by sale of the property of your orators and others in the taxing district created for paving said Myrtle street, and that the city of Detroit is thereby inflicting upon your orators a fraud, which they pray this court to relieve them against, and that by forms of law they would be defrauded of large sums of money each, for which they would receive no adequate consideration, if the city of Detroit be permitted to enforce the full collection of the special assessments aforesaid, without deducting for the inferior quality of the work at least."

The prayer of the bill is as follows:

"To the end, therefore, that said property-owners and your orators may have secured to them the true value of their money, and that, until they do, the said tax liens may be declared inoperative and void, and in any event suspended, your orators pray that the city of Detroit, and Simon C. Karrer, its receiver of taxes, and said Henry Merdian, contractor, as aforesaid, may be made parties defendant to this bill, and required to answer the same (their answer on oath being hereby expressly waived), and each material allegation therein; and that the said defendants may be, by order of this honorable court, restrained and enjoined from further proceeding with the sale upon the tax levy on the special assessment district of Myrtle street, as aforesaid; and that the same may be declared void; and, further, that your orators may have such other and further relief in the premises as the nature of their cause may require, and as shall seem meet unto equity."

A large amount of testimony was taken, by which, I think, it was made to appear that the improvement was not made in accordance with the plans and specifications; and it appeared that about the time the job was completed, and before it was accepted, a rain storm set in, and, as the result either of the great quantity of rain that fell or of the

defective manner of construction, the cedar blocks, with which a portion of the road-bed was paved, were more or less loosened, floated out of place, and the street became greatly out of repair. But the allegation of fraud in letting the contract was not substantiated by the testimony.

In the view we take of the law, it is not necessary for us to determine whether the street ought or ought not to have been accepted by the city authorities. The complainants do not ask to be relieved from the payment of any sum, but from paying more than the pavement as made is reasonably worth; but we have not a criterion, were it permissible for us to do so, by which to ascertain just what such worth is. The proof does not establish how much, if any, the property is benefited by the improvement less than what it would be if the work had been fully performed according to contract; nor is there any testimony tending to prove that the contract was let at an exorbitant price. If the city, acting through its authorized agents, had let the job for a grossly extravagant price, or permitted fictitious items to be included in the sum to collect which the assessment was levied, it would have operated as a fraud upon the property-owners, which might have called upon a court of equity to interfere and vacate the assessments, or reduce the amount which complainants should pay. *In re Livingston*, 121 N. Y. 94.

We have never interfered with the discretion of the authorized agents of municipalities in the excercise of the powers granted by the Legislature, except when there was a want of jurisdiction in the proceedings. Here the matters complained of are not jurisdictional, but are irregularities not affecting the jurisdiction, and mainly for the reason that the work and material were not such as the contract called for. That such objection is no defense to the enforcement of the assessment was directly

held in *Motz v. Detroit*, 18 Mich. 515. See, also, Cooley, Tax'n (2d ed.), 671; *Wells v. Atlanta*, 43 Ga. 67; *Hovey v. Mayo*, 43 Me. 322; 15 Amer. & Eng. Cyc. Law, 1046.

We think the decree of the court below, dismissing the bill, should be affirmed, with costs.

MORSE and LONG, JJ., concurred. MCGRATH and GRANT, JJ., did not sit.

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ELISHA A. FRASER AND JASPER C. GATES v. ELIZABETH HAGGERTY.

Attorney and client—Professional services—Evidence—Charge to jury—Credibility of witness.

1. In a suit to recover for legal services rendered under an agreement made with the defendant's solicitor by her authority, as the solicitor testified, and which defendant denied giving, it is competent to introduce in evidence, as a part of the cross-examination of the solicitor, his agreement with the defendant, made the same day that he claimed to have received authority to employ the plaintiffs, to conduct to a successful issue, for a specified sum, the suits in which plaintiffs claimed to have rendered the services, as bearing upon the credibility of the witness.
2. Where, in a suit to recover for professional services, the plaintiffs relied either upon an express contract covering the *entire* services or upon an implied one of the same extent, and their testimony related to the value of the *entire* services, the charge of the court, following such theory and proofs, is not open to the objection that the trial judge did not, of his own motion, introduce a theory supported only by defendant's testimony, which was denied by plaintiffs, which, if suggested, might have entitled plaintiffs to a verdict of $30, whereas their claim was for nearly $1,900.
3. It is improper for the court to instruct the jury as to the weight they should give to particular testimony, or to the tes-

timony of a particular witness, or to place a particular witness in undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony; citing *Chase v. Iron Works*, 55 Mich. 139; *Springett v. Colerick*, 67 Id. 362; nor has the trial judge a right so to instruct the jury as manifestly to reflect upon a particular witness; citing *Railroad Co. v. Martin*, 41 Mich. 667, 672; *Wheeler v. Wallace*, 53 Id. 355.

4. An instruction that, if the jury find that any witness has testified falsely as to any material fact in the case, they are at liberty to reject and disbelieve all of his testimony, clearly and sufficiently states the law upon the subject, and it is not error for the court to refuse to give a request applying such rule to a particular witness, and challenging the attention of the jury to particular portions of his testimony, which the request assumes as false.

Error to Wayne. (Hosmer, J.) Argued May 5 and 6, 1891. Decided July 28, 1891.

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

Fraser & Gates, in pro. per., for appellants, contended:

1. The mere acceptance by the defendant of plaintiffs' services rendered her liable. Col. Larned's agency, his making of the agreement, and defendant's acceptance of its benefits are all undisputed, and make her liable; and neither the agent's want of authority nor defendant's ignorance of the agreement is any defense. If she retains the benefits of the agreement, she subjects herself to its burdens also, and she cannot ratify so much as is beneficial, and repudiate all that is onerous; citing *Hudspeth v. Yetzer*, 78 Iowa, 11; *Brigham v. Foster*, 7 Allen, 419; *Hogate v. Edwards*, 65 Ind. 372; *Barber v. Britton*, 26 Vt. 112; *Mundorff v. Wickersham*, 63 Penn. St. 87; *Railway Co. v. Elliott*, 76 Ill. 67; *Scott v. Railroad Co.*, 86 N. Y. 201; *Bacon v. Johnson*, 56 Mich. 182; *Nichols v. Shaffer*, 63 Id. 599.

Henry M. Cheever, of counsel, for appellants, contended:

1. An acceptance of beneficial services raises an implied *assumpsit;* citing *Hosmer v. Wilson*, 7 Mich. 294; *Donovan v. Engine Co.*, 58 Id. 38; *Manderson's Appeal*, 113 Penn. St. 631.
2. As bearing directly upon the question of the employment of an

associate by an attorney, see *Price v. Hay*, 132 Ill. 543; *Eggleston v. Boardman*, 37 Mich. 20.

3. Plaintiffs were entitled to have their sixth request (see opinion) in its details submitted to the jury; citing *Mynning v. Railroad Co.*, 59 Mich. 259; *Cook v. Brown*, 62 Id. 477; *People v. Stewart*, 75 Id. 29; *People v. Macard*, 73 Id. 20, 21; *Babbitt v. Bumpus*, Id. 341; *Parrish v. Bradley*, Id. 620.

4. The record in this case settles a basis of fact, and covers the whole case, so that this Court has the absolute means for entering a judgment, within the ruling in *Carmichael v. Benefit Association*, 51 Mich. 494; *Wiley v. Lovely*, 46 Id. 83; and see, also, *Lindner v. Hine*, 84 Id. 511; *Tubbs v. Insurance Co.*, Id. 646.

Peter E. Park (*Edwin Henderson*, of counsel), for defendant.

McGRATH, J. Plaintiffs, as copartners, sued defendant in *assumpsit* for legal services alleged to have been performed by Mr. Gates for defendant. The jury found for defendant, and plaintiffs appeal.

Defendant was a party to two suits pending on the chancery side of the Wayne circuit court, in which Sylvester Larned was her solicitor of record. Mr. Gates claimed that defendant came to his office, November 26, 1886, and told him that she had a suit coming on in the circuit court, in which Col. Larned was her solicitor, and that he was out of the city; that she offered him $30 to assist Col. Larned to the end of that case; that he refused, but consented to appear in Col. Larned's absence; that he went into court on that day, and raised some objections, the argument upon which occupied most of the afternoon; that the objections were sustained, and the hearing adjourned to December 10; that Col. Larned came into court during the argument; that, on that day, defendant said that she wanted him to continue in the case; that afterwards, and on December 17, a dispute arose, she insisting that his agreement was to assist Col. Larned for $30, and he denying that agreement; that he

then retired from the case, and did not appear in court in the afternoon; that on that evening Col. Larned telephoned him, asking him to meet Larned at the court-room the next morning; that he was there, and Col. Larned told him that defendant had authorized him (Larned) to employ plaintiffs at the rate of $15 per day, the previous services of Mr. Gates to be paid for at what they were worth; that he was consulted from time to time by her, and that she was present from time to time in court, when he was engaged at the various hearings; that he did a large amount of labor in that case, and performed other services in the other suit and in other matters under the same arrangement; that, in all, he had performed 69 days of service in one case, and that his charges in that case, according to the agreement, amounted to $1,476.90; and that the amount of his bill in the other case was $363.60.

Col. Larned was called as a witness for plaintiffs, and testified that he was defendant's solicitor of record in both cases, and that on December 17 defendant authorized him to employ Mr. Gates, as counsel, at $15 per day for all the work which Gates had done, as well as all that he was to do. Other witnesses were called for plaintiffs as to the value of their services, and as to the presence of Mr. Gates in the cases in question, and as to defendant's presence also.

Defendant denies absolutely and unequivocally the employment of plaintiff, or that she ever authorized Col. Larned to employ him, or that she had ever consulted with Gates, or authorized him to do any work, except that, in the absence of Col. Larned from the city, she called upon Gates, and asked him to act for her in Col. Larned's absence, and agreed to pay him $30 for so doing; that this was the first time she saw Gates; that after Larned's return she noticed Gates in court, and told him that

their engagement was at an end, and that if he did any further work in the case she would not pay him for it; that she offered to pay him $30, and he declined to receive it, saying that he had done what he had out of courtesy to Col. Larned, in his absence; that afterwards she saw Gates in court, and protested to Larned about Gates' presence, and Larned said to her that, inasmuch as she did not have to pay Gates, she ought not to object; that she had employed Col. Larned to do the work in those cases, and to do all the work in them.

The case went to the jury upon this testimony, and the jury found for defendant.

The first four assignments of error relate to the cross-examination of Mr. Larned respecting his employment by defendant; the execution of a written agreement between the witness and defendant at the time of his employment, and a second written agreement on December 17; and he was asked to identify these agreements and certain receipts and notes, which he did. It is insisted that these agreements did not bind plaintiffs. But, as bearing upon the weight and credibility to be given to the testimony of the witness, it was important to show just what the relations between the witness and defendant were, and whether or not the witness had not himself agreed to do the work in these cases. Defendant's counsel stated that he proposed to show that the witness had by these papers agreed to conduct the cases to a successful issue. The court excluded the instruments, and this is the only error which we can discover in this part of the record. It was certainly proper to show that on December 17, the very day alluded to by both Larned and Gates as that upon which Larned had been authorized to employ Gates, the former had made an agreement with defendant such as was claimed. Especially is this true, in view of defendant's claim that Larned had afterwards assured her that

the presence of Gates was due to his employment, not hers.

The next five assignments of error relate to the admission of defendant's testimony as to conversations with Larned, and his agreement to try one of the cases for $50. On his cross-examination, Mr. Larned had been asked regarding these conversations, and had denied them.

Referring again to the contract between Col. Larned and defendant, counsel for defendant made the following statement:

"I offer this contract in evidence for the purpose of showing that in this paper Col. Larned agreed to conduct this case to a successful issue."

The court excluded it. Again counsel for defendant said:

"I now offer it in evidence for the purpose of contradicting the statement made by Col. Larned."

It was again excluded. Counsel for defendant then asked Col. Larned:

"Mr. Gates did the work in the Campbell-Strong case that you had agreed to do, and received pay for it, didn't he?"

The question was objected to, and excluded. Error is assigned upon these offers and question.

Defendant's claim was that she had employed Col. Larnard to do all the work necessary to be done in the conduct of this litigation; that, if plaintiffs were employed by Larned, it was to do that which she had employed Larned to do, and he, not she, had agreed to pay for it. Plaintiffs in their bill of particulars included items for "drafting lis pendens;" drafting receipts for costs; drafting subpœnas; securing signature of judge to decrees; drafting notice of settlement of decrees; preparing bills of costs; drafting order *pro confesso;* copying papers; serving papers; attending court 12 times when cause was

not reached; and attending taxation of costs,—aggregating $335.50. These items are within the scope of the solicitor's duty in the conduct of a cause, and are not ordinarily classed as duties of counsel. Plaintiffs sought to show that in their employment Larned acted as agent for defendant. Under such circumstances courts will ordinarily allow to a cross-examination a wide range. The offers and question were entirely proper, and the error was in their exclusion. All these circumstances bore upon the question of the credibility of the witness.

The other assignments of error relate to the court's instructions to the jury. The plaintiffs tried the case upon two theories:

1. An express contract at the rate of $15 per day.
2. An implied contract, growing out of the performance of the services by plaintiffs, the defendant's knowledge of Gates' presence in court, her consultations with him, and the receipt by her of the benefits of the work done.

The jury were instructed substantially as requested by plaintiffs on both theories, except, however, that the court instructed the jury that if defendant did not employ plaintiffs, and did not authorize Col. Larned to employ them, there could be no recovery upon any implied contract, if they found that defendant told Mr. Gates that she would not pay for any services which plaintiffs might render; that, if defendant "told Mr. Gates distinctly that she would not pay, the law would not imply from the acceptance of the services after that a promise to pay for them." There was no error in this instruction.

It is insisted upon the argument here that defendant did not claim to have notified Mr. Gates until December 17 that she would not pay for any further services, and that at that time plaintiffs had performed services amounting to about $250. But no testimony was offered as to

the value of these particular services. Mr. Gates testified that, up to and including December 17, he worked for defendant in court and office about 12 days.

"Twice during that time she came to our office. Once she brought in some witnesses for me to examine, and once I prepared a subpœna and 11 copies at her request. Our charges against her in this case during this time amounted to about $250."

No severance was made upon the trial, and no separate request submitted by plaintiffs in relation to these services. Mr. Gates testified that defendant first asked him simply to act in the absence of Mr. Larned, but denies that he agreed to do this for the sum of $30. He claims, however, that, after Mr. Larned's return, defendant asked him to stay in the case, and assist Col. Larned. This, however, defendant denies, and insists that the original agreement covered the services performed up to that date. Her testimony upon this point is as follows:

"I says, 'Mr. Gates, you were not to work in this case. I agreed to give you $30 to watch this case, in case it was left alone, as it was the first day, and, if so, have it adjourned, and notify me, that I could take care of my case.' I says, 'you were not to work in this case.' He said he knew that; and I says, 'Col. Larned was to try this case for $50;' and Col. Larned said he knew that, but he said there was going to be too much work in it, and he would not try it; and so I says to them, I says to Col. Larned, turning round, 'I will give you $15 a day for three days, $45, in addition to the $50 that I agreed to give you to try this case,—$95 in all.' And I says to Mr. Gates, 'I was to give you $30 to watch the case. I will give you $10 a day for 3 days in addition, —$60 in all.' And Mr. Gates says, 'I have quit the case,' and left the court-room.

"My sons, John and Floyd, and Mr. Henry and myself then went to Mr. Gates' office, and I asked Mr. Gates for the papers that Charles Larned and I had brought over there on November 26, and he handed them to me. Says I, 'There was another among them when he brought them here,—a mortgage.' He took it out of his desk

and handed it to me. Says I, 'Has there been anything done on this mortgage?' He says, 'I have not looked at it.' Says I, 'Do I owe you anything on it?' He says, 'Nothing at all.' 'Now,' says I, 'Mr. Gates, how am I going to pay you that $30 that I agreed to pay you for watching this case through in case it was left alone, to have it adjourned and notify me?' Says he, 'You don't owe me anything. What I have done so far in this case is a matter of courtesy to Col. Larned; a duty one lawyer owes to another.' And then says I, 'You say I don't owe you anything?' Says he, 'Yes, that is all right.'"

The testimony which plaintiffs introduced regarding the value of the services related to the entire services, and no proof was offered in relation to the particular services rendered prior to December 17, except Gates' testimony that "our charges amounted to about $250." There was no testimony upon which the jury could have based a verdict for these particular services.

Plaintiffs relied upon the theory of an express contract covering their entire services, or an implied contract of the same extent. They made no separate claim as to services performed before December 17, and made no sufficient proof as to these specific services; nor did they ask for any instruction relative to them, although a number of requests were submitted on behalf of plaintiffs. It is true that defendant claimed that she agreed to pay $30, but this agreement plaintiffs repudiated, and defendant testified that she offered to pay that amount, but that Mr. Gates informed her that what he had done up to that time was done out of courtesy to Col. Larned, and that he had made no charge therefor.

The court's charge followed the lines suggested by plaintiffs, and upon which their proofs were made, and is not open to the objection, made here for the first time, that the trial judge did not, of his own motion,

introduce a theory supported only by defendant's testimony, which was denied by plaintiffs, which, if suggested, might have entitled them to a verdict of $30, whereas the claim was made for nearly $1,900; especially in view of the disclaimer testified to by defendant, as to the effect of which no instructions were asked. *Rankin v. West,* 25 Mich. 195; *White v. Campbell,* Id. 463, 474; *Advertiser & Tribune Co. v. Detroit,* 43 Id. 116.

As was said in *White v. Campbell,* under the circumstances of this case,—

"Whatever might have been proper for the court below to have done on a motion for a new trial, there appears to be no ground upon which this Court, as one of review, and in the state of this record, can reverse the judgment in consequence of the want of an instruction adapted to that theory of the evidence for which plaintiff in error now contends, and in accordance with which no instruction was asked."

Plaintiffs' counsel requested the court to instruct the jury as follows:

"6. If you believe that Mrs. Haggerty has testified falsely in any of the following material particulars:

"*a*—That she did not consult with Mr. Gates in a single instance during the hearing of the cases in court;

"*b*—As to her belief of the contents of the amended bill in the Miloch case not being solely based upon the ground of a mistake in the discharge of the mortgage, but that it was to get Stellwagen out of the case;

"*c*—As to the conversation she claims to have had, on the hearing before Judge Look, with Larned;

"*d*—As to her belief that the $30 would be full compensation for Mr. Gates' services if the case lasted 30 years;

"*e*—As to the testimony of any other material points,—

"Then you are at liberty to reject her testimony entirely.

"7. If any witness or party has willfully testified falsely on this trial as to any material fact in the case, you are at liberty to reject and disbelieve all the testimony of any such witness."

The court upon this point instructed the jury as follows:

"I am asked to charge you, with reference to that, that if Mrs. Haggerty testified falsely in any material particular,—and there are several particulars named,—you are at liberty to reject her testimony entirely. That is so, gentlemen of the jury. If a witness has testified falsely in any particular, of course you may reject the testimony entirely. That applies not only to Mrs. Haggerty, but to any other witness that has been sworn in this case, either on the part of the plaintiffs or on the part of the defendant; but, inasmuch as I do not care to comment upon the testimony at large, I do not think I will call your attention to the specific instances that the counsel have requested. If a witness or a party has testified falsely on this trial as to any material fact in the case, you are at liberty to reject and disbelieve all the testimony of such witness."

The instruction given clearly and sufficiently stated the law upon the subject.

Appellants say in their brief:

"The general application of the rule, together with the omission of the details in which it was claimed Mrs. Haggerty had falsified, entirely destroyed the force of the proposition embodied in this request. There was no pretense on either side that appellants' witnesses had testified falsely. It was claimed that Mrs. Haggerty had, and the particulars of such perjury were defined."

The weight of evidence is a question for the jury. It is not determined by a count of the witnesses. It is improper for the court to instruct the jury as to the weight they should give to particular testimony, or to the testimony of a particular witness, or to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony. *Springett v. Colerick*, 67 Mich. 362; *Chase v. Iron Works*, 55 Id. 139. On the other hand, a trial judge has no right so to instruct the jury as manifestly to reflect upon a par-

ticular witness. *Wheeler v. Wallace,* 53 Mich. 355; *G. R. & I. R. R. Co. v. Martin,* 41 Id. 667, 672.

The correct rule of law was laid down by the court, and there was no error in the statement that it was of general application.

There is no error in the record, and the judgment must be affirmed, with costs.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred with MCGRATH, J.

LONG, J. *(dissenting.)* I am unable to agree with my Brother MCGRATH in the conclusion reached by him affirming this case.

Plaintiffs' testimony shows that prior to December 17, 1886, Mr. Gates spent about 12 days' time in the examination of defendant's case then on trial in the Wayne circuit court, and in the trial of the case, before any controversy arose between him and the defendant in reference to his charges; and he testifies that his charges for that time amounted to about $250.

It is shown upon the part of the plaintiffs that Mr. Gates, who is a practicing attorney of some 15 years active practice, was called upon, on November 26, 1886, by the defendant to engage him to attend to the case for her, then on call in the Wayne circuit court, for the reason that her attorney was absent. At that time defendant claims that she stated to him that there were nearly fifty parties defendant in the case. Mr. Gates went into court on that day, and raised a considerable number of objections to the proceedings, when the hearing went over until December 10.

Mr. Gates claims that, when defendant engaged him, he refused her offer of $30 to take charge of it and carry it through, as he knew but little of the case, but that she was in the office twice prior to December 17, con-

sulting him in reference to it, and that upon these occasions he stated to her that he was doing a considerable amount of work for her, and it was his custom to be paid something in advance; that the first time she promised him something in a few days, and finally said that she was responsible, and would pay when the case was finished. Upon December 17, defendant met Mr. Gates in the court-room, and she stated to him that he had agreed to go through with the case for $30. He denied this, and told her that what he had already done was worth many times that sum. She then offered him $15 a day for his services from that time, but insisted that he had agreed upon $30 with her for prior services. Mr. Gates then told her that he would have nothing more to do with the case, and left her. The evening following he received a telephone message from defendant's counsel to meet him next morning in the court-room. He went into court the next morning, and was there told by Col. Larned, defendant's counsel, that he had been authorized to employ him at $15 a day, and his previous services to be paid for at what they were worth. Upon this understanding Mr. Gates proceeded in the case.

The work performed by Mr. Gates thereafter is set out very fully in the charge of the court to the jury, from which it appears that a bill of complaint was filed for the partition of the estate of George Campbell, deceased, in which many legal questions and complications arose, and over 2,000 pages of testimony were taken in the case. Subsequent to that, another case arose in which the defendant was a party, and Mr. Gates took a leading part in that as counsel for her, the testimony covering a great number of pages. These matters were fully gone over and explained by Mr. Gates in his testimony before the court and jury, and the court in its general charge

dwelt at great length upon these services. A great number of witnesses were called by the plaintiffs, who testified that the services performed by Mr. Gates were worth all that was charged for them, and some considerable testimony was given tending to show that he performed the services for which the charges were made.

The defendant's contention was that she never employed the plaintiffs, except to go into court in the first instance, and represent her in the absence of Col. Larned, her counsel, and that she never authorized Col. Larned to employ them. The defendant testified as follows:

"I never employed Mr. Gates to do any work. He was simply to watch the case during the entire time it was in progress, until it was through, from the fact that Col. Larned was absent at that time, and might possibly be again. That was the only reason. I did not expect him to advise with Col. Larned, nor to examine witnesses, nor to make an argument. I employed him to watch, so that if Col. Larned was absent, and it was called up, Mr. Gates would get it adjourned and notify me."

She testified, further, that these cases extended over a period of nearly three years, and that during all that time she saw Mr. Gates in court, taking part in the trial, but testified positively that after the 17th day of December, 1886, she never spoke to him on the subject of her case. It appears that the testimony in the case was taken before a circuit court commissioner, and on the hearing before the court was read largely by Mr. Gates in her behalf, and argued at great length by him. This is testified to by the witnesses, including the defendant herself. The defendant was asked if Mr. Gates did not appear on one occasion before Judge Look, and make an argument. This she denied positively; and Judge Look, being called by the plaintiffs, contradicted her, stating that Mr. Gates was present, and made the argument before him.

I think the court was in error in directing the jury that the plaintiffs could not recover if the jury found that Mrs. Haggerty told Mr. Gates that she would not pay for any services that might be rendered in the case by him. This would entirely exclude any recovery by the plaintiffs for services rendered prior to December 17, 1886, and in this the court was in error. There was no claim that the agreement had not been made to pay for services rendered prior to that date. The only contention was the amount which had been agreed upon. It is true that the defendant testified that Mr. Gates told her he made no charge for that, as it was for services rendered to Col. Larned, but this is denied by Mr. Gates, his claim being that he refused to perform the services for $30, and refused to take $60, which she proposed to pay, and insisted that he had spent some 12 days in her services up to that date, and which were charged for in the bill of particulars at $15 a day.

It is a little difficult to understand how the jury, in the face of all this testimony, were able to arrive at the conclusion that the defendant was not indebted to the plaintiffs in any sum, unless they took it from the charge of the court that the plaintiffs could not recover any sum whatever if they found that Mrs. Haggerty told Mr. Gates she would not pay for services rendered by him after December 17, 1886.

For this reason the verdict and judgment should be set aside, and a new trial ordered.

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MATTHEW B. FAUGHNER AND WILLIAM A. FAUGHNER v. MANUFACTURERS' MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Facts not establishing contract.

A manufacturing firm applied verbally to an insurance broker for insurance, who had a conversation with an attorney engaged in making collections for an insurance company, but who was not its agent or authorized to make contracts of insurance, about insuring the applicants' property. The attorney took a memorandum of the proposed risk in pencil, as he obtained it from the broker, and either gave it or showed it to the secretary and agent of the company at its office, after which he wrote to the broker, inclosing an application partially filled out, and which contained a blank space in which to state the day from which the applicants desired the policy to run. He signed the name of the secretary to this letter, in which it was stated that the application could not be completed or policy sent for want of knowledge of the applicants' names, and the broker was requested to complete the application, and return it, and the policy would be sent. The broker sent the application to the applicants, who filled it out, excepting as to the date from which the policy was to run, and it was returned to the company by the broker, and upon examination by the secretary was marked as rejected. Two or three days afterwards the property was destroyed by fire, and in a suit to recover the insurance it is held:

a—That the sending and retention of the application did not constitute a contract of insurance.

b—That the contention of the applicants that the letter containing the application was a proposition from the company to insure, which was accepted by the applicants by filling out and returning the application, is untenable.

c—That the applicants could not have been compelled to pay the premium until the delivery of the policy, and had not become members of the company.

Error to Gratiot. (Daboll, J.) Argued June 4, 1891. Decided July 28, 1891.

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

W. H. Haggerty (*Moses Taggart,* of counsel), for appellant, contended for the doctrine of the opinion.

George P. Stone and *Clark & Norton,* for plaintiffs, contended:

1. Woodard was the legally authorized agent of the defendant. He was authorized to receive applications, deliver policies, and collect premiums for the company, and was clothed with the same authority as the agent of a stock company; citing *Russell v. Insurance Co.*, 80 Mich. 407.
2. A contract of insurance may be made by parol; citing *Insurance Co. v. Carrington*, 43 Mich. 252; *Insurance Co. v. Earle*, 33 Id. 153; and when the insured has accepted the terms proposed, and has performed on his part, the contract is complete, whether a policy has been issued or not; citing *Tayloee v. Insurance Co.*, 9 How. 390.

GRANT, J. Plaintiffs sued to recover a loss on an alleged contract of insurance. No policy was issued, and the question is whether the proofs established the contract. The court below left the question to the jury, who found for the plaintiffs.

Plaintiffs applied to one Woodard to effect an insurance upon their property. Woodard was a manufacturer, and did some insurance business. He was not the agent for the defendant. He was an insurance broker. He testified that he had no other arrangement with the defendant than to send on applications for parties desiring to be insured. He took and forwarded applications, and the company, if satisfied, issued and returned the policies. Woodard obtained one policy for plaintiffs in a Milwaukee company. He testified that he had no blank applications of the defendant; that he sent defendant by mail a diagram of the premises, together with a general description thereof; that he believed he used a blank of

some other company. He was unable to give any detail as to the contents of this application. About the same time he had a conversation with one Haggerty, an attorney, who was engaged at the time in making collections for the defendant, about insuring plaintiffs' property. Plaintiffs were engaged in a manufacturing business at Alma, Woodard resided and carried on business in Owosso, and the defendant's office was in Grand Rapids. In that conversation it does not appear that the plaintiffs names were mentioned, but the risk was referred to as one at Alma. Woodard admitted that he had this talk with Haggerty. Haggerty had written a letter to Woodard, which will appear hereafter. Counsel for the defendant then asked Woodard the following question:

"Do you mean to say that that letter was written by him in reply to something else, instead of your talk with him?"

To this Woodard replied:

"I mean to say that I laid before the company a diagram and description of that property, sufficient for them to determine whether they would issue a policy or not, and this letter is a reply to that intelligence. I don't say to whom exactly, nor I don't remember exactly how that intelligence was furnished to that company; but I know it was furnished."

Defendant's officer who had charge of all its correspondence testified positively that no such application or communication was ever received by the defendant.

Such testimony on the part of the plaintiffs does not rise to the dignity of evidence. It should not have been left to the consideration of the jury. Evidently the only information as to this risk the defendant received before that letter, and the application accompanying it, was obtained by Haggerty from Woodard in that conversation, and by him communicated to the agent of the company at Grand Rapids.

It is not claimed that Mr. Haggerty was the agent of the company, clothed with authority to make contracts of insurance. Nor is it claimed that the conversation between him and Woodard had any tendency to prove the contract. Haggerty simply took a pencil memorandum of the proposed risk, as he obtained it from Woodard, and either gave it or showed it to Mr. Granger, the agent, on his return to defendant's office. He then, on July 11, 1888, wrote to Mr. Woodard, as follows:

"Inclosed find application, partly filled out, for a policy on excelsior works at Alma. We cannot complete application or send you policy, because I don't know the parties' names. Have application filled out and sent to us, and we will return you policy at once. We also send you some applications in blank by same mail as this.

"Yours, etc.,

"A. M. GRANGER, Secretary,

"Per H."

Accompanying this letter was the application. In the body of this application was a space for the applicant to fill, specifying the day from which he desired the policy to run. Attached to the application was a deposit note, promising to pay all assessments made for losses and expenses incurred by the company. Upon receipt of this letter, Mr. Woodard sent the application to plaintiffs to fill out. Plaintiffs filled out the application, leaving the date from which the policy was to run unfilled. Woodard forwarded the application to defendant. Upon the back of this application was a blank arranged for a brief statement of the name of the insured, the amount, rate, etc., and also for stating whether the application was approved or rejected.

Mr. Granger, the agent of the defendant, who had authority to approve or reject, testified that he examined the application upon its receipt, and rejected it, writing the word "rejected" across the face of the application,

and also upon the back. Plaintiffs' property was destroyed by fire Sunday, July 22. The application had been received two or three days previous. The receipt and rejection were both previous to the fire.

The circuit judge instructed the jury that the letter, the forwarding of the application, and the retention of the application by the defendant, did not of themselves constitute a contract of insurance, but left it to them to consider this evidence, in connection with all the other evidence in the case, in determining the question. But there was no other evidence for them to consider. The facts were undisputed. The question must be determined entirely upon the letter written by Haggerty in the name of the secretary, and the application returned to the defendant. It therefore became a question of law for the court to say whether a contract existed. The court was therefore in error in leaving the question to the jury.

One other fact should be noted. Plaintiffs did not pay the premium, nor tender the same until September following, when they, by Woodard, sent a draft to the defendant for the amount, which it promptly returned. Plaintiffs and Woodard had mutual dealings. They made no special arrangement in regard to the premium. The subject of payment was not mentioned. Plaintiffs gave Woodard credit for the amount, and Woodard says he charged them with the premium on his account.

I think it clear that the contract of insurance between these parties was not complete. The sending and retention of an application does not make such a contract. Acceptance on the part of the insurer is necessary. Wood, Ins. (2d ed.), 42; May, Ins. § 50.

No question could therefore arise in the present case, were it not for the letter containing the application, which plaintiffs insist was a proposition from the defend-

ant to insure, and was accepted by the plaintiffs by filling out and returning the application. When the letter and application were sent, defendant did not know the names of the plaintiffs, nor was it fully informed as to the character and nature of the risk. Plaintiffs could not have been compelled to pay the premium until the policy had been delivered to them. They had not become members of the defendant. They had fixed no time in their application from which they desired their policy to run.

I think the court should have directed a verdict for the defendant.

Judgment reversed, and no new trial ordered.

The other Justices concurred.

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JOHN CEEDER v. THE H. M. LOUD & SONS LUMBER COMPANY (A CORPORATION).

Corporations—Authority of officer—Agency—Employment of men.

1. The president of a lumber company, in the active management of its business, is held to have authority to employ sawyers for the season at an agreed price per day; no limitation upon his power to employ men being shown, nor that authority had been conferred upon any particular person with reference to such employment.
2. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:

   a—The president of a manufacturing company, who is in the active conduct and management of its business, must be presumed to have all the powers of any agent exercising like control or management, and to have authority to do what is usually and ordinarily done by such agents or managers.

   b—The primary intention of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of

the agency, and third persons are invited to deal with him upon that understanding.

c—The fact that a person having the general direction and active control of the business of a corporation is also its president does not operate as a limitation of the powers usually exercised by such agents or managers; nor is his authority limited to that possessed by virtue of his office, but it is incident to the management of the business. *Mining Co. v. Senter*, 26 Mich. 73, 76; *Iron Works v. Bresnahan*, 60 Id. 332; *Whitaker v. Kilroy*, 70 Id. 635.

Error to Bay. (Cobb, J.) Submitted on briefs June 9, 1891. Decided July 28, 1891.

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

Hanchett, Stark & Hanchett, for appellant, contended:

1. In the absence of any proof, a president of a corporation has no more power than any other director, except that he is presiding officer at meetings of the board of directors; beyond that, his powers and authority depend upon the by-laws or resolutions of the board, or acts which would work an estoppel; citing 1 Mor. Cor. § 537; *Railway Co. v. James*, 22 Wis. 197; *Titus v. Railroad Co.*, 37 N. J. Law, 102; and individual directors have no power whatever to bind a corporation; citing *Lockwood v. Boom Co.*, 42 Mich. 539.

C. E. Pierce, for plaintiff, contended for the doctrine of the opinion.

McGRATH, J. Ceeder sues for wages, claiming a hiring for the season of 1889 at $3.50 per day, and setting up a discharge without cause before the expiration of his time.

One Aiken says that, in the spring of 1889, H. M. Loud, who was the president of the company, instructed him to go to Bay City, and employ two sawyers for the season, at $3.25 per day each; that he went to Bay City, but was unable to get his men at less than $3.50 per day, and sent word to Loud by one Chase, and wired Peter-

son, who was the superintendent of the mill, to meet Chase; that he received the reply telegram the same evening, and employed plaintiff and another for that season at $3.50 per day. He was not allowed to give the contents of the telegram, but, after stating the employment, he was asked, "did you have any instructions from Mr. Loud to make such an arrangement?" and replied, "yes, I did."

Ceeder testifies to his employment by Aiken for defendant at $3.50 per day for the season; that—

"He [Aiken] came there with the telegram from H. M. Loud & Sons Lumber Co. He read it over at the house. * * * That was Tuesday. * * * I left Bay City on the 7th of May, and arrived at Oscoda that night, about 6 o'clock. Upon my arrival I saw Mr. Loud, and gave him a letter that Mr. Aiken had given me. He says, 'All right; you are the two sawyers.' Says I, 'Yes.' * * * Then Mr. Loud said, 'Look around town, and I will see Mr. Peterson to-morrow, and give you work.'"

That he went to work on the 10th of May, and worked until July 6, when he was discharged without cause; that in June plaintiff and Paul Lemme, who was hired with plaintiff, were in the office of the company, and Loud was present, but witness was not sure that Loud heard the conversation; that Lemme asked Peterson if he was going to pay $3.50 per day for the season, and Peterson said, "Yes, that is the understanding;" that plaintiff could not get work till the 29th of July, when he obtained employment at $2 per day for the balance of the season.

He was paid at the rate of $3.50 per day up to and including the 5th day of July, and it is admitted that, if entitled to a verdict at all, he was entitled to $222.50, the amount found to be due by the jury.

The defendant raised two questions of fact upon the trial:

1. That Aiken was not instructed to employ plaintiff for the season.

2. That plaintiff was discharged for cause.

Both of these questions have been settled by the verdict. The only question raised here is that defendant is a corporation; that this is not a case of the ordinary employment of labor for the necessities of the company, but a special contract for the entire season, and it was not shown that the president had any authority to make such a contract. No testimony was offered tending to show that any limitation upon the president's powers with respect to the employment of men, nor was there any testimony offered to show that any authority had been conferred upon any particular person with reference to the same subject. It appears that Loud was in open and notorious charge of the business, and was there in the office from day to day, directing its conduct. The business of the corporation was the manufacture of lumber.

A president of a manufacturing company, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control or management, and to have authority to do what is usually and ordinarily done by such agents or managers. The primary intention of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent upon that understanding.

In *Adams Mining Co. v. Senter*, 26 Mich. 73, 76, referring to the powers of a mining agent, this Court say:

"We are not satisfied that any testimony would be needed to show the extent of the ordinary powers of an agent in charge of such a mine. The authority of such officers must, within the usual range of business, at least,

be recognized judicially, like that of bank cashiers, vessel captains, and other known agents. The mining law recognizes agents by name, as known representatives on whom process may be served. They are the persons who have charge, personally, of the local business at the mines, and are necessarily to be treated in law as general agents, to do all that is fairly within the scope of corporate business in conducting the operations in that locality. * * * The business could not be conducted at all without a very wide discretionary power. There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business. A general agent needs no instructions within the range of his duties, and any limitations on his usual powers would not bind others dealing with him, and not warned of the restrictions."

The fact that a person having the general direction and active conduct of the business of a corporation is also its president does not operate as a limitation of the powers usually exercised by such agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incident to the management of the business. The case is clearly within the principle laid down in *Adams Mining Co. v. Senter*, cited above. See, also, *Eureka Iron Works v. Bresnahan*, 60 Mich. 332; *Whitaker v. Kilroy*, 70 Id. 635.

The judgment is affirmed, with costs to plaintiff.

The other Justices concurred.

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ANN BYRNE v. GEORGE HUME, EXECUTOR, ETC.

[See 84 Mich. 185.]

Will—Specific legacy—Jurisdiction of probate court—Res judicata.

1. The probate court has jurisdiction to direct the payment of a specific legacy if such payment is withheld, and the construction placed upon the will in the exercise of such jurisdiction is *res judicata*, unless an appeal is taken.
2. A bequest to the father and mother of the testator of a legacy, to be paid out of the testator's life insurance as soon as collected, is held a general legacy, payable out of the general assets of the estate, if the insurance is not collected.

Rehearing, upon application of complainant, of case reported in 84 Mich. 185. Submitted June 10, 1891. Decree affirmed July 28, 1891.

E. S. Eggleston, for complainant.

T. J. O'Brien and *J. H. Campbell*, for defendant.

LONG, J. This case was in this Court at the October term, 1890, and was decided December 24, following. *Byrne v. Hume*, 84 Mich. 185.

A motion was made for a rehearing, upon the ground that counsel desired an opportunity to reargue the question of the effect of the decision of the probate court giving construction to the will, which we held was *res judicata* to the present bill. A rehearing was granted, and the case has again been argued upon this question, upon both sides, with great learning and ability. We are, however, unable to change our former ruling.

The contention is—

1. That the decision of the probate court was rendered on demurrer to the petition, and not on the merits.

2. That the probate court had no jurisdiction of the subject-matter of the petition, because the legacy was a specific one.

The petition filed in the probate court set out substantially what is set out in the present bill, and the judgment of the probate court upon it is a bar to any further action between the same parties, upon the same state of facts, unless it is apparent that the probate court had no jurisdiction in the matter because of the legacy being a specific one.

Complainant's counsel claims that this was a specific legacy, and was never any part of the assets of the estate of Thomas Byrne, deceased; that, as soon as it was collected, it became the property of William and Ann Byrne; that the judge of probate never had any authority over the money, and all the authority he had was to order the executor to do in regard to it what the testator in his will had directed to be done, and, in case the executor refused, to allow suit to be brought in his name against the executor and his bondsmen. It is therefore contended that the probate court, in construing the will, and in passing upon the petition presented by complainant, acted without authority of law, so far as this particular fund is concerned, as it was not then, and never has been, any part of the assets of the estate over which the probate court or the executor had control; that, by the terms of the will, it vested absolutely in William and Ann Byrne immediately on the death of the testator.

Whether this was a specific legacy or not, in our opinion, does not change the case, so far as the jurisdiction and powers of the probate court are concerned. The court has power and jurisdiction to construe wills, as was held in *Byrne v. Hume*, 84 Mich. 185, and cases there cited. How. Stat. § 6760, provides that—

"The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of deceased persons."

Whatever this legacy may be called, whether general, specific, or demonstrative, the probate court had jurisdiction to direct, in a proper proceeding, a payment of the legacy, if withheld.

We are not satisfied, however, that this was a specific legacy. The bequest is:

"I give and bequeath to my said father and mother the sum of $3,500, and I direct my executor to pay the sum over to them out of my life insurance money payable to my executor as soon as collected."

A specific legacy is a particular and specified thing singled out, or a particular fund, and, if this fund fail, or the specific thing bequeathed is not in existence to be carried over to the legatee, the legacy cannot be paid out of the assets of the estate. It would not be contended but that these legatees, if the insurance money could not have been collected, would have been entitled to receive the legacy out of the estate generally. It is rather in the nature of a demonstrative legacy, which is a pecuniary legacy, the particular fund being pointed out from which it is to be paid. Under such gifts the legatee will not lose the legacy if the fund fail.

We think it was the intent of the testator that this should be treated as a general legacy, to be paid to his father and mother, at all events, out of the general assets of the estate, unless the money was collected from his life insurance. In this view of the case, the probate court had jurisdiction, in giving construction of the will, over this fund, and its determination of the same questions under the petition which are now presented by this bill must be held final and conclusive upon the claimant, as no appeal was taken from its decision.

Since the case was presented, and the opinion filed upon the former hearing, Ann Byrne, the claimant, has died. The cause has been revived in this Court in the name of her administrator, so that the contest, as now presented, is solely between the executor representing the estate of Thomas Byrne, and the children of Ann Byrne, deceased, who are the brothers and sisters of the testator.

We must adhere to our former decision, and the decree of the court below will be affirmed, with costs to be paid out of the estate.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. MCGRATH, J., did not sit.

JONATHAN BOYCE v. SAMUEL H. STEVENS.

86 549
117 487

Taxes—Personal property—Return of township treasurer—Warrant—Replevin—Judgment.

1. The Court fail to see how the failure of a township treasurer to set forth in his return of unpaid taxes on personal property, pursuant to section 44 of Act No. 153, Laws of 1885, "the amount of all moneys collected by him on account of taxes," and to state "that the amount of moneys collected by him upon such tax roll is truly stated," can prejudice the tax-payer, or, under section 89 of the same act, render the return insufficient to authorize the county treasurer to issue a warrant for the collection of such tax.
2. Replevin will not lie for property seized by a tax collector, under a tax roll and warrant fair upon their face, to satisfy a *legal* tax, even though the defendant claims also to hold the property by virtue of a county treasurer's warrant for the collection of a *valid* personal property tax, the issuance of which was not authorized by a proper return by the township treasurer; and in such a case the defendant, on waiving a return of the property, may take a judgment for the *entire* tax.

Error to Muskegon. (Dickerman, J.) Argued June 10, 1891. Decided July 28, 1891.

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

F. W. Cook, for appellant, contended:

1. The authority vested in the county treasurer to issue the warrant is purely statutory, and, following the authority of Cooley, Tax'n, 454, must contain a statement of all the facts required by the statute; citing *Phenix v. Clark*, 2 Mich. 328; *Dickison v. Reynolds*, 48 Id. 158; *Hurd v. Raymond*, 50 Id. 369; *Sinclair v. Learned*, 51 Id. 335; *Gilchrist v. Dean*, 55 Id. 244.

DeLong & O'Hara, for defendant.

MORSE, J. This is an action of replevin, brought to recover possession of two piles of lumber taken by the treasurer of the city of Muskegon under a tax roll and warrant for the year 1889, upon which he claimed there was due from the plaintiff, for taxes, interest, costs, and fees, the sum of $232.66. This tax is now conceded by plaintiff's counsel to be correct. The defendant also claimed to take and hold the property under a delinquent tax warrant issued March 5, 1889, by the treasurer of Muskegon county, based on the return of delinquent taxes from the township of Lakeside on the tax roll of 1888, under which warrant the defendant claimed $864.98. The township of Lakeside was annexed to and became part of the city of Muskegon by an act of the Legislature dated March 5, 1889, which act took immediate effect.

The court directed a verdict for the defendant for the full amount claimed upon both warrants, he having waived a return of the property. The plaintiff disputes the validity of the Lakeside tax, and asks a reduction of

the judgment to the sum of $232.66, the amount of the city tax.

The counsel for plaintiff attacks the warrant of the county treasurer, and claims that the affidavit to the return of the township treasurer of Lakeside is defective, in that it fails to state "the amount of all moneys collected by him on account of taxes," in conformity to section 44 of Act No. 153, Laws of 1885, and that the amount of moneys so collected by him upon such tax roll is truly stated. An inspection of the affidavit shows that it is in conformity with the statute, except in the respect claimed.

The plaintiff relies upon the case of *Township of Pt. Huron v. Potts*, 78 Mich. 435; but in that case not only was this part of the affidavit omitted, but it contained no statement that the sums returned as uncollected remained unpaid, nor that the collector was unable to find any goods or chattels out of which to make the tax. These last two omissions were vital, and concerned the plaintiff, whose tax was returned as uncollected. It failed to show on oath that he had failed to pay the tax, or that the treasurer had been unable to collect it. In the present case these facts were shown.

I fail to see how the omission in this case to state the whole amount of moneys collected by the treasurer, and that the same was truly stated, could prejudice the plaintiff, or why it concerned him in any way. His counsel in his brief says:

"Just why this is required I am unable to discover; but I submit it is sufficient that the Legislature saw fit to make the distinction [in the facts to be stated in a return of real and personal delinquent tax]; and as the Legislature had the power to determine what facts should be stated, and have so determined, this Court is bound by that legislative determination."

But the same Legislature, in section 89 of the same act,

provided that no tax shall be held invalid on account of any irregularity in the assessment, or on account of any assessment or tax roll not having been made or proceedings had within the time required by law, or on account of any other irregularity, informality, or omission, or want of any matter of form or substance, in any proceeding, that does not prejudice the rights of the person whose property is taxed. In this case the record shows that the property of plaintiff was legally assessable for the year 1888 in the township of Lakeside, and that the tax has not been paid. There is no attempt to show that the tax was illegal or unjust. Indeed, it is stipulated in the case that the property assessed to him was owned by him in the township of Lakeside.

But whether the return of delinquent taxes was sufficient to authorize the issuing of the county treasurer's warrant or not, the plaintiff has no standing in court to question this judgment. In order to maintain replevin, he was obliged to make affidavit, which he did, that the property replevined had not been taken from him for any tax assessment. But when he comes into court he admits that the city tax is legal, and that judgment for that amount ought to pass against him, thereby confessing that he had no right to plant the suit in replevin.

It is argued, however, that because the defendant chose to take a judgment for the amount of the tax liens, he cannot recover for the Lakeside tax. But we think differently. Plaintiff stipulates as follows:

> "That on the second Monday of April, 1888, the plaintiff was the owner of the property assessed to him in the township of Lakeside, in Muskegon county, that year."

This conceded the validity of the tax, and under the statute such tax became at once a debt from plaintiff to

the township of Lakeside; and section 26 of the act provides that—

"All personal taxes shall also be a lien on all personal property of such persons so assessed from and after the first day of December in each year, and shall take precedence of any sale, assignment of, or chattel mortgage, levy, or lien on, such personal property, executed or made after said first day of December, except where such property is sold in the regular course of trade."

The township of Lakeside had a lien upon all the personal property of plaintiff for this tax from the 1st day of December, 1888. By the annexation of Lakeside to the city of Muskegon, the debt became a debt to that city, and the lien also accrued to the city. Stevens took this property as the agent of the city, and he is the only authorized agent to collect the tax. It was therefore proper for him, having taken possession of the property upon which the lien existed, to take judgment for the amount of the tax. The plaintiff cannot complain. He has only been compelled to pay a just tax, and the costs of the suit are not increased, as judgment must have passed against him in any event.

It is not the policy of the law that persons shall escape just taxation for mere irregularities and informalities in the proceedings which do not in any way prejudice or affect their rights; nor that such persons shall be allowed to bring action of replevin to harass and delay the collection of such taxes. The plaintiff has lost nothing that belonged to him, and must remain content.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MCGRATH, J., did not sit.

86 554
136 328

IDA A. COOK v. THE STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

[See 84 Mich. 12.]

Trial—Examining witnesses—Associate counsel—Absence of witnesses—Comments by counsel.

1. Where a witness has been cross-examined by one of the attorneys for the opposing party, and excused, and is recalled, and examined on a matter not elicited on his former examination, the refusal of the court to permit the other attorney to cross-examine him upon such new matter is in accordance with the letter and spirit of Circuit Court Rule No. 63, which limits the right of examination and cross-examination to one counsel on each side.[1]
2. Before counsel can properly comment upon the absence of witnesses, there must be some facts or circumstances shown from which the jury would have the right to infer that their testimony would be important and material, and it is the duty of the court to prevent such comment, in the absence of such a showing.
3. Where, on the second trial of a case, it was shown that two witnesses, who were sworn on the first trial in behalf of the defendant, were in the city where the trial was being had, but it did not appear upon what points they were examined, and the plaintiff's counsel was permitted to comment to the jury upon their absence, the error thus committed, being the only one in the case, is held not to be of sufficient importance to justify a reversal, as the appellant could easily have shown, if such was the fact, that the witnesses were unimportant and immaterial, when the testimony was offered showing their presence in the city, and that they were sworn on the former trial.

Error to Muskegon. (Dickerman, J.) Argued June 10, 1891. Decided July 28, 1891.

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

[1] See *Baumier v. Antiau*, 65 Mich. 32 (head-note 1*b*).

F. W. Cook (Keena & Lightner, of counsel), for appellant.

DeLong & O'Hara, for plaintiff.

GRANT, J. This case was before the Court at the October term, 1890. 84 Mich. 12. A verdict and judgment went for the plaintiff, and defendant appeals.

Two errors are assigned.

1. A witness had been examined on behalf of the plaintiff, was cross-examined by one of defendant's counsel, and then excused, defendant reserving the right to cross-examine further on some documents which counsel did not then have. Subsequently the same witness was recalled on behalf of the plaintiff, and examined on a matter not elicited on his first examination. The other counsel for defendant demanded the right to cross-examine the witness, but the court refused to permit it.

Circuit Court Rule No. 63 reads as follows:

"On the trial of issues of fact, one counsel only on each side shall examine and cross-examine witnesses."

We find no error in this ruling. It was in accordance with the letter and spirit of the rule.

2. Counsel for plaintiff, in his argument to the jury, commented upon the fact that two witnesses, who had been sworn upon the former trial, had not been called by defendant. It was shown that these witnesses were then in the city of Muskegon, where the court was held, and were laboring under no disability. It did not appear upon the trial what points these witnesses had been examined on upon the former trial, and defendant's counsel, therefore, claim that it was error for plaintiff's counsel to comment upon the fact of their absence, because they were not shown to be important or material.

It is true that, before counsel can properly comment upon the absense of witnesses, there must be some facts

or circumstances from which the jury would have the right to infer that their testimony would be important and material, and it is the duty of the courts to prevent such comment, in the absence of such testimony. When the testimony was offered by plaintiff, showing the facts above stated in regard to these witnesses, the defendant could easily have shown, if such was the fact, that they were unimportant and immaterial.

Under the circumstances, this being the only error in the case, we do not think it of sufficient importance to justify a reversal of the case.

Judgment affirmed.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. MCGRATH, J., did not sit.

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105 621

86 556
110 475

CHARLOTTE SHOWMAN v. HIRAM N. LEE AND GEORGE VAN WAGNER.

[See 79 Mich. 653.]

Fraudulent conveyances—Chattel mortgage—Evidence—Conversion —Measure of damages.

1. Parties who take security from insolvents, or from persons who are indebted to others, must act in good faith, and in such a manner as not unnecessarily to hinder, delay, or deceive other creditors; and taking a mortgage for an amount in excess of the debt or of the assumed liability is a badge of fraud, and is a fraud in law if the purpose is to protect the mortgagor's interest from other creditors; citing *King v. Hubbell*, 42 Mich. 597.
2. The honesty of one of two mortgagees will not save the mortgage, if there was any fraud or wrong in the other; citing *Adams v. Niemann*, 46 Mich. 135.

3. Parol testimony is admissible to show to whom a deed or mortgage ran, and, if material, in whose custody the instruments were placed; citing *Clemens v. Conrad*, 19 Mich. 170.
4. The measure of damages in a trover suit brought by a mortgagee against an attaching creditor is the market value of the property at time of its seizure, not exceeding, however, the amount of the mortgage lien.
5. Invoices of goods show their cost, rather than value, and are not the *best* evidence of the market value of the goods.
6. In this case it is held that the market value of a general stock of drugs is the cost of replacing it with a like stock at the time of its seizure, and not what it could be sold for as a whole to an occasional purchaser, who would buy only because he saw a large margin in the purchase.
7. A witness who testifies that he has been in the drug business for a number of years, and is very familiar with a stock of drugs, which he assisted in inventorying at time of their purchase, and is acquainted with the value of such goods, is competent to testify as to their market value.

Error to Ionia. (Smith, J.) Argued June 11 and 12, 1891. Decided July 28, 1891.

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

Davis & Nichols (*Fletcher & Wanty*, of counsel), for appellants, contended:

1. The court erred in refusing to submit to the jury the question of estoppel; citing *Faxton v. Faxon*, 28 Mich. 159; *Thompson v. Howard*, 31 Id. 309; *Vanneter v. Crossman*, 42 Id. 465; *Robb v. Shephard*, 50 Id. 189; *Clark v. Lee*, 78 Id. 221; *Horn v. Cole*, 51 N. H. 287; *Roe v. Jerome*, 18 Conn. 138; *Short v. Currier*, 150 Mass. 372; *Dickerson v. Colgrove*, 100 U. S. 578.
2. One who has merely been in the store without inspecting the goods is not competent to express an opinion as to value; citing *Dyer v. Rosenthal*, 45 Mich. 588.
3. The measure of plaintiff's damages was the market value of the goods taken at time of the trespass; citing *Hunt v. Strew*, 33 Mich. 89; *Worthington v. Hanna*, 23 Id. 531; *Walrath v. Campbell*, 28 Id. 117; *Dyer v. Rosenthal*, 45 Id. 588; *Densmore v. Mathews*, 58 Id. 624; and the retail price of a drug stock is

not the market value, as applied to a mortgagee's damages for conversion.

Griffin, Warner & Hunt, for plaintiff.

McGRATH, J. This is a suit in trover against the sheriff and deputy-sheriff of Ionia county, for seizing and converting a certain stock of goods in the village of Portland, upon which plaintiff had a chattel mortgage amounting to the sum of $4,920.52.

The case has been twice tried. An appeal was taken by the plaintiff from the first verdict and judgment, and the case is reported in 79 Mich. 653. The case was reversed by this Court, and upon the second trial plaintiff recovered a verdict, from which defendants appeal.

The mortgagor, Willis M. Elder, was plaintiff's son-in-law, and plaintiff resided in his family. The mortgage was given upon Elder's stock of drugs, silver-ware, crockery, stationery, groceries, and fancy goods. Elder had sold the stock to one Williamson, who had taken possession, but Elder replevined it, and then certain of his creditors attached. Elder compromised with Williamson, gave the attaching creditors notes indorsed by plaintiff and her husband, and took possession of the stock. To secure plaintiff for the indorsements and the payment to her of an indebtedness claimed to be due to her, Elder, on February 3, 1888, executed to her a mortgage on his stock and fixtures for $4,920.52. The indorsed notes aggregated $3,210.52, and the amount claimed to be due plaintiff was $1,710, making a total of $4,920.52.

Elder continued in business until some time in March, when he went West, leaving his brother in charge of his stock. His object in going West is thus explained by plaintiff:

"I suppose it was more especially my desire to have my daughters nearer together. One of them was already

at Spokane Falls. And it occurred to me that as the stock was run down, and we hadn't very good success in selling it as a bulk, and we would have to sell it at a sacrifice, the best thing to do was to ship it, in case he would be satisfied to locate there; and Willis went West to see if he could be satisfied, and, if he sold the stock, he was to follow some other business; but my money was still in it, and I knew of no better way to get it, and thought the better way was to ship the stock. It was for the purpose of getting out of it what it was worth, and by adding more to it. I had no intention of defrauding Elder's creditors in any way."

Before leaving, Elder paid two of the indorsed notes, amounting to $1,000, and had paid to plaintiff $774. Elder finally concluded to locate at Spokane Falls, Washington Territory, and on April 6 the goods were being packed preparatory to shipment to him.

Tufts, a creditor, took out a writ of attachment on the last-named date, upon which defendants seized the goods. Judgment was recovered in the attachment suit, November 18, 1888, and the goods were sold at sheriff's sale, under a levy, in December, 1888. Plaintiff filed the usual declaration in trover. Defendants gave notice of justification under the attachment proceedings in *Tufts v. Elder*. Plaintiff and Elder testified to the indebtedness of Elder to plaintiff, to the indorsement of the notes by plaintiff and her husband, to the payment of two notes, amounting to $1,000, and the sum of $774, by Elder, and to the payment of the other indorsed notes, amounting to $2,210.52, by plaintiff.

Forty-three errors are assigned. We shall only refer to such as have been discussed by appellants' brief.

Counsel for defendants requested the court to instruct the jury as follows:

"The plaintiff bases her action in this case upon an alleged chattel-mortgage interest in a stock of goods which were owned by Willis M. Elder, and which she

claims the defendants have converted to their own use by taking them under an attachment, and she cannot recover in this case unless it appear from the evidence that, at the time the defendants levied the attachment upon the goods, she had a valid, subsisting chattel-mortgage interest in the goods so levied upon."

It is only necessary to say that this request was very fully covered by the instruction given.

The court instructed the jury that, in any event, the mortgage was good for the amount of the indorsed notes, whether the personal indebtedness was *bona fide* or not. This was error. Parties who take security from insolvents, or from parties who are indebted to others, must act in good faith, and so as not unnecessarily to hinder, delay, or deceive other creditors. The taking of a mortgage for an amount in excess of the debt of the assumed liability is a badge of fraud, and it is a fraud in law if the purpose is to protect the debtor's interest from other creditors. *King v. Hubbell*, 42 Mich. 597. To say that a party who assumes a liability may take a mortgage in excess of the amount necessary for his security, for the purpose of hiding the debtor's interest from other creditors, and, when the fraud is exposed, may have the benefit of the mortgage to protect himself, would open the door to gross abuses.

Nor does the fact that plaintiff's husband, as co-indorser, was interested in the security, make any difference in the application of the rule. In *Adams v. Niemann*, 46 Mich., 135, it was held that the honesty of one of two mortgagees would not save the instrument, if there was any fraud or wrong in the other.

Inasmuch as the jury found, by their verdict for the entire amount, that the personal indebtedness existed at the time the mortgage was given, the defendants were not prejudiced by the instruction.

Referring to the personal indebtedness, the court instructed the jury as follows:

"You can take into consideration all her after acts as bearing upon that question, as to whether she participated in any fraudulent intent upon the part of Elder. If the mortgage was good at the time it was given,—if there was a *bona fide* debt existing at that time, and it was given to secure it,—then the mortgage must stand, no matter what she did, about the time of the seizure, in regard to shipping goods to Washington. If there was a *bona fide* debt, and it was given for the purpose of securing that debt, and she took it for that purpose, then the mortgage must stand for the entire amount."

There was no error in this instruction.

At the time of the seizure in attachment, the goods were being packed preparatory to their shipment to Washington Territory, and before Elder went West he drafted a bill of sale running to plaintiff; but there was no testimony tending to show its execution and delivery, and both were denied. The testimony showed that it was to be used, if at all, to protect plaintiff's interest while the goods were in transit. Defendants claim that when they made the attachment it was because of the attempted removal of the goods, and with full knowledge of plaintiff's claim of a chattel-mortgage lien, but that after the attachment plaintiff claimed title to the property under a bill of sale, and that, not being in possession, the bill of sale was void as against creditors, and that plaintiff was estopped from afterwards claiming under the mortgage; that, had she continued to claim under the mortgage, they had a right to attach subject to it, pay plaintiff's claim, and sell the goods under their levy.

Regarding the question of estoppel, the court instructed the jury as follows:

"Now, as to the claims made by the defendants on the ground of estoppel, I do not think that need trouble

you, or that there is anything shown here by which she is estopped from asserting her real right in this case."

Plaintiff was not in possession of the goods at the time of their seizure, and had no bill of sale of them. Her chattel mortgage was of record, and defendants had actual notice of it. This suit was commenced shortly afterwards, and the sheriff testified that before it was instituted plaintiff demanded the goods from him under her chattel mortgage. The position of defendants was unchanged. Nothing had been done in reliance upon a claim of absolute ownership. Defendants were not misled to their prejudice, and there was no error in the court's instruction to the jury upon the question of estoppel.

Elder was called by plaintiff, and on cross-examination was asked if he did not trade the stock to Williamson for land up north, take a mortgage back to his wife, and then have it transferred to himself. This was objected to, and, when asked by the court to state the purpose of the testimony, counsel for defendants replied:

"We purpose to show that this mortgage was made a cover; that it was made with an attempt to defraud the creditors; that previous to this time, while Elder was indebted to other parties, he disposed of this very stock to another, and, instead of paying Mrs. Showman and these other parties, he transferred it to this other party, and took the consideration in his wife's name, and without any objection from Mrs. Showman. It was one of those acts which we claim go to make up a series of acts to defraud creditors.

"*The Court:* This is a part of the same stock that was mortgaged and attached?

"*Mr. Davis:* Yes sir.

"*The Court:* And you purpose to show that Mrs. Showman knew that the goods were transferred to this other man, and the consideration was paid back to Elder's wife; and under that statement I guess you may go on. If you don't make that showing, I will strike it out."

The witness then testified that the consideration of the sale to Williamson was $12,500, and that Williamson was to give witness a mortgage and land. The witness was then asked, "Did you take it in your own name?" but the court held that that could not be shown without the papers. Counsel then asked the witness whether the papers were turned over to witness or his wife, or kept by the witness, but the court held that that was unimportant, and excluded the testimony; and it is to this ruling that exception is taken.

It was competent for defendants to show by parol to whom the deed or mortgage ran (*Clemens v. Conrad*, 19 Mich. 170), and, if material, it was entirely proper to follow up the question of the custody of the papers. But there was no evidence tending to show that plaintiff had any knowledge of this transaction, and the matter was not referred to upon her cross-examination. Elder testifies that he had no talk with plaintiff about this transaction. It may be said that it would tend to show that Elder was not indebted to plaintiff at that time. But would the sale of her son-in-law's property, and the transfer of the consideration to her daughter, without objection by her, tend in the slightest degree to show that at that time Elder was not indebted to her? I think not. It was not shown that Williamson had in fact conveyed any land or given any mortgage; and, too, the fact appears that Elder replevined the stock from Williamson, presumably because Williamson had not performed.

It is contended that under the admissible evidence in the case the judgment is excessive.

The court admitted testimony with respect to the value of the goods at the time of the seizure. The appraisal made under the sheriff's directions was admitted, and the court permitted the defendants to show what the goods

brought at auction sale. The court instructed the jury that plaintiff was entitled to recover the market value of the goods at the time of the seizure, but not to exceed the amount of plaintiff's claim, and that in determining the value they were entitled to consider all the testimony bearing upon that question. There was no error in this instruction.

Counsel for defendants requested the court to instruct the jury as follows:

"1. If the jury find that the plaintiff is entitled to recover, then, in arriving at the amount of your verdict, you must take into consideration the market value of the goods in question at the time of the seizure; and, in arriving at this market value, you have the right to consider the question as to whether the condition of the goods had changed between the date of the seizure and the date of the sale, and you may also consider, in this connection, the amount that these goods brought at public auction under the execution sale as bearing upon this question, as bearing upon the market value at the time of the seizure, and upon the amount of your verdict.

"2. If you find from the evidence the plaintiff was entitled to recover, she can only recover the actual value of the goods at the time of the seizure; and when arriving at this value you have the right to take into consideration all the evidence in the case as to character and condition of goods,—whether new or second-hand, or in good or bad condition, and also the evidence of the length of time the goods have been in stock, how they have been used, and how long in stock, and the fact that they have passed from hand to hand for a number of years.

"3. The extent of the plaintiff's recovery must not exceed what it will be found she could have sold the goods for under chattel mortgage if she had taken the foreclosure proceeding thereon. In other words, she is not entitled to recover what these goods might bring at retail, but would be limited to the amount the goods would bring upon the market at forced sale under her chattel mortgage."

The court gave the requests numbered one and two, but declined to give number three. There was no testi-

mony which tended to show that the values put upon the stock were the retail values or prices. The "price-lists" were referred to by the witnesses, and these are not usually made up by the retailer. If it was so in this instance, it was counsel's duty to draw it out. It is not the rule that plaintiff was limited in her recovery to what the goods would bring upon the market at forced sale under her chattel mortgage. Such an instruction would simply set the jury to guessing. Mortgagees are in a situation to protect themselves against sacrifice at a forced sale, and parties who take the mortgaged property wrongfully cannot be permitted to deprive them of that right.

Counsel for defendants requested the court to instruct the jury that—

"The jury are instructed that the burden of proof is upon the plaintiff to show the value of the goods in question at the time of the seizure under the attachment; that it is the duty of the plaintiff to present the best obtainable evidence of such value, and the jury have the right to consider whether or not the plaintiff has produced the best evidence within her control showing such value; and that if she has failed to produce the evidence within her power, such as books of account, bills payable, invoices of goods, and cash accounts, and has relied upon inferior evidence to prove such value, the jury have the right to take into consideration such omissions as bearing upon the good faith of the plaintiff."

The plaintiff called, as witnesses to prove the value of the goods, the mortgagor, who had been in the drug business for 15 or 18 years, another witness who had been in the drug business seven or eight years, a physician who had been in the drug business for a number of years before he commenced the practice of medicine, and another witness who had been in the drug business for seven years, and who was one of the appraisers. All of these witnesses were familiar with the stock, and

several of them had taken the inventory made by the sheriff, and from their knowledge of values had carried out and agreed upon the market value of each article. The invoices would show cost, rather than value, and would not have been the best evidence. Again, plaintiff was the mortgagee. She did not have possession of the papers and books. There was no error in the refusal to give this instruction.

Defendants called as a witness one Yeomans, who testified that he had been engaged in a drug store for 24 years, and that he was acquainted with the market value of second-hand drug stocks.

"*Q.* Now, what is the general market value for second-hand drug stocks? Would it be about the same in all cases?

"*A.* There would be a general value to such stock. It would depend a good deal upon how those stocks had been kept up; whether upon shelves, in cases, and so on. There would be a general value, however, to stocks of that kind.

"*Q.* Now, taking the general value into consideration, what would be the market value in relation to the first cost price?"

This was objected to, and the testimony was excluded. This witness knew nothing about this stock, its age or condition. The articles comprising a general stock of drugs have a market value, which is easily determined, but it is well known that a stock of goods which must be sold in bulk has not a corresponding aggregate value. The public generally buy drugs, but few persons desire to buy a stock of drugs. The sale of a bankrupt's stock at 30 cents on the dollar is not a fair measure of value for other goods of the same character. The market value of this stock was what it would cost to replace it with a like stock at the time of the seizure, and not what it could be sold for as a whole to an occasional purchaser,

who would buy only because he saw a large margin in the purchase.

Objection is made to the admission of the testimony of the witness Alton as to the value of the goods; but the witness had testified that he had been in the drug business for a number of years; that he was very familiar with this stock; that he had assisted in making an inventory of the stock when Elder purchased; and that he was acquainted with the values. Upon this showing, there was no error in admitting his testimony.

Other errors are assigned upon the admission and rejection of testimony involving similar questions, but it is unnecessary to discuss them severally. From a careful examination of them, I am satisfied that defendants were not prejudiced by the rulings of the court.

The judgment is affirmed, with costs to plaintiff.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not sit.

THE VILLAGE OF GRANDVILLE v. LUMAN JENISON AND LUCIUS JENISON.

[See 84 Mich. 54.]

Highways—User.

It is no defense to a suit for encroaching upon a highway, claimed to have become such by user prior to the encroachment, that travel had not *then* been continuous over its entire length for the statutory period, if it appears that travel over the portion of the street encroached upon had been so continuous.

Rehearing, upon application of defendants, of case

reported in 84 Mich. 54. Submitted June 2, 1891. Decree affirmed July 28, 1891.

Taggart, Wolcott & Ganson, for complainant.

McGarry & McKnight and *E. A. Mayer,* for defendants.

MORSE, J. This case will be found reported in 84 Mich. 54. The opinion was filed on the last meeting of the Court before the retirement of Mr. Justice CAHILL from the Bench. A rehearing was granted on motion of defendants, mainly for the reason that some of the members of the Court, especially the writer of this opinion, feared that perhaps they had not, in the limited time afforded between the first hearing and the filing of the first opinion, given the case the full and searching consideration that it deserved. Since then we have most carefully examined and studied the record, and are satisfied that the opinion of Mr. Justice CAHILL is correct in every particular.

The main question raised upon the rehearing is one of fact, to wit, whether "South street," so called, or that portion of it occupied by the building of the Jenisons, has become a public highway by user. There seems to be no ground whatever for disputing the fact, which is well established, that an arrangement was made under attempted, but not legal, proceedings to lay out a street, by which South street, as shown on the old plats, was opened in 1871 from East street through as far as a stave-mill then in operation, and that in the following year it was turnpiked by highway labor. This portion of South street included that part of the street now occupied by the Jenisons' building. The street has been traveled more or less ever since, and the evidence seems to be conclusive that at the corner where the Jenisons'

store is situated it has always been traveled until obstructed by them.

It is true that a road cannot be established by user of any greater length or width than the use makes it; but the defendants are in no position to complain, or aver in their defense that the whole length or width of South street as it appears upon the old plats, or as it was opened in 1871, has not been continuously traveled ever since such opening, as long as it appears without serious dispute that the travel upon the portion of the street upon which their building encroaches has been continuous for upwards of seventeen years before they erected their store building.

There also seems to be a substantial want of equity in the defense. Nicholas Osterhouse, through whom they claim title, never had any deed to this land upon which they are encroaching with this building. His conveyance recognized the old plats of the village, upon which this South street is shown as a public street by that name. His deed was of block 12, eastern addition to the village of Grandville, which, according to these plats, was bounded on the south by South street. In 1871, when he deeded a portion of said block 12 to the railroad company, he expressly bounded it, in his deed, on the south by South street. When he conveyed to Miller, his deed described the land as the "north half of 'South street,' so called, on the south side of block 12." Miller followed this description in his deed to defendants,

It does not appear that Osterhouse ever purchased any title to this land except as a street. He took the fee in the street, subject to the public easement, by virtue of his deed to block 12. If he owned this land absolutely in fee at the time he conveyed to Miller, which may be questioned, he so owned it because the street had been abandoned by the public, and not otherwise. Of this the

defendants had full notice. There are other equitable considerations in favor of the complainant, which we do not deem it necessary to mention.

The opinion heretofore filed must be adhered to, and the decree of the lower court affirmed, with costs.

The other Justices concurred.

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86 570
107 622

LORENZO COREY v. CHARLES T. CADWELL.

Partnership—Profit-sharing—Construction of contract.

1. While an agreement to share in the profits of a venture will not constitute a partnership as between the parties if contrary to their intention that there should be no such relation, it is strong evidence of the intent, and sufficient, where there is a community of interests and capital, to establish such relation, unless rebutted by satisfactory evidence.
2. An agreement by which one of the parties is to furnish money for the purchase of a certain tract of timbered land and of certain standing timber, and the other is to manufacture the timber into lumber and shingles, and, after the sale of the land and manufactured products, the proceeds remaining, after payment of the expense of manufacture and sale and the repayment of the money so advanced with interest, are to be equally divided between the parties, constitutes them copartners in the special venture.

Error to Montcalm. (Smith, J.) Argued June 11, 1891. Decided July 28, 1891.

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

N. O. Griswold, for appellant.

Griffin, Warner & Hunt, of counsel, for appellant, contended:

1. It will be noted that the question is not one between the defendant and a third person who has assumed to rely upon the partnership liability, but between the parties to the agreement, which must be construed according to their intention as discovered from the agreement and the circumstances leading to it; citing *Bird v. Hamilton,* Walk. Ch. 361; *Beecher v. Bush,* 45 Mich. 188.
2. In support of the contention that the agreement and surrounding circumstances did not constitute a partnership, counsel cited *Gray v. Gibson,* 6 Mich. 312; *Edson v. Gates,* 44 Id. 253; *Hamper's Appeal,* 51 Id. 71; *Monroe v. Greenhoe,* 54 Id. 9; *Wells v. Babcock,* 56 Id. 276; *Colwell v. Britton,* 59 Id. 350; *Kingsbury v. Tharp,* 61 Id. 216, 224.

L. C. Moore and *George S. Steere,* for defendant, cited no authorities.

CHAMPLIN, C. J. The parties to this suit were in partnership in 1886 in the business of buying, manufacturing, and selling shingles. In January, 1887, they dissolved this partnership, and the business was continued by the defendant. In July, 1887, the defendant told the plaintiff that he knew of a piece of pine in Newaygo county that could be bought at a bargain, and asked the plaintiff if the money could be had of him. Plaintiff said, "Yes, if the trade is a good one," and advised the defendant to go and examine the timber. Defendant did so, and on his return told plaintiff that it was a very nice tract of timber. The plaintiff then agreed to furnish the money to pay for the timber, and defendant agreed to pay it back, with interest at the rate of eight per cent., as fast as the timber was removed. The plaintiff then gave his note to defendant for $6,000, due in 20 days, with which, or the proceeds of which, defendant bought the first tract of timber, known in the record as the "Danaher Land." Plaintiff paid the note when it

became due. The deed was then made in plaintiff's name, and bears date August 16, 1887.

The testimony introduced in the case tended to show that afterwards, in October, 1887, Cadwell desired to purchase some standing pine timber from one Wise for $550, and applied to Corey for a loan of the capital to enable him to do so. Corey agreed to loan it to him at the rate of eight per cent. Corey then suggested to the defendant that, as he was furnishing a good deal of money, why should he not have an interest in the profits of it? and proposed that he should have, and that Cadwell should give him one-half of the profits above eight per cent. after paying for the timber, and Cadwell acceded to the proposition. The parties then entered into an agreement, which agreement was entered upon the books of the defendant, Cadwell, in the following form:

"October 18, 1887.

Newaygo pine			6,558 75
L. Corey			6,550 00
Aug. 16.	For Danaher land		6,000 00
Oct. 18.	" Wise pine		550 00
	Cash		8 75
	Paid highway tax		8 75

"It is hereby agreed by and between the undersigned that the net proceeds from the above, either from sale of land, lumber, timber, or shingles, after paying above, and all expenses of manufacturing, transportation, and sale, shall be equally divided between the parties.

"LORENZO COREY.
"C. T. CADWELL."

This is the first, and for more than a year afterwards the only, writing the parties had in relation to the investment. Sometime during the year 1889, plaintiff asked defendant to give him a certificate containing the substance of this agreement on the books, so that, in case the book should be destroyed in any way, he would have something to show his interest there; and thereupon

Cadwell made, signed, and delivered to the plaintiff a certificate, as follows:

"This is to certify that Lorenzo Corey has purchased certain lands in Newaygo county, Michigan, for the sum of $6,550, and which said sum I agree to refund to him as the timber is removed, with interest at eight per cent. per annum from the first day of January, A. D. 1888.

"And I also agree to cut the timber into lumber or shingles, and agree that the net proceeds from the sale of land, lumber, timber, or shingles, after paying for said land and all expenses of manufacturing, transportation, and sale, shall be equally divided between the said L. Corey and myself.

"C. T. CADWELL."

This latter paper the plaintiff accepted and held, while the former one was on the defendant's books and in his possession.

The plaintiff testified that in December, 1890, he asked the defendant if he had cut the timber from the land, and he stated that he had; that it was all manufactured and sold, and the returns received, except from one carload of shingles, which they arrived at from guess-work, comparing with other shipments. He was not permitted to testify to the whole of this conversation, nor whether they looked over and had a settlement at that time. He did testify that Cadwell had never paid any of the money which he let him have.

The defense contended that the agreement of October 18, 1887, constituted a partnership, and that no recovery could be had in this form of action.

As between the parties to the agreement, the question of the relation of partnership or no partnership must depend upon the intention of the parties. An agreement to share in the profits of a venture alone will not constitute a partnership, if contrary to the intention of the parties that there should be no such relation. That fact, however, is strong evidence of the intent, and is suffi-

cient, where there is a community of interests or capital, to prove a partnership, unless rebutted by satisfactory evidence.

Counsel for the plaintiff contend in this case that the $6,550 was a loan at eight per cent., and was to remain so, and this sum and interest must be repaid at all events. They further insist that the contract of October 18 is divisible; that one part relates to the loan and repayment, and the other to sharing in the profits; and that this suit is brought simply to recover the money loaned, and interest. They claim that they have proven the loan, the rate of interest, that it was to be repaid as fast as the timber was removed, that the timber has all been removed, and the plaintiff has never been paid. Their contention is correct, unless there was a partnership existing between the parties with reference to the purchase and sale of the land, the manufacture and sale of the timber, the repayment of the capital invested, including expenses, and the division of the profits.

The intent of the parties must be gathered from the agreement. It must be viewed in the light of the surrounding circumstances. Grant that, in the first instance, the money to buy the Newaygo land was loaned by Corey to Cadwell, and the deed taken in his name as security, and that the bill of sale of the Wise pine was taken in Corey's name, as the testimony shows, and that Corey was to be repaid the money loaned, with interest at eight per cent., as fast as the timber was removed, Cadwell was still personally responsible for the repayment of the money. The testimony of Corey is that this agreement was changed by the agreement made October 18, 1887. The substantial terms of this agreement were reduced to writing and signed by the parties, and their intention must be gathered from the language of the instrument. It will be noticed that there is first a statement of account entered

on the books of the defendant, Cadwell, in which Newaygo pine is charged with the cost, viz., $6,558.75; and that this item is made up of the $6,000 paid for the Danaher land, August 16, the item of $550 paid for the Wise pine, and cash paid by Cadwell for highway tax; and Mr. Corey is credited with the money advanced by him, being $6,550. That amount having been entered, the parties wrote underneath their agreement as to the division of the net proceeds. These proceeds are what remained over from either selling the land, lumber, timber, or shingles, after paying $6,558.75 and all expenses of manufacturing, transportation, and sale.

The relations of the parties are materially changed by this agreement. Before, the relation of debtor and creditor existed between them, and Cadwell was liable to pay generally. Now the money is to be paid out of the proceeds from the sale of the land, lumber, etc. The agreement signed by them both does not express the whole agreement. Nothing is said in it as to who shall manufacture or who shall sell; in other words, who shall manage the enterprise. The writing produced by the plaintiff, which he says was received by him in 1889, signed by Cadwell, and which he says was given to him to show what his interests were in the contract, supplies the omission, and when read together they show what the contract was.

The whole, taken together, shows that the parties entered into a special venture, by which Corey furnished the capital to purchase land and pine, for which he was to be reimbursed with eight per cent. interest, and Cadwell was to manufacture the timber into lumber or shingles, and the land, timber, lumber, and shingles were to be sold, and out of the proceeds Corey was to be paid the capital invested by him and interest, and then all expenses of manufacturing, transportation, and sale,

and the net proceeds remaining were to be equally divided between Corey and Cadwell.

We think the contract is one and indivisible, and that the intention was that they should be partners in the venture, one contributing the capital and the other the labor and supervision, and the net profits were to be equally divided.

The judgment is affirmed.

MORSE, MCGRATH, and LONG, JJ., concurred. GRANT, J., did not sit.

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106	35
86	576
115	200
86	576
a121	477
86	576
125	137
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f137	1362
86	576
153	2492

DWIGHT BROOKS v. DANIEL MANGAN AND SAMUEL M. CATLIN.

Unconstitutional statute—False imprisonment—Liability of officers—Ordinance—Validity—Reasonableness—Discrimination.

1. A justice of the peace, having jurisdiction of the person and subject-matter of the suit, is not liable to respond in damages because, in the exercise of his honest judgment, he holds an unconstitutional ordinance constitutional, and enforces it by the arrest and imprisonment of one who violates its provisions; nor is the officer who executes the warrant of arrest, if fair upon its face, so liable.
2. An ordinance requiring hawkers and peddlers traveling on foot to pay a license of $10 for the first day and $5 for each subsequent day, and, if traveling with one horse, $20 and $15, and, if with two or more horses, $25 and $15, and which practically exempts residents of the municipality from its provisions, is invalid on account of its unreasonableness, and objectionable for making an unjust discrimination between residents and non-residents.[1]

[1] See *Chaddock v. Day*, 75 Mich. 527.

Error to Bay. (Cobb, J.) Argued June 12, 1891. Decided July 28, 1891.

Case. Defendants bring error. Reversed. The facts are stated in the opinion.

T. A. E. & J. C. Weadock, for appellants.

Gallagher & Barry, for plaintiff, contended:

1. An unconstitutional law does not afford protection or justification to a magistrate or officer of a court of inferior jurisdiction; citing Cooley, Torts, 417–420; *Fisher v. McGirr*, 1 Gray, 1 (61 Am. Dec. 381); *Kelly v. Bemis*, 4 Id. 83 (64 Am. Dec. 50); *Barker v. Stetson*, 7 Id. 53 (66 Am. Dec. 457); *Sumner v. Beeler*, 50 Ind. 341 (19 Am. Rep. 718); *Merrit v. St. Paul*, 11 Minn. 223; *Mitchell v. State*, 12 Ark. 50 (54 Am. Dec. 263); *Savacool v. Boughton*, 5 Wend. 170 (21 Am. Dec. 199); and it is no protection that the inferior court decides in good faith that the law confers jurisdiction; citing *Wingate v. Waite*, 6 Mees. & W. 739; *Piper v. Pearson*, 2 Gray, 120.
2. Process issued under an unconstitutional law is not fair on its face, and affords no protection; citing Cooley, Torts, 464; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Kelly v. Bemis*, 4 Gray, 83.

GRANT, J. Plaintiff obtained a verdict and judgment against defendants for false imprisonment for $450.

Defendant Mangan was the police justice of Bay City, and defendant Catlin was a policeman. One Michael Tanney entered a complaint against the plaintiff, charging him with a violation of a city ordinance in regard to hawking and peddling. A warrant was issued by the justice, and placed in the hands of Catlin, who executed it by arresting plaintiff and bringing him before the justice for trial. The trial was adjourned three days, and plaintiff permitted to go on his own recognizance. He waived a trial by jury, was convicted, sentenced to pay a fine of $100, and in default thereof, that he be confined in the county jail until the payment thereof, not exceeding 90 days. He refused to pay the fine, and

was committed to jail, where he remained four days, after which he was released on an appeal-bond, having appealed his case to the circuit court. Plaintiff employed an attorney upon the trial of the cause before the justice, who there claimed that the ordinance was unconstitutional and void.

The justice had jurisdiction of the person and of the subject-matter of the suit. It is not claimed that the defendants acted in bad faith. On the contrary, it is manifest that both acted honestly, and in the belief that they were in the performance of their official duties. The violation of the ordinance by plaintiff is conceded. The sole question raised before the justice was upon the validity of the ordinance. The defendant Mangan, in the exercise of his honest judgment, held it valid, and the defendant Catlin acted upon a warrant and commitment fair upon their face.

The ordinance required every person soliciting a license as a hawker or peddler to pay $10 for the first day, and $5 for each subsequent day, if he traveled on foot; if he traveled with one horse, $20 for the first day, and $15 for each subsequent day; if he traveled with two or more horses, $25 for the first day, and $15 for each subsequent day. We think the ordinance invalid on account of its unreasonableness. Practically, if enforced, it would amount to a prohibition of the business. The ordinance is objectionable upon another ground, viz., it makes an unjust discrimination between residents of Bay City and non-residents. It practically exempts residents from its provisions, while imposing so unjust and unreasonable a license upon non-residents. Counsel for the defendants did not seriously contend for its validity.

The main question is, are these defendants to be held responsible in a civil action,—the one for his judicial

determination, and the other for executing a warrant issued by a court of competent jurisdiction? Plaintiff's counsel state their position as follows:

"Officers acting under unconstitutional laws are liable, no matter how innocently they may act, nor how ignorant they may be of the invalidity of their process. It is a fundamental rule in the law of torts that, no matter how good the faith of the wrong-doer, nor how earnestly he may believe that his acts are justified, he must respond in damages to the party on whom he has inflicted the wrong."

This statement, under all the authorities, must be confined to inferior judicial officers. It is conceded that circuit judges cannot be held liable in a civil action for any judicial determination, although such determination results in depriving the citizen temporarily of his liberty. Circuit judges are usually men of experience and education in the law, while justices of the peace seldom have any legal education or training. Upon what reason should the former be held exempt from liability for their errors, while the latter must be severely punished for honest errors of judgment? I can find no reason in such distinction.

In the case of *Ortman v. Greenman*, 4 Mich. 291, this Court severely censured a justice of the peace for holding an act of the Legislature unconstitutional. In that decision the Court said:

"We regret that any magistrate should, in the course of his official duty, presume to do that which the highest judicial tribunals of the land do with great caution, and only after the most mature deliberation."

It is evident that under this rule justices of the peace would seldom hold an ordinance or act of the Legislature valid, were its unconstitutionality challenged in the interest of a respondent charged with crime. If these inferior officers are to be held liable in one case, it fol-

lows that they must in all, and a justice of the peace could therefore be held liable for binding a person over to the circuit court for trial, if it should afterwards be held by the appellate court that the act under which he was arrested was unconstitutional. Public policy, in my judgment, forbids the adoption of such a rule.

In all criminal prosecutions there are two parties interested, viz., the accused and the people. It is inevitable under any criminal procedure that innocent persons will sometimes be arrested and tried. Judicial officers are, and must of necessity be, instrusted with the investigation and trial of offenses against the laws of the State, and in such cases constitutional questions must frequently arise for determination. When these officers have acted in good faith in determining such questions, the innocent is without remedy. The Constitution guarantees no man immunity from arrest. It guarantees him a fair and impartial trial. It has provided him with appellate courts, to which he may resort for the correction of errors committed by the inferior courts. With this he must be content. These inferior tribunals should be left to the exercise of their honest judgment, and when they have so exercised it they are exempt from civil liability for errors. This is the only rule which can secure a proper administration of our criminal laws. The interests of the individual must in such case yield to the interests of the public. This is the rule adopted by the supreme court of Iowa. *Henke v. McCord,* 55 Iowa, 378.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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THE WHITE SEWING MACHINE COMPANY v. MILO H. DAKIN, AARON T. BLISS, AND ANTHONY BYRNE.

Written instrument—Materiality of alteration—Agency—Bond.

1. A material alteration, made by the agent of one of the contracting parties without express or implied authority, will not avoid the contract; citing 1 Amer. & Eng. Cyc. Law, 505.
2. The insertion in the formal part of a bond, the penalty and conditions of which are fixed by its terms, of a promise to pay ten per cent. attorney's fees in case of suit on the bond, is an immaterial alteration, such promise being no part of the penalty, nor affecting the judgment to be rendered in case of suit, nor the amount of damages to be assessed.

Error to Saginaw. (Edget, J.) Argued June 12, 1891. Decided July 28, 1891.

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

Hanchett, Stark & Hanchett, for appellants, contended:

1. The clause, as it read before the alteration, could only mean that in case of suit the penalty would be increased ten per cent., or to $1,100, and a jury in arriving at the amount of a verdict would compute interest on the $1,100. In other words, the penalty is variable, namely, $1,000 if the claim is settled amicably, and $1,100 if suit is brought. By the alteration the extra ten per cent. is made a fixed sum, not a part of the penalty, and not drawing interest, and is a material alteration, and, if made without the consent of the defendants after the execution of the bond, discharges them from liability; citing *People v. Brown,* 2 Doug. 9; *Wait v. Pomeroy,* 20 Mich. 425; *Holmes v. Trumper,* 22 Id. 427; *Miller v. Finley,* 26 Id. 249; *Bradley v. Mann,* 37 Id. 1; *Aldrich v. Smith,* Id. 468; and this is true, even though their liability would be reduced by the alteration; citing *People v. Brown,* 2 Doug. 9.
2. The alteration makes a provision for an attorney's fee, and this

renders void the entire clause providing for an additional ten per cent.; citing *Bullock v. Taylor*, 39 Mich. 137; *Myer v. Hart*, 40 Id. 517, 522; and therefore it is material, and, although favorable to the defendants, they are released from liability; citing *People v. Brown*, 2 Doug. 9; *Hewins v. Cargill*, 67 Me. 554; Brandt, Sur. § 338.

John M. Brooks, for plaintiff.

CHAMPLIN, C. J. This is an action on a bond given by Milo H. Dakin as principal, and Aaron T. Bliss and Anthony Byrne as sureties, to the plaintiff, to secure any indebtedness incurred by Dakin to the plaintiff while acting as its agent in selling sewing-machines.

In January, 1888, Mr. Van Ness, an agent of the plaintiff employed to procure dealers in the White sewing-machines, made a contract with the defendant Dakin by which Dakin was given the exclusive right to deal in White sewing-machines within certain territory. It is the custom of the plaintiff to require dealers to give a bond to secure the company on any indebtedness to it which may be incurred by such dealers. Blank forms are furnished by the company, and are filled out by Van Ness when needed. Mr. Dakin signed the bond in this case, and obtained the signatures of the defendants Bliss and Byrne as sureties, and delivered it to Mr. Van Ness, who forwarded it to the plaintiff.

The formal part of the bond, before stating the conditions, reads as follows:

"*Know All Men By These Presents*, that Milo H. Dakin, Aaron T. Bliss, and A. Byrne are hereby held and firmly bound, severally and individually, unto the White Sewing Machine Company in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the White Sewing Machine Company, their representatives or assigns; for which payment (together with 10 % attorney's fees thereon in case of suit on this bond), well and truly to be made, they bind themselves, their heirs, executors, and administrators and

separate estate, jointly and severally, firmly by these presents.

"Sealed with their seals.

"Dated the twenty-fifth day of January, one thousand eight hundred and eighty-eight."

Then follows the condition of the bond, which was to pay or cause to be paid any and every indebtedness or liability then existing, or which might thereafter in any manner exist or be incurred, on the part of Milo H. Dakin to the White Sewing Machine Company, etc. The words "attorney's fees" appear to have been interlined in the bond between the words "10 %" and the word "thereon."

The only questions presented by the record are:

1. Was the insertion of the words "attorney's fees" a material alteration, if inserted after the bond was executed?

2. If inserted by Van Ness after it was executed, and before it was forwarded by him to the plaintiff for acceptance or rejection, did it render the bond invalid in the hands of the plaintiff?

First. Clearly the alteration by the insertion of the words "attorney's fees" was immaterial. An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto. 1 Amer. & Eng. Cyc. Law, 505.

This instrument is not a money bond, and the action upon it is regulated by How. Stat. §§ 7737, 7738, and 7739, which provide as follows:

"SEC. 7737. When an action shall be prosecuted in any court of law upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought.

"SEC. 7738. Upon the trial of such action, if the jury find that any assignment of such breaches is true, and

that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.

"SEC. 7739. In every such action, if the plaintiff recover, the verdict of the jury, assessing the plaintiff's damages, shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited, as in other actions of debt, together with the costs of suit, and with a further judgment that the plaintiff have execution to collect the amount of damages so assessed by the jury; which damages shall be so specified in such judgment."

The penalty of this bond is $1,000, no more and no less; and no recovery can exceed that amount. *Bishop v. Freeman,* 42 Mich. 533; *Odd Fellows v. Morrison,* Id. 523; *Spencer v. Perry,* 18 Id. 394. The damages, including the interest, where it is proper to allow it to be assessed under the conditions, cannot exceed the penalty; and if they equal the penalty, they can only draw interest from the date of the judgment. In this case, as in the other cases under the statute, the recovery and judgment would be for the penalty of the bond, and the further judgment that the plaintiff have execution for the damages assessed. The promise to pay ten per cent. attorney's fees is no part of the penalty of the bond, and by no possibility can it affect the judgment to be rendered upon the bond, nor the amount of damges to be assessed.

Second. If any alteration was made after the execution of the bond, it was done by Van Ness, and although he was the agent of the plaintiff, and received and forwarded the bond in question to the plaintiff for its approval or rejection, yet there is no testimony in this record tending to show that he was expressly or impliedly authorized to make any alteration in the bond.

The rule of law is that, when an alteration is made by a third party, it is an act of spoliation, and the altera-

tion, although material, cannot invalidate the written instrument; and when the spoliation is done by the agent of one of the parties, it will not avoid the contract if the agent had no express or implied authority to do it. 1 Amer. & Eng. Cyc. Law, 505; *Van Brunt v. Eoff*, 35 Barb. 501; *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. Law, 227; *Bigelow v. Stilphen*, 35 Vt. 521; *Miller v. Reed*, 3 Grant, Cas. 51; *S. C.*, 27 Penn. St. 244; *Terry v. Hazlewood*, 1 Duv. 104. The declaration counts upon the bond as being in a penalty of $1,000, and assigns breaches of the conditions. It follows that the bond would be a valid instrument in the hands of the plaintiff for what it was before the alteration was made.

The errors assigned must be overruled, and the judgment affirmed, with costs of both courts.

The other Justices concurred.

SARAH J. BARNES v. THE ESTATE OF ROBERT S. MOORE.

Husband and wife—Claim for services of wife—Evidence.

1. Where a husband supports his family, he is entitled to the compensation for services rendered by himself and family (including his wife) in nursing and caring for a boarder, in the absence of an agreement to the contrary.
2. In such a case the wife cannot maintain a claim against the estate of the deceased boarder for such services without proof of the husband's consent and relinquishment, which cannot be shown by the commissioners' report on claims, wherein it appears that no claim has been filed by the husband for such services.

Error to Wayne. (Brevoort, J.) Argued June 19, 1891. Decided July 28, 1891.

Appeal from the disallowance of a claim by the commissioners on claims. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

William J. Gray, for appellant, contended:

1. "We do not believe that it is now sound law that a husband owns his wife's services performed outside of the family. There have been many cases holding that way, and in our own reports are to be found mere *dicta* in that direction; but if we show that no Michigan case has expressly passed on the point, and convince the Court that the outside cases are a relic of barbarism, with no sound basis, it is not unreasonable to ask that this case be decided upon sound principles, no matter what any other court may have said." Counsel then cites *Glover v. Alcott*, 11 Mich. 470; *Tong v. Marvin*, 15 Id. 60; *Tillman v. Shackleton*, Id. 447; *Mason v. Dunbar*, 43 Id. 407; *Harrington v. Gies*, 45 Id. 374; *Benson v. Morgan*, 50 Id. 77; *Sines v. Superintendents*, 58 Id. 503.
2. At the common law the husband owned the wife's earnings; but the married woman's act (How. Stat. § 6295) gives them to her. None of the cases cited here passed upon this point (beyond a mere *dictum*), and we ask the Court to construe the act liberally. It provides that "the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled," etc., shall be her own. Does not the word "property" include money due for services? Upon the construction of a similar statute, the supreme court of errors of Connecticut, in 1884, held that it did; citing *Shea v. Maloney*, 52 Conn. 327; *Whiting v. Beckwith*, 31 Id. 596; and a chose in action is property, and this Court has held that *that* word "property" includes damages for personal injuries and for slander, and that such damages belong to the wife; citing *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Id. 145.

H. C. Wisner, for defendant.

GRANT, J. Plaintiff presented a claim against the estate of Mr. Moore for nursing him in August and

September, 1885, and from January to August, 1887, at $10 per week, $420, and for extra room rent for 22 months, $110. The commissioners disallowed the claim, and on appeal to the circuit court a verdict was directed against the plaintiff.

Mr. Moore boarded in plaintiff's family, which consisted of herself, husband, and son. He paid $16 per month for his board and room. During that time he was sick on two occasions, and was nursed and cared for by the plaintiff, her husband, and son. Her husband supported the family, and, in the absence of any agreement, was entitled to the compensation for the services rendered by his family and himself to Mr. Moore. There was no evidence that the husband had relinquished his right to these services.

We think the present case is clearly ruled by that of *Mason v. Dunbar*, 43 Mich. 407.

When the husband supports his family, his wife cannot maintain an action for services like those here rendered without proof of the husband's consent and relinquishment. Such relinquishment and consent cannot be shown by the commissioners' report of claims, wherein it appears that no claim has been filed by the husband. The ruling of the court in refusing to admit this report was therefore correct.

Judgment is affirmed.

The other Justices concurred.

ABRAM B. KNOWLSON v. SARAH BRUIST.

Fraud—Procuring execution of mortgage.

The controversy in this case grows out of the claim of the defendant that she never executed the contract and note and mortgage, to foreclose which complainant files his bill, with knowledge of their contents, and the finding of the circuit judge to the contrary is sustained.

Appeal from Kent. (Grove, J.) Submitted on briefs June 19, 1891. Decided July 28, 1891.

Bill to foreclose a mortgage. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

J. M. Jamison, for complainant.

Earle & Hyde, for defendant.

LONG, J. The bill was filed in this case to foreclose a mortgage. The proofs were taken in open court, and a decree entered finding the amount due the complainant on the note and mortgage to be the sum of $1,382, and ordering foreclosure for that amount. The defendant appeals. It appears that the note and mortgage were made on October 6, 1888, for the sum of $1,500, and, as complainant claims, were given to secure the payment of certain moneys due to him on the purchase of coal, wood, coke, lime, and cement. The complainant was a dealer in coal, etc., in the city of Grand Rapids, dealing in large quantities. The husband of the defendant was also a dealer in the same commodities in that city, and prior to the execution of the note and mortgage had had dealings with the complainant, purchasing from him such commodities. In August of that year the complainant

refused further to sell to the husband of defendant upon account and time payments, unless secured. The complainant claims that he so advised defendant's husband, and shortly thereafter he proposed to give complainant security upon certain lots in the city of Grand Rapids, the title of which was in the defendant; that, in pursuance of this arrangement, he had an interview with Mr. L. P. Eddy, an attorney of that city, who drafted an agreement, which is set forth in the record, by which he agreed to sell to the defendant, and the defendant agreed to purchase of complainant, coal, coke, etc., upon time payments, and to secure the payments he took a mortgage upon the premises decribed in the bill.

This agreement recites—

"That said Knowlson, his heirs and assigns, hereby agrees to discharge said mortgage whenever and at such times as said Sarah Bruist shall have paid in full for all coal, wood, coke, lime, cement, etc., furnished as aforesaid by said Knowlson, provided such payment in full is made on or before one year from date."

It was also provided in the agreement that complainant should indorse on said note and mortgage the payments made. This agreement was signed by the defendant in Mr. Eddy's office on the same day that the note and mortgage were executed. The complainant thereafter delivered to the husband of defendant coal, wood, etc., to the amount, as complainant claims, of $4,145.01, and the total payments made during the year were $2,711.19, leaving a balance, as complainant claims, with interest, of $1,486.74.

The real controversy between the parties grows out of the claim made by the defendant that she never executed the contract or note and mortgage with knowledge of their contents; that she was deceived and defrauded, the papers were never read to her, and that she supposed, at

the time she signed and executed them, she was simply joining her husband in the execution of a chattel mortgage upon her husband's property; that she was not engaged in business herself, purchased no wood, coal, etc., such as is mentioned in the contract, and did not know that she was binding her separate property to secure the payment of her husband's indebtedness to the complainant. She testified to this positively upon the witness stand, and was supported by her husband in the claim that complainant deceived and intended to deceive his wife as to the character of the papers she was about to execute.

The husband testified that, when the complainant spoke to him about security, he asked him if his wife would not give a mortgage upon her property; that he told complainant he was afraid his wife would not do that, and that he was afraid to ask her about it; when the complainant said, "I will make out the papers, and you sign them, and when she signs she won't know the difference." The defendant and her husband are contradicted in this statement by the complainant and by Mr. Eddy, the scrivener who drew the papers, as well as by Mr. De Hughes, who was in the employ of the defendant's husband in the coal business.

Mr. De Hughes testified that he stated the matter fully to the defendant as to what Mr. Knowlson wanted by way of security, and she assented to the giving of the mortgage upon her property. Mr. Eddy, the scrivener, testified that the matter was explained to the defendant in his office before the papers were executed. Those two witnesses fully corroborate the testimony of the complainant, and from which it appears that the defendant and her husband were fully advised of the contents of these papers, and the defendant executed them knowing

their contents, and that the mortgage was a lien upon her individual property.

The circumstances surrounding the transaction, in my judgment, support the complainant's theory. At the time the mortgage was given, defendant's husband had nearly paid up his past indebtedness to the complainant, and wanted credit for future purchases. The complainant was willing to extend the credit if security was given. It is a little difficult to comprehend, under these circumstances, that the complainant was so anxious to sell upon credit that he was willing to enter into a scheme with defendant's husband to cheat and defraud the defendant by obtaining from her security upon her separate property without her knowledge and consent.

We think the circuit court was not in error in finding the facts in favor of complainant's theory. We are also satisfied that the court was not in error in the amount he found due the complainant.

The decree must be affirmed, with costs.

The other Justices concurred.

GILBERT LAFFERTY v. ROBERT LORIMER ET AL.

Contract—Payment—Set-off.

1. The agreement of defendants to pay the plaintiff 20 cents per ton in coal for all orders taken and delivered at their office, said coal to be delivered as ordered, is construed as an agreement to pay plaintiff the agreed commission upon the coal delivered upon said orders, and upon orders which defendants, by their own fault, refused or neglected to fill.
2. In a suit to recover such percentage, it appeared that plaintiff

had asked and received money from defendants from time to time on the contract, which was paid without examining the account, and upon the assumption that the orders would be filled, which payments exceeded the commissions on the coal actually delivered. And it is held that the payments were a proper subject of set-off, having been made under a mistake of fact, and that the defendants were entitled to judgment for the excess.

Error to Wayne. (Gartner, J.) Argued June 20, 1891. Decided July 28, 1891.

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

Thomas Hislop, for appellant.

Barbour & Rexford, for defendants.

GRANT, J. Defendants made the following agreement with plaintiff:

"We agree to pay G. Lafferty twenty cents per ton in coal for all orders taken and delivered at our office, said coal to be delivered as ordered.

"ROBERT LORIMER & Co."

The date of this agreement is not given. We presume it was made about September 1, 1889, when defendants gave plaintiff a writing authorizing him to take orders for coal.

Plaintiff brought orders to the defendants for 1,744¼ tons. Of this amount only 739 tons were delivered. Plaintiff brings suit to recover $348.85, being the commission on all the orders taken by plaintiff. Plaintiff introduced evidence of the contract, and the taking and delivery of the orders, and rested. Defendants then proved that they did not refuse to deliver coal to any responsible party who ordered coal. Defendant Lorimer went to many of those whose orders plaintiff had furnished, and several of them declined to take it. Some of

these orders were canceled by agreement between plaintiff and defendants.

Plaintiff had asked and received from defendants money from time to time on this contract. Defendants had paid these amounts without examining the account, and evidently upon the assumption that the orders would be filled. The amount so paid exceeded the commissions on the coal actually delivered.

We think it was the plain intent of this contract that plaintiff was to be paid a commission upon the coal delivered upon these orders, and upon any orders which defendants, by their own fault, refused or neglected to fill. There is no evidence in the record upon which to base such neglect or refusal.

The circuit judge correctly directed a verdict for the defendants.

The only other question is, were the defendants entitled to judgment for the amount they had overpaid? We think these payments were the proper subject of set-off, and that they were properly held by the court to have been paid under a mistake of fact.

Judgment affirmed.

The other Justices concurred.

THE PEOPLE v. EDWARD WAGNER ET AL. THE PEOPLE v. ALBERT H. BARIE ET AL. THE PEOPLE v. FRANK WITTELSBERGER ET AL.

[Three Cases.]

Municipal corporations—Ordinance regulating the manufacture and sale of bread—Police power.

1. An ordinance of the city of Detroit providing that all bread, manufactured by the bakers of the city for sale, shall be made into loaves of one, two, and four pounds, and no other, avoirdupois weight, and forbidding them to sell or expose for sale any bread that shall be deficient in weight, is sustained as within the provisions of the charter empowering the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof."
2. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:

   a—The constitutional provisions relating to the title of laws passed by the Legislature do not apply to city ordinances; citing *People v. Hanrahan*, 75 Mich. 611.

   b—It has been held in Massachusetts that no recovery could be had for the price and value of shingles which were not of the statutory dimensions (*Wheeler v. Russell*, 17 Mass. 258), or for oats and meal when sold by the bag, the statute requiring such sale to be by the bushel (*Eaton v. Kegan*, 114 Mass. 433).

   c—The State may institute any reasonable preventive remedy when the frequency of the frauds aimed at, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. Tied. Lim. § 89.

   d—The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency, and laws providing for the detection and prevention of imposition and fraud, as a general rule, are free from constitutional objection. Tied. Lim. § 89.

Certiorari to recorder's court of Detroit. (Chambers, J.) Submitted on briefs June 20, 1891. Decided July 28, 1891.

Defendants were convicted of a violation of an ordinance of the city of Detroit providing a uniform weight of a loaf of bread. Convictions affirmed. The facts are stated in the opinion.

William Look and *H. F. Chipman,* for defendants.

Charles W. Casgrain and *Charles S. McDonald,* for the people.

McGRATH, J. These cases come from the recorder's court of the city of Detroit by writ of *certiorari,* defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record.

Defendants are bakers, and are charged with making for sale, selling, and offering for sale bread that was deficient in weight under the ordinance.

The ordinance is entitled, "An ordinance relative to the manufacture and sale of bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows:

"SEC. 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds, and no other, avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter: *Provided,* always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed in his presence, within eight hours after the same shall have

been baked, sold, or exposed for sale: *And provided, further*, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread.

"SEC. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stored, or deposited or offered for sale, and to inspect and examine all bread found therein, and also to stop, detain, and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weigh the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law.

"SEC. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this ordinance, either by refusing him or delaying his entrance or admission into any of the places above mentioned, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it, shall be impeded or obstructed.

"SEC. 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed $50 and the costs of prosecution, and the offender may be imprisoned in the Detroit House of Correction until the payment thereof: *Provided*, always, that the term of such imprisonment shall not exceed the period of six months."

The defendants insist:

1. That matters contained within the body of the ordinance are not within its title.
2. That by the ordinance private property is taken without compensation.
3. That the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable.
4. That it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business.
5. That the ordinance is not within the police powers of the State.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the Legislature do not apply to ordinances enacted by a common council of a city. *People v. Hanrahan,* 75 Mich. 611, 615.

The ordinance does not provide for the taking, seizing, or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle, or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk.

In *Wheeler v. Russell,* 17 Mass. 258, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Eaton v. Kegan,* 114 Mass. 433, it was held that, in view of the statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it

is that evaporates, they reply, "Water." But they say the process of baking is not always uniform; that the oven may be too hot, in which case the bread crusts or skins quickly, retaining the moisture, and, again, it may be too cold, in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against and the weight of the dough must always be regulated accordingly; that fermentation is not always regular, and when it reaches a certain point the dough must be put into the oven, without reference to the condition of the oven; that the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust.

Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was 15 years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance, and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance.

Again, it is claimed that a barrel of flour will make 250 loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen

buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade.

The State may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. Tied. Lim. § 89, p. 208.

Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale

of a half or a quarter or any other fraction of a loaf.

Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one-third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. Tied. Lim. § 89, p. 208.

The charter of the city of Detroit empowers the common council to "direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293, be subjected to the test of reasonableness.

The convictions are affirmed, and the writ dismissed.

The other Justices concurred.

MARTHA I. REED v. ALFRED REED.

Divorce—Alimony.

Where the proofs show that, at about the time a bill for divorce was filed, the husband was the owner of several parcels of land of considerable value, and was possessed of considerable personal property, and of an interest in his father's estate worth at least $7,000, an award of $2,000 permanent alimony is reasonable.

Appeal from Wayne. (Reilly, J.) Argued July 1, 1891. Decided July 28, 1891.

Bill for divorce. Defendant appeals. Decree affirmed. The facts are sufficiently stated in the opinion.

Atkinson, Carpenter, Brooke & Haigh, for complainant.

John J. Speed, for defendant.

GRANT, J. Complainant obtained a decree of divorce from defendant on the ground of extreme cruelty. Defendant appeals, claiming—

1. That the decree should be reversed for lack of evidence that the parties were not acting in collusion.
2. That too large an amount was decreed for alimony.

We think the proof sufficient to show that there was no collusion between the parties.

The court decreed alimony in the sum of $2,000, the same to be in full satisfaction of complainant's claim to dower, if the amount was paid or secured within 60 days. The proofs show that about the time the bill was filed the defendant was the owner of several parcels of land of considerable value; that he was also possessed of considerable personal property, and of an interest in his father's estate worth at least $7,000. We think the award of alimony by the court was very reasonable, under the circumstances and situation of the parties.

The defendant attempted to show the transfer of the most of his property to his brother. It is evident that these transfers were not in good faith.

The decree is affirmed, with costs.

The other Justices concurred.

[86 602]
[101 417]

JOHN PALMER AND GEORGE J. PALMER v. LEVI H. ROATH AND CHESTER C. VAN DOREN.

Sale—Tender of property—Authority of agent—Parol evidence.

1. The right of the plaintiffs to give in evidence the statements and representations of the agents of a manufacturing company as to the kind, character, and condition of an engine ordered of the company, not varying or contradicting the description in the order, is sustained under the ruling in *Phelps v. Whitaker*, 37 Mich. 72.
2. Where, upon examining an engine ordered through an agent of a manufacturing company, and shipped to the firm of which he was a member, and from whose statements the proposed purchasers were alone informed as to the identity of the engine examined with the one ordered, the agent informs them that if they do not wish to take the engine they need not do so, they claiming that it did not fulfill the requirements of the order and of the representations made in addition to the order, they have the right to assume that the agent has authority to make such statement.
3. The failure of a manufacturing company to keep in a situation for delivery an engine ordered to be manufactured and delivered at a given point, to which it had been shipped, and, on the refusal of the proposed purchasers to accept it, reshipped to the company, is held to estop the company from claiming title to an engine which, by the terms of the order, was to be taken as a cash or down payment on the engine so ordered.

Error to Lenawee. (Lane, J.) Argued July 2, 1891. Decided July 28, 1891.

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

Salsbury & O'Mealey, for appellants, contended:

1. It was not competent for plaintiffs to show that they were to have any other or different engine than the one described in the order; citing *Adair v. Adair*, 5 Mich. 204; *Savercool v. Farwell*, 17 Id. 308; *Martin v. Hamlin*, 18 Id. 354; *Cline v.*

Hubbard, 31 Id. 237, 239; *Johnson v. Sutherland*, 39 Id. 579; *Spence v. Bowen*, 41 Id. 149; *Coon v. Spaulding*, 47 Id. 162; *Baker v. Morehouse*, 48 Id. 334; *Carney v. Hotchkiss*, Id. 276; *Bearss v. Preston*, 66 Id. 15.

2. The parol negotiations were merged in the written contract, and the only question to determine the liability of the plaintiffs was, did the engine sent correspond with and fulfill the terms of the written order? and not whether it corresponded with the Crandall engine, or any other engine but the one described in the order; citing *Cash Register Co. v. Blumenthal*, 85 Mich. 464.

3. In support of the proposition that Roath had no authority to relieve plaintiffs from accepting the engine, counsel cited *Hammond v. Bank*, Walk. Ch. 214; *Kornemann v. Monaghan*, 24 Mich. 37; *Busch v. Wilcox*, 82 Id. 336; and where an attempt is made to hold one responsible for the acts of another, claimed to be his agent, the agency must be clearly shown; citing *Campbell v. Sherman*, 49 Mich. 534; and the declarations or assumptions of the claimed agent are no proof of authority, or its extent; citing *Bacon v. Johnson*, 56 Mich. 182.

4. An agent cannot establish his own authority by representations, or assuming to exercise it; hence persons dealing with an agent are bound to ascertain, not only the fact of agency, but the extent of the authority, and, in case either is controverted, the burden is on those who claim its existence to establish it; citing *Rice v. Peninsular Club*, 52 Mich. 87; *Hurley v. Watson*, 68 Id. 531; *Busch v. Wilcox*, 82 Id. 315.

Watts, Bean & Smith, for plaintiffs, contended for the doctrine of the opinion.

MORSE, J. This action is brought to recover the value of a second-hand portable engine known as a "J. I. Case Engine."

The plaintiffs were clearly entitled to recover, unless the defendants established one of their three defenses, to wit:

1. That at the time the suit was commenced the engine was the property of the Upton Manufacturing Company, as a down or cash payment for a rebuilt engine ordered of them by plaintiffs.

2. That, if not the property of said Upton Manu-

facturing Company, such company had a lien upon it, and the right to hold it, as security for the damages they incurred, because the plaintiffs did not accept the engine they ordered of said company.

3. That the plaintiffs had sold the engine before the commencement of this suit to Arbuckle & Ryan, of Toledo, Ohio, and had no right to recover the value.

The plaintiffs had verdict and judgment for $313.65.

The order for the engine of the Upton Manufacturing Company was obtained on the 17th day of April, 1889, by the defendant Roath, and one Shettler, general superintendent and manager of the outside business of the company, at the house of the plaintiff George J. Palmer, who then and there signed it. By agreement it was left with defendants, who were the local agents of the company, for the plaintiff John Palmer, father of George J., to sign when he came to Adrian. John Palmer lived in Rome, and George J. in Blissfield, Lenawee county. After George J. had signed the order he went and saw his father, told him what kind of an engine he was to have, and shortly afterwards John went to Adrian and also signed the order, which reads as follows:

"ORDER FOR MACHINERY.

"[The original order is to be filled out and signed by the purchaser, and forwarded to the Upton Manufacturing Company, Port Huron, Michigan, for registration.]

"Dated at ———, April 17, 1889.

"To the Upton Furnish Company, Port Huron, Mich.:

"You will please manufacture for the undersigned, and deliver on board cars at your factory, on or about the 1st day of June, 1889, one engine, second hand, horse power of engine to be 10 traction. This engine to be rebuilt good and new; 50-inch driver, and 10 and one-half wide.

"And we agree to receive the same on its arrival, and pay the freight and charges, and further agree to pay Upton Manufacturing Company, or agents, on or before the arrival of the machinery above mentioned, the sum of seven hundred dollars, in notes, and one J. I. Case

plain engine, as cash payment; note due Nov. 1, 1889, $250; note due Nov. 1, 1890, $225; note due Nov. 1, 1891,—with interest at 10%, but if paid at maturity, then 7% interest from date.

"Also,—further agree to furnish satisfactory security for the prompt payment of the notes, in the following manner:

"Chattel mortgage on above-described machinery, and also upon ———.

"And it is further agreed that the title, ownership, and right of possession of said machinery hereby ordered shall remain in the said Upton Manufacturing Company until the purchase price thereof is paid or satisfactorily secured, and that the other property above mentioned is hereby sold and transferred to the Upton Manufacturing Company as security for the faithful acceptance of the machinery ordered.

"[A printed warranty then follows, after which are these words:]

"This warranty does not cover second-hand machinery sold.

☞"This order is taken subject to approval of the Upton Manufacturing Company.

"GEORGE PALMER. (L. S.)
"JOHN PALMER. (L. S.)

"Post office, Blissfield; township, Blissfield; R. R. station, Adrian, Lenawee county, Mich."

May 20, 1889, George J. Palmer received notice from defendants that the engine was ready for him at the depot at Adrian. On the 22nd or 23rd of May, George came to Adrian, examined the machine, and refused to take it, on the ground that it did not comply with the order; and also for the further reason that it did not come up to the representations made by Shettler and Roath when they obtained the order; and that it was not such an engine as it was agreed should be sent to plaintiffs. Afterwards the plaintiffs purchased an engine of Arbuckle & Ryan.

Upon the refusal of plaintiffs to accept the Upton engine, Shettler claimed the J. I. Case engine, and demanded it of George Palmer, who refused to deliver

it, or tell where it was. Learning its whereabouts, Shetler had it drawn up to defendants' place of business, and gave them instructions to hold it for the Upton Manufacturing Company. The plaintiffs then demanded it of defendants, who refused to give it up, and this suit was then begun.

The court disposed of the first and third defenses of the defendants in his charge to the jury. He instructed them that the Upton Company could not claim title to this J. I. Case engine under the cash or down payment mentioned in the order, for the reason that the evidence disclosed that there had been an abandonment on the part of such company of any such right, as they had taken the engine back, and had not kept the offer or tender of delivery good, and were not in a position to insist upon the fulfillment of the contract by plaintiffs. This instruction was correct, in view of the testimony that the engine had been shipped back to the company at Port Huron, and no one could tell what had become of it. It was not kept in a situation to be delivered to the plaintiffs.

As to the third defense, he charged the jury that the defendants could not rely upon the fact that the plaintiffs, in purchasing another engine of Arbuckle & Ryan, had made "a deal" by which they were to turn out the J. I. Case engine to them, for the reason that, in any event, so far as that contract was concerned, the plaintiffs were entitled to the possession of the machine, as no delivery had taken place of the engine to Arbuckle & Ryan; the contract between the latter and the plaintiffs being that plaintiffs should deliver it to them at Toledo, Ohio. This instruction was also correct. It also appeared in evidence, without any dispute, that when it was found that the engine had been taken by defendants a new arrangement was entered into by the parties that a note

should be given to Arbuckle & Ryan by plaintiffs in lieu of this engine, which was done.

This disposition of these two issues left the case to go to the jury upon the question whether or not, under this order, the Upton Company had a lien upon this engine for damages for non-acceptance of the engine shipped by such company upon the order of the plaintiffs. The court said that the case resolved itself into the question whether the engine furnished by the Upton Manufacturing Company was such a one as, under the contract between the parties, the plaintiffs were under obligations to accept, and instructed the jury as follows:

"There was a writing between these parties, which purports to embody at least some portions of the contract between them. So far as it covers the negotiations of the parties it must control. No parol evidence here could change the agreement which the parties have put into the writing, or the stipulations which the parties have put into the writing, they must control, as against other or parol evidence as to what was said. [It does not necessarily include, as the court has held here, the right of the plaintiffs to show that all the stipulations between the parties were not put in the contract; that all the representations which the parties made were not put in the contract.]

"As I said, this contract, in some respects, was reduced to writing as between these parties. It is claimed by the plaintiffs that the writing does not embrace all the representations as to the quality, character, and kind of engine which was to be furnished. But, as I have said, so far as it does provide for the kind and character of engine which should be furnished, it must control; and nothing in the evidence, outside of the contract, can stand as against the contract itself; that is, so far as the evidence may conflict with the provisions of the contract, the contract must control.

"*Mr. Bean:* Your honor does not mean to say, 'provided the contract has been in any way changed?'

"*The Court:* I will come that question. It is the presumption, of course, gentlemen, that this contract is as it was made between the parties. It seems that this

contract provides that the engine which was sold was to be rebuilt, as the contract is presented here, good and new; certain provisions as to the power of the engine, as to the size of the wheels, both as to diameter and width of face. These provisions, then, must control as to the kind of engine which was to be furnished. The contract and the evidence together show that a particular engine was in the mind of both parties. They contracted to rebuild and furnish a second-hand engine to the plaintiffs. [Then, whatever representations that were made respecting this particular engine, which were material, and operated to influence the plaintiffs to make the contract to purchase, must be made good in the engine which is furnished, and which the company asks shall be accepted under the contract. If any of the representations as to the character of the engine were not true, substantially,—such representations as were material, and operated to influence the plaintiffs to make the contract to purchase,—then the plaintiffs would be under no obligations to accept.]"

The defendants excepted to the portions of the charge inclosed in brackets.

Upon the trial the plaintiffs were permitted to give in evidence the statements and representations of the agents of the company as to what kind of an engine this was to be, and its character and condition, on the ground that the order was not such a contract as would preclude the plaintiffs from showing anything not in variance or contradiction of its description in the order. The defendants contended that all the negotiations and talks of the parties before the order was signed, or at the time of its execution, were merged in the order, which alone must stand as the contract between the parties. The court was right in his construction of the order. It was not sufficient, standing alone, to constitute the whole contract between the parties. It comes clearly within the case of *Phelps v. Whitaker*, 37 Mich. 72. See, also, *Weiden v. Woodruff*, 38 Mich. 131; *Wood, etc., Machine*

Co. v. Gaertner, 55 Id. 455. This disposes of a majority of the assignments of error.

The plaintiff George J. Palmer testified that, when he went to examine the engine, at the depot at Adrian, Mr. Roath said to him, "Now if you do not want to take this engine, you need not take it;" and that he acted upon this declaration of Mr. Roath, and went off and purchased another engine. The court instructed the jury that if they found that Mr. Roath said this (which was denied by Roath), and the plaintiffs acted upon it, then the plaintiffs would be entitled to recover.

In view of the fact that Roath was one of the agents of the company who obtained the order; that he was the local agent at Adrian; that the engine was shipped to his firm, and not direct to plaintiffs; and that all the plaintiffs knew as to this engine being sent as the one to fill their order was what Roath said,—we think that Mr. Roath had authority to bind the company in respect to the taking of this engine. At least the plaintiffs had the right to assume that he had such authority. No error was therefore committed in this instruction.

The plaintiffs' counsel contend that this order was not binding upon plaintiffs until it had been accepted in writing by the company, and the plaintiffs notified of such acceptance, as the order, by its terms, was subject to the approval of the company, and had no life until accepted by them; and that, until accepted, it was of no more force than a verbal promise would have been, and such a promise would have been void under the statute of frauds. The case of *Weiden v. Woodruff*, 38 Mich. 130, which is similar to the one before us, is relied upon to support this contention. As the case stands, we do not consider it necessary to pass upon this point, as we find no error in the proceedings below.

Some questions are raised touching the admission and rejection of testimony, but we find no material error in any of them, and there is no necessity for mentioning them here in detail. The court was very liberal in the admission of testimony, and in the end all the material facts necessary to a proper understanding of the case by the jury were admitted, and we cannot find that any legal or competent evidence was excluded.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., concurred in the result.

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JAMES O'NEIL v. THE TOWNSHIP OF DEERFIELD.

Municipal corporations—Defective bridge—Liability—Notice—Evidence.

1. In a negligence case for injuries sustained by reason of the breaking of a bridge, statements of the overseer of highways at the time of the accident, made some 18 months thereafter, that "he had not regarded the bridge as safe," are inadmissible, under the rule laid down in *Stebbins v. Township of Keene*, 55 Mich. 552.
2. While the age of a bridge may suggest probable infirmity, and impose the duty of inspection upon a township, and its condition may be such as to charge the township with knowledge, yet it cannot be charged with knowledge or notice in the absence of anything suggestive of weakness, and in spite of the lack of knowledge of or notice to either its agents or the general public of such weakness, while at the same time positive acts on the part of the township are shown indicating proper care and careful inspection.

Error to Lapeer. (Moore, J.) Argued July 1, 1891. Decided July 28, 1891.

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

Stickney & Halpin and *S. B. Gaskill,* for appellant, contended:

1. Before a verdict can be properly directed, all of the testimony in favor of the plaintiff bearing upon the issues, and all making a case for him given on the part of the defendant, if accepted as true, must fail to make out a *prima facie* case after the most favorable construction possible; citing *Conely v. McDonald,* 40 Mich. 150; *Marcott v. Railroad Co.,* 47 Id. 1; *Gibbons v. Farwell,* 63 Id. 344.
2. In this case there can be no question but that the plaintiff received serious injury, and that the injury was the direct result of the defective and unsafe condition of the bridge in question. It therefore follows that the case should have been submitted to the jury if there was testimony which could charge the defective condition of the bridge to the negligence of the defendant, either because of defective construction when the defective stringer was put into the bridge, which would of itself be notice to the township, or by allowing the bridge to become defective, and to remain out of repair after the township, through its officers, had notice of its defective condition. If the defective stringer, which was put into the bridge in 1885, was not when put in of proper material, or was put into the bridge in such a manner as to make it unsafe, the township, by the negligence of its officers in permitting such defects in construction, had notice of the unsafe condition of the bridge, and the township would be liable; citing *Chicago v. Langlass,* 66 Ill. 361; *Brooks v. Somerville,* 106 Mass. 271.
3. From the testimony it appears that the defective stringer was taken from a dead pine tree, was flattened on both the upper and lower sides, reducing its thickness to about 10 or 12 inches, and was placed in the bridge with a span of 22 feet between the abutments. There was also testimony showing that at the time of the injury the stringer was perfectly rotten, except a small strip around the outside, and that it must have been decaying two or three years. These are facts from which the jury could have inferred that there were defects in construction in putting in the defective stringer in 1885, and that the bridge remained out of repair until the time

of the injury. Such being the case, it was error to direct a verdict for the defendant; citing *Weyburn v. Kipp*, 63 Mich. 79.

4. Taking all this testimony and putting it together, we find that, less than two months before the time of the injury, the township officers whose duty it was to have the care of the bridges of the township made an examination of the bridge in question. At that time the defect existed which caused the injury, and it could have been discovered by the exercise of reasonable care in the use of the means which they had and used on the examination. The bridge was not repaired, and the injury followed after the township had had sufficient time to put the bridge in good repair. The case should have been submitted to the jury on the question of notice, which the township had from the examination made on the 13th of April. From the testimony the jury could have inferred that the officers discovered the defect, and neglected to repair it within a reasonable time. They made the examination. The defect existed, and could be detected by the means they used, and, if they did so discover it, the township had notice, and was liable for the injury. If they did not discover it, it follows that they did not use reasonable care, because by the use of such care the defect could have been discovered with the means which they had at hand, and which they say they used in making the examination.

5. There can be no question as to the duty of township officers, as stated by Mr. Justice CHAMPLIN in *Blank v. Township of Livonia*, 79 Mich. 6, cited by counsel for defendant. "In respect to latent defects in the timbers of a bridge, it is the duty of the highway commissioner to make *proper* and seasonable inspection to ascertain its condition as to safety for the public travel, and to *exercise due care and caution* in so doing to find defects, and the kind of inspection and the amount of care and caution required of him upon which to predicate negligence in the performance of the required duty *will depend upon all the facts and circumstances of the particular case*, and the particular neglect of duty must be pointed out."

Geer & Williams, for defendant.

MCGRATH, J. While plaintiff was driving with a load of stone over a bridge in the defendant township, one of the stringers gave way, and plaintiff was injured. He brings this suit, claiming that the bridge was improperly constructed, and that defendant negligently allowed

the bridge to remain in a condition not reasonably safe and fit for travel. The court directed a verdict for defendant, and plaintiff appeals.

It seems that the plaintiff was driving on the westerly side of the bridge, closer to that edge than was usual to drive, and the westerly stringer broke. Plaintiff's own testimony shows that there was nothing about the stringer that indicated any weakness of the timber before it broke. It had the appearance of a sound stick of timber, and, although rotten at the heart, it had from two to three inches of sound timber around the outside, and when it broke it splintered two or three feet each side of the break. There was no evidence tending to show that any person questioned the strength of the bridge before the accident.

The testimony on the part of the township was that this stringer was about 12 by 14 inches in thickness, hewed on two sides; that it extended over a 22-foot span; that it was cut from a dead standing pine tree, and placed in the bridge in 1885; that it was sound at that time; that in 1886 the bridge was examined by the township authorities, and two new center stringers placed therein; that in 1887 the plank were removed from the bridge, and the stringers were all cleared, tested, and examined; that in April, 1888, the owner of a traction-engine, weighing nearly three tons, made a thorough examination of the bridge, satisfied himself regarding it, and took over his engine; that shortly after this the township authorities examined the bridge and stringers, and tested them, and to all appearances this stringer, with the others, was in good condition and sound. At all of these examinations the tests were made by pounding on the timbers with an axe. The accident occurred to plaintiff about two months after the last examination.

The court held that the evidence did not show either knowledge or notice to the township, and that plaintiff could not recover. I think that the circuit judge was correct. The stringer in question had been in use but three years, and had been examined with reference to its soundness but two months before the accident. There was nothing in the general appearance of the timber, or of the bridge, to indicate any weakness. Several teams were engaged in drawing stone over the bridge on the day before as well as on the day of the accident, and no one had discovered or suspected any infirmity therein. The township had neither constructive notice nor constructive knowledge that the stringer was defective.

While the age of a bridge may suggest probable infirmity, and impose the duty of inspection upon a township, and its condition may be such as to charge the township with knowledge, yet the township cannot be charged with knowledge or notice in the absence of anything that is suggestive of weakness, and in spite of the lack of knowledge of or notice to either its agents or the general public, while at the same time positive acts on the part of the township are shown indicating proper care and careful inspection.

Plaintiff introduced testimony tending to show that, some 18 months after the accident, one O'Brien, who was the overseer of highways at the time of the accident, had said that he had not regarded the bridge as safe; but, under the rule laid down in *Stebbins v. Township of Keene*, 55 Mich. 552, this testimony was improperly received.

The judgment is affirmed, with costs.

The other Justices concurred.

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AUGUST HAGAN v. THE CHICAGO, DETROIT & CANADA GRAND TRUNK JUNCTION RAILROAD COMPANY.

Railroad companies—Liability for loss by fire—Evidence—Improved appliances.

1. Testimony cannot be said to be undisputed, when inconsistent with some established fact in the case, or one regarding which testimony has been admitted.

   So *held*, where in a negligence case against a railroad company to recover the value of buildings destroyed by fire, alleged to have been caused by sparks thrown from defendant's engine, the uncontradicted testimony on the part of the defendant tended to show that the machinery, smoke-stack, and fire-box of the engine were in good order, and properly managed, and of the most approved kind, and that the engineer and fireman were competent and skillful; which facts it was claimed by the defendant should have been treated as established, and a verdict directed in its favor. And it is held that the court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant.

2. How. Stat. § 3378, making railroad companies liable for all loss or damage to property by fire originating from its engines, unless proof is made to the satisfaction of the jury that the machinery, smoke-stack, or fire-boxes of such engines were in good order and properly managed, contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances and in the management and operation of trains; and it fixes the standard of condition and management, but does not attempt to establish a standard of kind or quality of appliances.

3. Before a railroad company can be made liable by reason of its failure to adopt other appliances, they must be shown to have been well and popularly known, and their efficiency must have been demonstrated by actual use.

4. Where, in a suit against a railroad company to recover the value of buildings destroyed by fire communicated from its engine, it appears that the buildings were insured, and that the loss has been paid to the plaintiff, evidence of the amount

paid is immaterial; the question being ruled by *Perrott v. Shearer*, 17 Mich. 48, 55.

5. It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of 40 miles an hour for this purpose is not in itself negligence.

6. In this case the following instructions should have been given to the jury, and their refusal was error:

"*a*—You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely, but the business cannot be done at all unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays, and it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather.

"*b*—The engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their train as nearly on time as possible; and in case of a way freight, whose length of stops at the stations is necessarily irregular, they are not to be considered negligent by reason of using natural and reasonable means to make time."

Error to Macomb. (Canfield, J.) Argued April 14, 1891. Decided July 28, 1891.

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

E. W. Meddaugh, for appellant.

Lungerhausen & Erskine, for plaintiff.

[The points of counsel are fully stated in the opinion. —REPORTER.]

MCGRATH, J. This action was brought to recover the value of certain buildings and contents destroyed by fire, alleged to have been caused by sparks thrown from an engine running upon defendant's road, upon which plaintiff's farm abuts. Plaintiff had judgment, and defendant appeals.

Plaintiff's testimony tended to show that the fire occurred September 15, 1888, at about 9 o'clock A. M.; that the buildings burned were located about 160 feet from the track; that there had been no rain for about four weeks, and everything was very dry; that there was a high wind, which was blowing with the train, and in the direction of plaintiff's buildings; that the train was running at a high rate of speed; that the engine was laboring very hard; that the fireman had the door of the fire-box open, and was poking the fire; that the poking of the fire would tend to throw out sparks; that, as the engine approached plaintiff's buildings, smoke of a bluish-gray color, streaked with red, was seen to roll over the buildings, and, in the course of a few minutes, fire was discovered in the shingle roof of one of the sheds, which spread to the other buildings; that the roof which took fire sloped towards the train as the train approached; that just before it reached plaintiff's place, after the same train had passed, on that morning, fire was discovered in a clover field near defendant's right of way, about half a mile south of plaintiff's buildings, in the direction from which the train came.

The defendant's testimony tended to show that the machinery, smoke-stack, and fire-box of the engine were in good order, and were of the most approved kind, the best in use; that they had been examined on the morning of that day, and were examined the next day after the fire, by competent persons, and found to be in good order; that the engineer and fireman were skillful and competent, and were managing the train carefully and skillfully; that the fireman was not poking the fire as it passed plaintiff's premises; that it was not necessary to poke the fire, and that poking the fire would not tend to throw out sparks; that an engine in good repair, and properly managed, could not throw fire from the track

to plaintiff's buildings, and that the barn was on fire before the train reached the buildings. The fact and extent of the fire were not disputed, nor was it attempted to be shown that the fire could have originated in any other way.

The first question raised is that the verdict of the jury is not warranted by the evidence; that inasmuch as the testimony introduced by defendant, that the apparatus was in good order and was properly managed, and that the engineer and fireman were competent and skillful, was uncontradicted, those facts should have been treated as established, and a verdict directed for the defendant.

In the absence of any testimony tending to show that the fire could have happened in any other way, the jury were justified in finding that the fire was started by a spark from the locomotive. Having concluded that the fire was caused in that manner, they were entitled to consider, as bearing upon the question of negligence, not only defendant's testimony as to the condition of the locomotive, the competency and skillfulness of the engineer and fireman, and the proper management of the locomotive on that occasion, but also the testimony as to the poking of the fire, its effect upon the emission of sparks, and, in that connection, defendant's testimony that it was unnecessary to poke the fire. As bearing upon the question of the condition of the smoke-stack and fire-box and the management of the locomotive on that occasion, they were entitled to consider the testimony regarding the clover-field fire, and the testimony offered by defendant that an engine in good order, and properly managed, could not possibly throw fire from the track to plaintiff's buildings. The only inference that could be drawn from the testimony relating to the impossibility of the communication of fire from the locomotive to plaintiff's buildings, in view of the circumstances of fire, was that the

engine was either not in good order or was not properly managed. *Johnson v. Railway Co.*, 77 Iowa, 666 (42 N. W. Rep. 512).

Testimony cannot be said to be undisputed, when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted. The court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant.

It appeared that the buildings which were destroyed had been insured, and that the insurer had paid the loss, but the court rejected testimony as to the amount paid as immaterial, and this is assigned as error. The question is ruled by *Perrott v. Shearer*, 17 Mich. 48, 55.

The court instructed the jury as follows:

"1. If you find that the fire was caused by a spark from the engine, the law raises a presumption of liability on the part of the defendant. The burden of proof is then passed upon defendant, in order to escape such liability, to show affirmatively, to your satisfaction, that the engine from which the fire originated was, at the time in question, properly constructed, and equipped with the best approved appliances for preventing the escape of fire. * * * * * * * * * * * * * * *

"2. In regard to the construction of its engine and appliances to prevent the escape of fire and sparks, a railroad company is required to keep constantly in use the most approved machinery and apparatus for that purpose on its engines. * * * * * * * * * *

"3. If you are satisfied from the evidence that, at the time in question, the defendant's engine was properly constructed, and equipped with the best-known and most approved apparatus to prevent the escape of fire therefrom, and that the same was in good repair as to its machinery, fire-box, and smoke-stack, and the engine and train was properly managed with reasonable and ordinary care and skill by the servants and employés of the railway, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. * * *

"4. It is not negligence in a railroad company to run

an engine which emits sparks, providing the company has the engine equipped with means and appliances to arrest the escape of sparks, recognized as the best known and in use, and approved as such by experienced railroad operators. * * * * * * * * * * * *

"5. If you do so find, then you will consider the question whether the defendant has satisfied you, by a fair preponderance of the evidence, that the engine was equipped, as I have stated to you, with proper and the best-known appliances to prevent the escape of fire."

Defendant introduced several witnesses who testified that the machinery, smoke-stack, fire-boxes, netting, and all the equipments of that engine for providing against the escape of fire and cinders, and providing against the danger of setting fires, were of the most approved order, form, and pattern known; that they were claimed to be the best in use; and that they were in use by the great majority of railroads in this country. The defendant requested the court to instruct the jury as follows:

"6. The engine was in good order, so far as this case is concerned, if at the time it was supplied with the best approved appliances to prevent the escape of fire, and such appliances were in good repair."

"13. In view of the fact that it is impossible to prevent the escape of sparks from a locomotive, it is not negligence in a railway company to run an engine which emits sparks, provided the company has the engine equipped with means and appliances to arrest the escape of sparks, recognized as the best known and in use, and approved as such by experienced railroad operatives."

"16. The appliances which a railroad is by law to use, to comply with its duty, are those most efficient to prevent the escape of sparks of smallest size, consistently with the successful making of steam."

While the instructions given were in accord with the defendant's theory of its own duty in the premises as indicated by its proofs and its requests, and for this reason, if no other error appeared, we might hesitate to reverse the judgment, yet the instructions that defendant was

"required to keep constantly in use the most approved machinery," of "the most approved pattern," the "best-known and most approved apparatus," the "best-known appliances," without further explanation, were misleading. How. Stat. § 3378, provides that—

"Any railroad company building, owning, or operating any railroad in this State shall be liable for all loss or damage to property by fire originating from such railroad, either from engines passing over such roads, fires set by company employés by order of the officers of said road, or otherwise originating in the constructing or operating of such railroad: *Provided*, that such railroad company shall not be held so liable if it prove, to the satisfaction of the court or jury, that such fire originated from fire by engines whose machinery, smoke-stack, or fire-boxes were in good order and properly managed."

This statute contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances and in the management and operation of trains. It fixes the standard of condition and management, but it does not attempt to establish a standard of kind or quality of appliances.

While the degree of care required of a railroad company, respecting the management and operation of its trains, must vary according to circumstances, there must of necessity be some stability in appliances, and railroad companies cannot be expected to be constantly changing appliances, or to instantly apply newly-discovered devices, nor can they be required to adopt every new and untried instrumentality, even though subsequent experience may demonstrate the same to be the more efficient. Indeed, the introduction of untried devices may of itself be negligence. The efficiency of an appliance can only be demonstrated by actual experience, and adoption and use are the real tests of approval. In view of our statute, and other similar statutory provisions which make rail-

road companies *prima facie* liable, prudent railroad companies naturally adopt appliances which will most effectually protect them from that liability, and at the same time protect their own property, and the general use of apparatus for that purpose grows out of these considerations. No individual should be held to a higher degree of care and prudence, in the selection and adoption of appliances, than that which is generally exercised by prudent railroad men using appliances for the same purpose. Unreasonable requirements should not be exacted. There should be some degree of security in the use of apparatus. The fact that an appliance is commonly used by prudent railroad men, and has been for a long time, for the same purposes, and has substantially guarded against the danger sought to be avoided, should be a good defense to a charge of negligence because of its use. Wide differences of opinion may exist among those desirous of reaching the same result. Two or more kinds of appliances may be used, each one of which is approved by a number of railroad companies which are managed by practical and prudent men, and the adoption of each may have been after careful consideration of the merits of all, yet, unless that adoption and approval has some weight, there is no safety in the use of either. In any event, before a railroad company can be made liable by reason of its failure to adopt other appliances, it must be shown that such appliances have been well and popularly known, and their efficiency demonstrated by actual use.

In *Hoyt v. Jeffers*, 30 Mich. 181, 192, cited by plaintiff, the rule laid down was applied to the facts of that particular case, and was subjected to qualifications. A mill was set in the midst of a city, and the mill chimney was without any apparatus for arresting the escape of sparks; and the Court held that it became the duty of the owner of the mill to avail himself of some such

apparatus as experience had shown to be reasonably adequate, if not the most effectual, to prevent the escape of sparks and fire from his chimney, whether such apparatus had ever been previously used upon that particular kind of chimney or not, so long as it was susceptible of being applied, and, if so applied, would operate to prevent or check the escape of such fire and sparks. It was then shown that spark-catchers constructed upon the same principle as those long in use, and well and publicly known, upon other smoke-stacks, would, if applied to this chimney, have substantially avoided the danger; and the Court say that this was so long and generally known that it was the duty of the defendant to have known it, and to have availed himself of their use. And on page 193, Mr. Justice CHRISTIANCY, speaking for the Court, says:

"In fact, I think the true rule is that the defendant, in adopting means to check the flow of sparks, and to avert the danger in question, under the circumstances of this case, was bound not only to adopt means calculated to avert the danger, but the means which, in the progress of science and improvement, have been shown by experience to be the best; unless, indeed, it be some invention so recently made as not to be generally known, or which the defendant, by reasonable inquiry for the best means, might not fairly be supposed to have obtained knowledge of, or unless the expense of such particular invention should be so excessive as to render its requirement practically unreasonable, when a less expensive mode of protection, substantially guarding against the danger, might be held sufficient."

In the present case, there was no evidence offered which tended to show that there were other appliances superior in kind to those in use, or even that there were other appliances used for that purpose, much less that there were other generally known and approved devices which were more efficient; and defendant was entitled to an instruction that it was not negligent in

the selection and adoption of its apparatus. The phrase, "the best-known appliances," is susceptible of different interpretations. It may be taken to mean the best appliances known, or the best approved or acknowledged appliances, or those appliances which are best known.

Plaintiff offered testimony tending to show that the train was running at the rate of 40 miles an hour; that the weather was very dry, and a high wind was blowing at the time. Defendant requested the court to instruct the jury as follows:

"4. You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays. It would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather.

"Those who establish themselves in the neighborhood of railroads must know that trains are expected to run with regularity, and, if there are special risks arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation."

The court gave the last paragraph, but declined to give the first.

Defendant's counsel also requested the court to give the following instruction, but the court declined:

"The engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their train as nearly on time as possible; and in case of a way freight whose length of stops at the stations is necessarily irregular, they are not to be considered negligent by their use of natural and reasonable means to make time."

It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of

40 miles an hour for this purpose is not in itself negligence. The law insists, however, that with increased speed must be associated a higher degree of care. Trains must be run with regularity, and with reference to the movements of other trains, in dry weather as well as in wet weather. Uninstructed, the jury were at liberty to find that, although the train may have been properly equipped, the high rate of speed was improper management of the train.

The defendant was entitled to the instructions asked for, and for this error the judgment must be reversed, and a new trial granted, with costs.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., concurred in the result.

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THE CITY OF MUSKEGON v. THE S. K. MARTIN LUMBER COMPANY (A CORPORATION).

Taxes—Suit for collection—Warrant of county treasurer—Return—Evidence—Costs.

1. A city (township) treasurer may testify to the *fact* and time of making a return or statement of unpaid personal property taxes to the county treasurer in a suit for their collection.
2. In a suit by a township treasurer for the collection of a personal property tax, brought under section 35,[1] of the tax law of 1885, the production and identification of the tax roll, and

[1] Section 35 provides for the collection of taxes by seizure and sale of the property of the person to whom they are assessed on his refusal or neglect to make payment, and authorizes the township treasurer, if otherwise unable to collect a tax upon personal property, to sue the person to whom it is assessed, in the name of the township, and makes the tax roll *prima facie* evidence of the debt sought to be recovered.

of the assessment and levy of such a tax thereon against the defendant, makes a *prima facie* case for the plaintiff.

3. Where a city treasurer bases his right to bring a suit for the collection of a personal property tax upon section 47[1] of the tax law of 1885, and the supplemental warrant issued to him thereunder by the county treasurer, he must show that he made a verified return or statement of the unpaid personal property taxes remaining upon his roll, pursuant to section 44 of the act; and the statutory presumptions arising under section 89 of said tax law do not apply to such a case.[2]

4. Where a city treasurer institutes a suit for the collection of personal property taxes in the name of the municipality without authority, no costs can be awarded against it upon a reversal of the judgment.

Error to Muskegon. (Dickerman, J.) Argued May 15, 1891. Decided July 28, 1891.

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

H. L. Delano, for appellant.

DeLong & O'Hara, for plaintiff.

CHAMPLIN, C. J. This suit is brought to recover the taxes assessed against defendant upon the general tax roll for the year 1889 of the city of Muskegon. Samuel H. Stevens was city treasurer, and by virtue of that office collector of the taxes.

Defendant, a foreign corporation, organized under the laws of the state of Illinois, was assessed upon the assessment roll for personal estate upon a valuation of $48,000, and State, county, city, and school taxes were

[1] Section 47 authorizes the county treasurer to give to the township treasurer a statement of all of the personal taxes which remain uncollected, taken from his return made under section 44 of the act, with a warrant authorizing him or his successor to collect such taxes according to law, and gives to the township treasurer or his successor the same power to make such collection as he had under his original warrant.

[2] See *Port Huron v. Potts,* 78 Mich. 435.

levied against it, and extended upon the tax roll, amounting in the aggregate to $1,660.43. The treasurer, being unable to find personal property belonging to the corporation whereupon he could levy the same, returned the taxes to the county treasurer. The county treasurer thereupon gave to the city treasurer a statement of all the personal taxes in the city remaining uncollected taken from the return of the latter, with a warrant authorizing him to collect them according to law. This statement embraced, among others, the taxes assessed against defendant corporation. The warrant is dated March 17, 1890. The city treasurer endeavored to collect the tax, and called upon S. K. Martin, its president. He did not pay, and claimed that the tax was excessive; and, further, that he had no personal property there. Stevens testified that he could find no property belonging to the company whereon to levy, and, acting under the advice of the city attorney, commenced this suit on May 29, 1890.

Upon the trial of the cause the original tax roll for the year 1889, returned to and filed with the county treasurer, containing the assessment and taxes against defendant, was introduced in evidence. No jurisdictional defects were pointed out in this roll, or in the proceedings upon which the assessment was based. The statement of uncollected taxes upon personal property for the year 1889, with the warrant of the county treasurer annexed, in which statement the assessment and taxes against defendant appeared, was also offered in evidence.[1] We think the objections to the introduction of these documents were not well taken. The objection to the latter went rather to the order of proof than to the relevancy of the statement and warrant.

[1] This statement was made by the county treasurer from the return of the city treasurer, pursuant to the last paragraph of section 47 of the tax law of 1885.

The witness Stevens was permitted to testify to the fact that he made a return of the tax roll to the county treasurer, and when he did so. This testimony was objected to in due season by defendant's counsel as incompetent, because, if he did make a return, the return would be the best evidence of the fact, and when it was made. The next question asked the witness was this:

"After having made your return of the roll that I have called your attention to,—the tax roll for the year 1889,—did you receive this statement and warrant from the county treasurer, marked 'Plaintiff's Exhibit 1?'"

Exhibit 1 is the statement of uncollected personal taxes, with the warrant annexed, given by the county treasurer to the city treasurer. The counsel for the defendant objected to the question, for the reason that it had not been shown that the city treasurer made such a return to the county treasurer as is required by the charter of the city of Muskegon or the general laws of the State of Michigan. The court overruled the objection, and the witness answered, "I did." It must be presumed that the expression, "made return of the roll," made use of, refers to the statements required by section 44, and referred to in section 45, of Act 153, Laws of 1885. These statements are public documents, and are necessarily brought to the cognizance of tribunals through the medium of human testimony, and such testimony must be limited to giving such a general description of the document as shall be sufficient to identify it, and deposing to the real evidence afforded by its visible state. Best, Ev. §§ 216, 223. The witness was not called upon to give the contents of the statements, nor to depose to the fact of verification. The statute required these statements to be made and verified in a certain manner, and the county treasurer was by the statute required to file them. The testimony was admissible.

Having shown the existence of such documents *eo nomine* in the proper office, and in the keeping of the proper custodian, the plaintiff relies upon the presumption of the regularity of such documents, which the statute declares shall exist in their favor, as establishing—

1. Not only the right of the city to sue for and recover this tax, but—
2. The authority of the city treasurer to institute suit for its recovery.

The two questions are independent of each other. In considering the first question, we must give effect to all the provisions of the statute bearing upon it. Section 26 of the act declares that the taxes assessed under the provisions of the act shall become at once a debt to the township from persons to whom they are assessed. The other provisions of the law are mere procedures to enforce the collection. Section 35 makes the tax roll *prima facie* evidence of the debt sought to be recovered, and section 90 enacts that—

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

"1. That no law authorizes such tax.

"2. That the person or persons appointed to decide whether a tax shall be raised under a given law have acted without jurisdiction, or have not imposed the tax in question.

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

"4. That the tax has been paid.

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

Under these provisions, a *prima facie* case is made in an action to enforce the payment of a tax levied upon an assessment of personal property by the production and

identification of the tax roll, and the assessment and levy of a tax thereon against the defendant.

The further question is that the city is not entitled to recover because the institution of the suit was unauthorized by any competent municipal authority. The only authority claimed is that derived under section 47 of the act; that is, the city treasurer claims the right to institute the suit by virtue of the statute and the warrant of the county treasurer. It follows that, if the warrant was unauthorized, the suit is also unauthorized. *Township of Port Huron v. Potts*, 78 Mich. 435. Under the above decision, the plaintiff must show that the statute relative to the verification of the statement was complied with; otherwise the warrant could not issue, and the city treasurer would have no authority to institute the suit. In this case the statement was not introduced by the plaintiff, and its counsel rely entirely upon the presumptions declared in section 89 of the act of 1885, which reads as follows:

"No tax assessed upon any property, or sale therefor, shall be held invalid on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of the property having been assessed without the name of the owner, or in the name of any person other than the owner, or on account of any other irregularity, informality, or omission, or want of any matter of form or substance, in any proceeding, that does not prejudice the rights of the person whose property is taxed. * * * The absence of any record of any proceeding, or the omission of any mention in any record of any vote or proceeding, or of mention of any matter in any statement or certificate that should appear therein under the provisions of any law of this State, shall not affect the validity of any proceeding, tax, or title depending thereon: *Provided*, the fact that such vote or proceeding was had or tax authorized is shown by any other record, statement, or certificate made evidence by the terms of this act, or any other

law of this State. No tax, or sale of property for any tax, shall be rendered or held invalid by showing that any record, statement, certificate, affidavit, paper, or return cannot be found in the proper office; and, unless the contrary is affirmatively shown, the presumption shall be that such record was made, and such certificate, statement, affidavit, paper, or return was duly made and filed."

It will be noticed that this section applies and is restricted to taxes and tax sales. Neither the tax, nor a sale of property, shall be held invalid for irregularity in the assessment or absence of papers from the proper office, unless it is affirmatively shown that there was no record or the papers were not duly filed. In this case the validity of the tax is not questioned, and there has been no sale of property. The presumptions of the statute do not apply to the question before us. The statute does not say that no warrant issued by the county treasurer to the township or city treasurer to collect unpaid taxes on personal property shall be held invalid, unless, etc. It therefore rested upon the city treasurer to show that the warrant to him was authorized. He showed that a return was made and filed; he showed that the county treasurer gave him a statement of the personal taxes so returned which remained unpaid, and annexed thereto his warrant for the collection thereof; and he invokes the aid of the presumption that public officers correctly perform their official duties, and therefore the presumption is that he made the proper return, and that the county treasurer would not have delivered to him the statement and warrant unless the verification had been properly made. But this position is met and overcome by the principle that presumptions are never allowable when better evidence of a primary nature is required by law to be preserved. *People v. Treadway*, 17 Mich. 480, 485. He failed to show a valid warrant in his hands,

and consequently failed to show any authority for planting the suit in the name of the city.

It follows, further, that, if the suit was instituted in the name of the municipality without authority, no costs can be awarded against it upon a reversal of the judgment.

The judgment of the circuit court must be reversed, without costs to either party.

The other Justices concurred.

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THE MECHANICS' BANK OF DETROIT v. WILLIAM H. BARNES, CYRUS B. BARNES, AND CHARLES O. BARNES, IMPLEADED WITH EPHRAIM K. ROBERTS.

Partnership—Accommodation indorsement—Verdict.

The question involved in this case is the liability of one of three partners upon an accommodation indorsement of a note in the firm name, made by another partner with the knowledge of the third. It was shown that other like indorsements had been made for the same maker, and that he had made and also indorsed paper for the accommodation of the firm, for the purpose of showing the knowledge or assent of the third partner to the indorsement in question. The jury, in answer to special questions, found a want of such knowledge or assent on his part, and answered that they were unable to find whether he authorized his partners to sign the firm name as accommodation indorsers to promissory notes for third parties, although instructed that they might infer such fact from the facts shown, and rendered a general verdict for the plaintiff.

1. Mr. Justice LONG filed an opinion, concurred in by MORSE, J., holding:

   a—As a general rule, if a party takes negotiable paper indorsed by one partner in the firm name, knowing that it

was indorsed merely as a surety, he does so at his peril, and cannot charge the members of the firm who did not assent to the transaction.

b—The possession of the note by the maker after such indorsement is sufficient to charge a bank which discounts it with notice that it is an accommodation indorsement, and the payment of the avails to the maker is evidence that the transaction was purely in his interest.

c—In such a case a legal presumption arises against the assent of all of the partners to such use of the firm name, and the burden of proving it is cast upon the bank, which assent may be shown by the circumstances of the case.

d—In this case, the jury having been directed that they could infer such consent from the facts shown, and not having done so, there is nothing upon which the general verdict can rest, and it amounts to a mistrial.

e—It is error for the court to direct the jury that their answers to special questions must agree with their general verdict.

2. CHAMPLIN, C. J., and MCGRATH, J., concurred in a reversal, on the ground that the appellant, William H. Barnes, is not liable under the facts proven, and that the judgment should have been in his favor.

Error to Wayne. (Brevoort, J.) Argued May 8, 1891. Decided July 28, 1891.

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

C. E. Warner, for appellant, contended:

1. If a person takes negotiable paper, either made or indorsed by one partner in the firm name, knowing that the name of the firm was indorsed merely as surety, he takes it at his peril, and cannot charge the partners who have not assented to the transaction; citing *Joyce v. Williams*, 14 Wend. 141; *Bank v. Bowen*, 7 Id. 158; *Stall v. Bank*, 18 Id. 466, 478; *Butler v. Stocking*, 8 N. Y. 410; *Bank v. Bank*, 14 Id. 629; *Bank v. Bank*, 16 Id. 135; *Bank v. Monteath*, 26 Id. 509; *Heffron v. Hanaford*, 40 Mich. 305.

2. The burden of proving the authority or consent of the copartners rests upon the holder of the note; citing *Butler v. Stocking*, 8 N. Y. 408, 410; *Tanner v. Hall*, 1 Penn. St. 417; *Hen-*

drie v. Berkowitz, 37 Cal. 113; *Bank v. Bowen*, 7 Wend. 159; *Austin v. Vandermark*, 4 Hill, 262; *Gansevoort v. Williams*, 14 Wend. 133; *Insurance Co. v. Bennett*, 5 Conn. 580; *Darling v. March*, 22 Me. 184; *Smith v. Sloan*, 37 Wis. 285.

3. The effect of the answer to the last question was a mistrial. The answer is inconsistent with the general verdict; citing *Harbaugh v. Cicott*, 33 Mich. 241; *Maclean v. Scripps*, 52 Id. 222; *Wilson v. Railroad Co.*, 57 Id. 155.

Bowen, Douglas & Whiting, for plaintiff, contended:

1. In support of the right of the jury to infer assent to the indorsement from interchange of indorsements, etc., counsel cited *Darling v. March*, 22 Me. 184; 15 Cent. Law J. 222.
2. Whether the act of a partner is within the scope of the business of the partnership, or whether in doing the contested act he was conducting the business in the ordinary way, is a question of fact for the jury; citing Thomp. Tr. § 1380; Abb. Tr. Ev. 214.
3. The jury had a right to infer that W. H. Barnes knew of the existence of this accommodation paper, and the rule must apply that, as between two innocent parties, the one who placed it within the power of the other to cause the injury should suffer; citing Chitty, Cont. 249; Edw. Bills, § 106.
4. If it appears that a partner was in the habit of indorsing at the bank or elsewhere for another, such general course of dealing should be sufficient evidence of authority from all of the members of the firm, and such use of the firm name by one would bind all; citing *Bank v. Saffarrans*, 3 Humph. 597; *Duncan v. Lowndes*, 3 Camp. 478; *Bank v. Breese*, 39 Iowa, 640; *Bank v. Alberger*, 101 N. Y. 202; *Bank v. Brooking*, 2 Litt. 41; Story, Part. § 127; Story, Ag. §§ 54, 56, 84, 89, and cases cited; *Gansevoort v. Williams*, 14 Wend. 139; *Sweetser v. French*, 2 Cush. 315.
5. The answer, "Don't know," to the fourth question, is in harmony with the general verdict, it having reference to their knowledge as to whether W. H. Barnes had given *express* authority or had *express* knowledge; citing *Foster v. Gaffield*, 34 Mich. 356.

LONG, J. This action was brought in the Wayne circuit court upon the following promissory note:

"$2,000. DETROIT, Aug. 21, 1889.

"Three months after date I promise to pay to the order

of Barnes Bros. two thousand dollars, at the Citizens' Savings Bank. Value received.

"E. K. ROBERTS."

Indorsed: "BARNES BROS."

William H. Barnes and Cyrus B. Barnes filed separate pleas with affidavits attached denying the execution of the note, and averring that, if the note was indorsed by Barnes Bros., it was indorsed and delivered by one of said copartners without the authority, express or implied, of these defendants, and against the express agreement upon which the copartnership was created, and without the knowledge or consent of said defendants, and for purposes outside the partnership business. It appears that after the note was indorsed by Barnes Bros. it was presented to the Mechanics' Bank by Roberts, the maker, and was discounted by that bank for Roberts, on August 28, 1889, the avails being paid directly to Roberts; the note having been indorsed by Barnes Bros. purely for the accommodation of Roberts. The cause was tried before a jury, who rendered a verdict in favor of the plaintiff for the amount of the note and the interest, upon which judgment was entered. Defendant William H. Barnes alone brings the case to this Court by writ of error. On the trial it was practically conceded that Cyrus B. Barnes was liable with Charles O., who indorsed the firm name on the note, as Cyrus was shown to have full knowledge of the note and its indorsement, and had promised to pay it.

It appears that Barnes Bros. carried on a wholesale paper business in Detroit for many years. They also had a paper-mill at Rochester, this State. Cyrus B. and Charles O. Barnes conducted all the business in Detroit, handled all the money, paid all the bills, borrowed money when necessary, and apparently had full authority in the conduct and charge of the Detroit business. William H.

Barnes looked after the mill at Rochester, and occasionally went to Detroit to look after the business there. Upon that subject William H. Barnes testified as follows:

"I live in Rochester, and have lived there for about 20 years. I look after the mill; run the paper-mill. The mill belongs to Barnes Bros. I have been running it. Some portion of it has been running all the time. I take general charge of the mill. The title to the mill has been in the name of Barnes Bros. Cyrus B. resides in Detroit; Charles O., in Ypsilanti. Cyrus B. and Charles O. have been in Detroit running the store. I sometimes came every two or three months, and perhaps every week, and sometimes perhaps six months. My part of the business has been principally in looking after the mill. The books have been kept at the store. I suppose you might say that Cyrus B. and Charles O. have almost the entire charge of the financial part of the business, as the books were kept there, and the money taken in on collections and sales. I presume the firm has borrowed money. I do not know about it. Cyrus B. and Charles O. had full authority to borrow money for running the business. I did not know anything about it. They had authority for borrowing money, if they did borrow it, so far as running the business was concerned.

"I do not know of any notes they have made within the last five years. I do not know of any instances where they have indorsed the firm's name within the last five years, except the cases that have been presented here. I do not know of any other case of any character, where they have indorsed the firm name either for my benefit or otherwise. I did not keep the books, and had nothing to do with them. I very seldom examined them. I have not examined them within the last five years. I have taken and looked into them sometimes to look up some particular account. But to examine the books they have a regular book-keeper there. I relied upon them in the conduct of the business to a certain extent. I have the fullest confidence in Cyrus B. and Charles O. I always thought they were straight in regard to that, to carry out our agreement and arrangement. * * *

"Cyrus never had authority to do anything outside of

the firm, not from me. I never knew anything about the firm raising any money by making paper and getting indorsements from anybody else. I never knew of the firm getting any money by their own indorsement of some other person's paper. I have not examined the books at any time to see whether they were doing that or not, and within the last five years I have only examined particular accounts. * * * * * * *

"In 1875 I was told that they had indorsed some paper for somebody else. I did not know the party that was indorsed for, or the bank, and never heard of it afterwards, but was told what had been done. I did not know whether it was ever put in circulation, or whether it was ever released, but I was told by outside parties. So I wrote them a letter and asked about it afterwards. I did not look on the books, to see what it was. They claimed they did not indorse any at that time. I did not look on the bills-payable book. I did not go around to the banks, and attempt to find out what the paper was. I do not know that there was any paper. I was simply told that by outside parties.

"In 1889, I think the firm was banking at the Dime Savings Bank. I can't tell where the firm was banking in 1888. It might have been at the Dime Savings Bank, or it might have been at some of the others. I presume, if a note had been protested upon which the firm were the indorsers, taken in the usual course of business, and otherwise, and a notice had been sent, it would come to the firm here in Detroit, and, if it was delivered at the store, either Cyrus or Charles O. would take care of it. I do not know that it would be very likely to come to my attention. I suppose if a protest was received on a note it would be likely to go to the firm of Barnes Bros. at their place of business, and I would not be very likely to see it. In 1889, I presume there were four or five months, and perhaps six months, I was not in. I was sick at the time. I have been out of health a good deal. I did not come to Detroit in from one to six months. During that time I attended to the business out there, manufacturing of paper. I do most of the business of buying of stock for the mill. I pay no attention to the paper stock, and the collection of accounts. I paid no attention to the banking of paper in the course of trade, and the taking care of the paper when it became due.

"REDIRECT:

"I had confidence in my brothers to attend to the firm business in Detroit. I did not mean to say that I understood they had any authority, or that I intended to give them any authority, to do anything outside of the firm business.

"*Q.* I call your attention to letter under date of January 19, 1875."

The letter was produced and shown to the witness, and the witness said that the letter was transmitted to his brothers. Said letter was thereupon offered and admitted in evidence, and marked "Exhibit D," and is as follows:

"ROCHESTER, January 19, 1875.

"MESSRS. BARNES BROS.—GENTS: When I was out to Ypsilanti last week I was told by Lambert that you were exchanging checks and notes with parties in the city. If that is the case, it has got to be stopped at once. I suppose you know what our agreement is, and, if you will do it, I shall withdraw from the firm, for I will not allow anything of the kind. Not but what the parties may be all right, but it is no way to do business, and it must be stopped.

"Yours, W. H. BARNES."

It is claimed by counsel for the plaintiff that it is thus made apparent that W. H. Barnes gave up the financial end of the business to his brothers, and, if the necessities required it, Cyrus B. and Charles O. had full power to do whatever they chose towards raising money. It is also contended that Barnes Bros. were under obligations to Roberts to indorse his paper, for the reason that Roberts had been accustomed to indorse for Barnes Bros.; that is, that the parties had been exchanging credit by indorsing for each other.

Roberts was president of the Citizens' Savings Bank. He testifies that Cyrus B. Barnes made a note of $1,000 to his order. Charles O. was present, and they asked him to indorse it and get the money on it, which he

did, of Mr. Butler, at the Mechanics' Bank of Detroit. The Barnes firm took their business thereafter to the Dime Savings Bank. In 1888 they made another note of $10,000, which Roberts indorsed, and the money was got by the Barnes Bros. In 1889 two $500 notes were made by Roberts, indorsed by Barnes Bros., and taken by Roberts to the Mechanics' Bank, and discounted, and the money paid over to Barnes Bros. These indorsements and the two $500 notes were made at the request of Cyrus B., but it appears with the full knowledge of Charles O., and there is no question but that the moneys were all used in the partnership business. The note in suit was made on August 21, 1889, by Roberts, and indorsed by Barnes Bros., and presented by Roberts to plaintiff, the Mechanics' Bank of Detroit, for discount on August 28. At the time the note in suit was presented for discount, the two $500 notes indorsed by Barnes Bros. were then held by plaintiff, not having yet matured. They were subsequently paid by Barnes Bros. When the note in suit became due, Charles O. promised to pay it, but wanted to renew it. The renewal had been drawn up, signed by Roberts, and indorsed, "Barnes Bros.," by Cyrus B. The renewal was refused by Mr. Butler. It appears, further, that Barnes Bros., on June 11, 1889, indorsed another note for Roberts of $2,000, which was discounted at the Michigan Savings Bank. It was not paid at maturity, and was renewed; Barnes Bros. becoming indorsers on the renewal. It appears also that, in 1888, Barnes Bros. became the indorsers upon a note of Roberts for $2,000, which was discounted at the American Exchange National Bank. This paper has been renewed from time to time, and Barnes Bros. remain upon it as indorsers. This appears to have been for the accommodation of Roberts, and the indorsements were made by

Cyrus B. evidently with the knowledge and assent of Charles O. Barnes.

At the close of the testimony counsel for defendants submitted the following special findings to the jury, to which they returned answers:

"1. Do you find that the defendant William H. Barnes had any knowledge of the indorsement of Barnes Bros. upon the note in suit at the time such indorsement was made?

"*A.* No.

"2. Do you find that the defendant William H. Barnes ever assented to the indorsement of the name of Barnes Bros. upon the note in suit, if such indorsement was made?

"*A.* No.

"3. Do you find that the note in question was given by Roberts for his own use and benefit, and that such note was indorsed by Barnes Bros. for the accommodation of Roberts, and that Roberts personally received the money upon the same?

"*A.* Yes.

"4. Did William H. Barnes authorize his partners to sign the firm name as accommodation indorsers to promissory notes for third persons?

"*A.* Don't know."

The jury returned a general verdict for plaintiff for the amount of the note and interest. Defendants thereafter moved to set aside the general verdict, and to enter verdict on the findings for the defendants, which was refused. The court entered judgment on the general verdict in favor of plaintiff for the amount claimed.

By the answers to these special questions the jury found that William H. Barnes had no knowledge of the indorsement of the firm name upon the note in suit, and never assented to its being placed there, but whether he ever authorized his partners to sign the firm name as accommodation indorsers to promissory notes for third persons they were unable to find. They did find that the note

was given by Roberts for his own use and benefit, and that it was indorsed by Barnes Bros. for his accommodation, and he personally received the money upon it.

The court instructed the jury, at the request of counsel for the plaintiff, as follows:

"1. If one or more of the defendants were in the habit of indorsing notes in the name of the firm, made by E. K. Roberts, for his accommodation, you are entitled to infer that the members of the firm who indorsed on behalf of the firm had authority to do it.

"2. If the firm of Barnes Bros. received the avails of, and paid in due course, notes made by Roberts and indorsed by the firm, they cannot repudiate notes of like kind subsequently made, the proceeds of which Roberts received.

"3. If the firm of Barnes Bros. became the indorsers of notes made by Roberts, which were negotiated for the firm's benefit, it became liable upon the like note in suit, although the same was negotiated by Roberts for his own benefit.

"4. By receiving the avails of notes made by Roberts indorsed by the firm, which notes were negotiated by Roberts in person, the firm authorized the plaintiff to deal with the note in suit as the obligation of the firm, with respect to which the several members of the firm were liable.

"5. It is a principle of law that, when one of two innocent persons must suffer, the loss falls upon the one who has put it within the power of the guilty person to perpetrate the fraud; and if in this case you believe that W. H. Barnes could, with ordinary care, either by the examination of the books of Barnes Bros. or by inquiry, have ascertained there was paper outstanding, made by Roberts and indorsed by Barnes Bros., similar to the paper in suit, and he failed to make any such inquiry or investigation, but left the entire financial management of the business to his partners, Charles O. Barnes and Cyrus B. Barnes, then any claim on his part of ignorance of such transactions can be no defense to this case, and the plaintiff would be entitled to recover."

Following these requests of plantiff's counsel the court instructed the jury as follows:

"The evidence shows that the note in suit was made or executed by Roberts for his personal use and purposes, and that he secured the indorsement of Barnes Bros. as an accommodation for his (Roberts') use and benefit, and that such note was taken to plaintiff's bank by said Roberts, and discounted by said bank for the use and benefit of Roberts, and the avails of said discount given directly to said Roberts. Barnes Bros. had no actual or pecuniary interest in said note. Under these circumstances, it must be presumed that said indorsement was purely an accommodation indorsement, and any member of Barnes Bros. not assenting to such indorsement is not bound by it. There is no evidence in the case that plaintiff, at the time of discounting the note, took said note upon any other understanding than that expressed in the note itself; and said note having been made by said Roberts, and indorsed by said Barnes Bros., and the same having been presented and discounted by said bank, and for the benefit of said Roberts, such facts and circumstances show that said indorsement was an accommodation indorsement only, and I will leave it to you to say, under all the evidence, if all the partners knew of its indorsement."

The principal contention of defendants' counsel is that the burden rested with the plaintiff to prove the authority or consent of the defendant William H. Barnes to the indorsement of the firm name upon the note, or that the firm of which he was a member was interested in the loan; that the firm was not interested in the loan, and that the jury were unable to find, and did not find, that William H. Barnes ever authorized the use of the firm's name thereon, or assented to its use; and that, therefore, the court was in error in not entering judgment for the defendants. This is assigned as error.

It will be seen from what took place on the trial, in the rulings of the trial court and its general charge, that the theory adopted by the court was, and the jury were led to follow it in finding their general verdict, that one or more of the defendants had been in the habit of

indorsing notes in the name of the firm, made by Roberts, for his accommodation, and it might be inferred that the member of the firm who indorsed for the firm had authority to do it; or that, if the firm received the avails of, and paid in due course, notes made by Roberts and indorsed by the firm, they could not repudiate notes of like kind subsequently made, the proceeds of which Roberts received; or that, if the firm became indorsers of notes made by Roberts, which were negotiated for the firm's benefit, it became liable upon the like note in suit, although the same was negotiated by Roberts for his own benefit; or that, by receiving the avails of notes made by Roberts indorsed by the firm, which notes were negotiated by Roberts in person, the firm authorized the plaintiff to deal with the note in suit as the obligation of the firm, with respect to which the several members of the firm were liable; or that either the bank or William H. Barnes must suffer, and that had William H. Barnes exercised ordinary care he might have before ascertained that paper was being indorsed by the firm for Roberts' benefit, and thus have prevented a fraud being practiced upon the bank.

It is contended by counsel for the plaintiff that the special findings of the jury should not have the construction given them by counsel for the defendants; that the finding of the jury that William H. Barnes had no knowledge of the indorsement of Barnes Bros. on the note in suit was limited to the fact that he had no actual knowledge, and the finding that he never assented to it is simply a finding that he did not expressly assent. This claim is based on the testimony in the case, which it is claimed abundantly shows that Cyrus B. and Charles O. impliedly had this authority. We think the jury must have taken this view of the case under the charge of the court, and answered the special questions in this view,

or they could not have found a general verdict in favor of the plaintiff.

It is said by counsel for the defendants that, the jury being unable to determine whether William H. Barnes ever authorized his partners to sign the firm's name as accommodation indorsers to promissory notes for third persons, they should have returned a general verdict for the defendants, and the court should have so directed, as the burden of proving the authority rested upon the plaintiff; that this fact is not proved, and under the evidence the jury were unable to find it.

The general rule is that, if a party takes negotiable paper, either made or indorsed by one of the partners of a firm in the partnership name, knowing that the name of the firm was indorsed merely as a surety, he takes it at his peril, and he cannot charge the members of the firm who have not assented to the transaction. It must be admitted that Mr. Butler, acting for the bank, knew that the firm of Barnes Bros. were merely accommodation indorsers. The note was made payable to their order, and indorsed by them in blank, and Mr. Roberts, the maker, presented the note for discount, and received the avails. The fact of the possession of the note by Roberts, the maker, after the indorsement of the name of the firm, was sufficient to charge the bank with notice that the indorsement of Barnes Bros. was that of accommodation indorsers, and the payment of the avails of it to Roberts was of itself evidence that the transaction was purely for Roberts' interest, and not for the indorsers.

These facts being known to the bank, the legal presumption arises against the assent of all the partners to such use of the firm's name, and the burden of proving it is cast upon the bank. *Insurance Co. v. Bennett,* 5 Conn. 574; *Williams v. Walbridge,* 3 Wend. 415; *Hen-*

drie v. Berkowitz, 37 Cal. 113. But the burden which the law puts upon the plaintiff, under such circumstances, to prove such authority, is not limited to direct and positive proof. It may be shown by the circumstances of the case. But the jury failed entirely to find the facts, even from the circumstances, which were fully submitted to them under the charge of the court at the request of plaintiff's counsel. The fact of the interchange of indorsements and the indorsement by Roberts for the firm's benefit, and the number of indorsements made between the parties, were all allowed to go to the jury, and we think very properly, for the purpose of showing the knowledge or assent of William H. Barnes thereto; yet the jury were unable to find that William H. Barnes ever authorized the partners to sign the firm name as accommodation indorsers for third persons, but did find that William H. Barnes had no knowledge of the indorsement of the note in suit, and never assented to it. The burden was upon the plaintiff to show these facts, and the jury were directed that such inferences might be drawn from the facts shown. But they have not done so, and consequently there was nothing upon which the general verdict could rest in favor of the plaintiff. This amounted to a mistrial. *Crane v. Reeder*, 25 Mich. 303; *Harbaugh v. Cicott*, 33 Id. 241; *Cole v. Boyd*, 47 Id. 98; *Wilson v. Railroad Co.*, 57 Id. 155.

It is also claimed that it was error for the court to direct the jury that their findings must agree with their general verdict. It appears that after the jury had deliberated for a time they came into court, and asked if the special questions could be answered, "We do not know," as well as "Yes" or "No," and were told by the court that they could be answered in that way, but that the special questions answered must agree with their general verdict. It was said by Mr. Justice CAMPBELL

in *Cole v. Boyd*, 47 Mich. 98, that the purpose of the statute in allowing special questions to be put to the jury—

"Is to enable the court to know what view the jury take of the material issues, and to correct their possibly wrong inferences from the facts which they find to exist."

In that case the jury found a general verdict, and then announced that they were unable to agree upon the special questions, and they were told by the court that, having found a general verdict, they were bound to answer these questions in harmony with it. This was held to be error. This case was cited and approved in *Maclean v. Scripps*, 52 Mich. 250. The court was therefore in error in this direction to the jury.

We shall not discuss the other errors assigned upon this record.

The verdict and judgment must be reversed, with costs, and a new trial ordered.

MORSE, J., concurred with LONG, J.

CHAMPLIN, C. J. I do not think that William H. Barnes is liable under the facts proven, and the judgment should have been in his favor.

MCGRATH, J., concurred with CHAMPLIN, C. J.

GRANT, J., did not sit.

WILL E. RICHEY AND LOUIS K. RENCH v. PAUL J. DAEMICKE.

Sale—Warranty—Parol evidence.

1. The mere exhibition of testimonials by a dealer on the sale of goods cannot be considered as a warranty that they shall conform to such testimonials, unless there is something said which expressly or impliedly guarantees that the goods shall equal in quality or performance the praise of the testimonials.
2. A guaranty attached to a bill of goods, insufficient in itself to constitute an agreement, will not be considered the entire contract between the parties, when the contrary is conclusively shown; citing *Phelps v. Whitaker*, 37 Mich. 72.

Error to Cass. (O'Hara, J.) Argued May 19, 1891. Decided July 28, 1891.

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

Spafford Tryon, for appellant.

MORSE, J. The plaintiffs commenced suit in justice's court, and declared verbally against the defendant as follows:

"On the common counts in *assumpsit,* and particularly on the contract of warranty of the sale of the cooler, which said cooler was sold on or about the 12th day of March, 1888, for a certain price or sum of money, to wit, $155, to be paid therefor, and that the said defendant undertook there and then, and faithfully promised the said plaintiffs that said cooler would keep fresh meats four weeks, or a satisfactory length of time, if properly iced and regulated; and the said plaintiffs aver that they, confiding in the promises and undertakings of the said defendant, did on the 12th day of March purchase the said cooler as above said, and paid him the said $155."

The declaration further avers that the said "Butcher Boy Cooling Room" would not keep fresh meats four weeks, or a satisfactory length of time, if properly iced and regulated, but, on the contrary, was worthless, and became and was of no use to plaintiffs, to their loss and damage in the sum of $300. The plaintiffs obtained judgment in justice's court, which, on appeal to the circuit, was affirmed.

It appears that one of the plaintiffs went to the business place of defendant in Chicago, Ill., and there made an agreement for the cooler, which was to be built of the special dimensions directed by the plaintiffs, and for their special use, to be set up in their place of business at Dowagiac, Mich. It was to be put on the cars at Chicago "free," and shipped to Dowagiac, Mich. Fifty dollars was paid down in cash upon it, and the balance was given in two notes of the plaintiffs, when it arrived at Dowagiac. When the defendant shipped it, he mailed the following bill to plaintiffs, which was received and retained by them:

"52 State St., CHICAGO, ILL., 3-22-1888.

"Mr. RICHEY & RENCH, Dowagiac, Mich.:

1 6x8 ft. cooling room, as ordered	$155 00
Rebate	7 50
	$147 50
Cr. By cash	50 00
	$97 50

"*Guaranty:*

"The above cooling room is guaranteed to keep fresh meat a satisfactory length of time, if properly iced and regulated.

"PAUL J. DAEMICKE."

The defendant claimed that this was the written contract of sale, and objected to any testimony on the part of the plaintiffs of the oral agreement at Chicago, at the time of the purchase of the cooler; citing *Nichols, Shep-*

ard & Co. v. Crandall, 77 Mich. 401. We do not think the guaranty attached to this bill can be considered the whole contract between the parties. It was not sufficient in itself to constitute an agreement, and did not, as conclusively shown, embody the whole of the contract. It is governed by the case of *Phelps v. Whitaker,* 37 Mich. 72. See, also, cases cited in note to that case.

But the case must be reversed for an error that goes to the vitals of the plaintiffs' case. The theory of the declaration, and the charge of the court to the jury, proceeded upon the idea that the defendant warranted the cooler—

"To keep fresh meats *four weeks,* or a satisfactory length of time, if properly iced and regulated."

There was no evidence in the record tending to show any such warranty. The plaintiffs' counsel in the outset stated that they did not rely upon the guaranty attached to the bill of the cooler, but that they relied upon the conversation and representations made at the time it was purchased. One of the plaintiffs, William Richey, testified that he went to Chicago, and called upon the defendant. Defendant took him up-stairs, and showed him his cooler. Defendant "told him what they would guarantee they would do. I thought his cooler the best. He showed me a circular." What the circular was does not appear in the record, unless it was composed of the following testimonials, which were introduced in evidence:

"TESTIMONIALS.

"SUTTON, NEB., Nov. 18, 1887.

"PAUL J. DAEMICKE,—

"*Dear Sir* Referring to Butcher Boy Cooling Room, sent last spring, it is a number 4, 8x18 feet. After once filled, will take 250 to 300 pounds ice per day to run it in warm weather It holds about four beeves, with customary other kinds of meats, and will keep meats in good condition at least four weeks. I am much pleased with

the cooler, and consider it the best I have used, as the meats keep sweet and sound as long as I care to keep them.

"Yours truly, HENRY BOEHM.

"CASCADE, WIS., Dec. 2, 1887.

"PAUL J. DAEMICKE:

"In reply to yours, I would state your cooler works well, and I wish I had bought one two feet larger. If well filled with ice, I can keep meats as long as I please in the finest condition.

"Yours respectfully, E. H. O'HEARN."

Richey testified that defendant called his attention to these testimonials in the circular. He was then asked:

"*Q.* What else, if anything, did he state to you at that time about the quality of the cooler?

"*A.* He said that his triple pans was the only cooler in the world that would keep meat any length of time properly."

The witness testified that in making the purchase he did not rely upon the examination he made of the cooler (he testified he examined it), but did rely upon these said representations made by the defendant. All of said testimony was objected to by defendant's counsel as not competent, and that the writing contained the final agreement of the parties. The objections were overruled, and the testimony received against defendant's objection, and exception taken. The witness further testified that he at the time purchased the cooler of the defendant.

"*Q.* You may state the terms. [Objected to by the defendant's counsel as incompetent; that the contract was in writing. Objection overruled. Defendant excepts.]

"*A.* The cooler was to be delivered to me inside of three weeks. The payments were to be, $50 down and a rebate of $7.50. I was to have three and five months for the payment of two notes, to be given for $48.75 apiece. The cooler was delivered at Dowagiac, but later than the date agreed upon. It was delivered free on board cars at Chicago. I paid the freight."

This is the whole of the testimony of a warranty. It will be clearly seen that the warranty relied upon was the testimonials shown him by defendant. There is no evidence of the defendant making any other warranty in this conversation, except "that his triple pans was the only cooler in the world that would keep meat any length of time properly;" and this was probably a mere expression of opinion, rather than a warranty. At any rate, it is not relied upon in this suit as a warranty. It is not shown in the record that the coolers mentioned in these testimonials were of the same dimensions as the one purchased by plaintiffs, or that the letters were not true statements as to the coolers purchased and used by the writers, unless the second one carries its own refutation on its face, that fresh meat could be kept as long as the writer pleased. Nor is there any evidence that the defendant adopted the language of these testimonials, or either of them, as his own, and warranted this particular cooler to keep meats as long as those were said to have kept such meats in the testimonials. The mere showing of such testimonials by a dealer in the attempt to sell his goods, or in the sale of them, cannot be considered as a warranty that the goods sold shall conform to such testimonials, unless there is something said which expressly or impliedly guarantees that they shall equal in quality or performance the praise of the testimonials. Nothing of the kind was shown in this case. The jury, therefore, should have been directed to find a verdict for the defendant.

Other errors are assigned, but, as they are not likely to arise upon another trial, we shall not discuss them.

The judgment below is reversed, and a new trial granted, with costs of this Court to defendant.

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

M. J. P. DEMPSEY, EXECUTOR, ETC., v. ISAAC PFORZHEIMER ET AL.

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Chattel mortgage—Failure to file—Rights of subsequent mortgagee —Payment.

1. A creditor who has the right to secure a lien by legal process *superior* to that of a chattel mortgage *then on file*, because his debt was contracted while the mortgage was *withheld from record*, may obtain a like lien by the execution to him by the debtor of a chattel mortgage to secure the same indebtedness *after* the filing of the first mortgage.
2. A note and mortgage given for an existing indebtedness will be presumed to have been taken as security, and not as payment, in the absence of a contrary showing.

Error to Wayne. (Gartner, J.) Argued May 12, 1891. Decided July 28, 1891.

Trover. Defendants bring error. Reversed, and judgment entered in this Court in favor of defendants for costs of both courts. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson, for appellants.

Keena & Lightner, for plaintiff.

[The points of counsel are fully stated in the opinion, where the authorities are reviewed.—REPORTER.]

MORSE, J. On the 22d day of October, 1886, William H. Harris and Charles T. Karpp, in partnership in the general jewelry business in Detroit, and both residents of that city, borrowed $2,000 of Caspar H. Borgess. To assure the payment of the same, they executed to him, under the firm name of Harris & Karpp, a chattel mortgage for that amount, which mortgage was taken by said

Borgess in good faith to secure such indebtedness, but was not filed in the city clerk's office until December 26, 1887, at 9:08 o'clock A. M. This mortgage covered all the goods "now contained or hereafter to be contained" in the jewelry store; also the fixtures and safes therein; and was payable on or before October 23, 1889.

On December 30, 1887, Harris & Karpp executed a mortgage to the defendants in this suit to secure an indebtedness incurred in the purchase of merchandise between the date of the execution and the filing of the Borgess mortgage, which merchandise was sold by defendants in ignorance of the existence of the indebtedness to Borgess or the execution of the mortgage to him. The two mortgages embraced substantially the same property. The mortgage to defendants recited that it was to secure an indebtedness of $2,528.53, which was the amount of the merchandise sold as above. It also contained the following recital:

"*And whereas,* the said parties of the first part [Harris & Karpp] expect to buy from the said parties of the second part [the defendants] from time to time, during the continuance of this mortgage, goods on time, and on such terms of credit as may be agreed upon; *and whereas,* the indebtedness of the said parties of the first part to said parties of the second part is therefore liable to change in amount and time of payment; *and whereas,* the said parties of the first part have agreed that the payment of the existing indebtedness of said parties of the first part to said parties of the second part, and also the payment of the other indebtedness for goods to be purchased by said parties of the first part from said parties of the second part, shall be secured in the manner hereinafter mentioned."

The $2,528.53 was to be paid according to five promissory notes of even date with the mortgage, as follows: $500 in 60 days, $500 in 90 days, $500 in 4 months, $528.53 in 6 months, and $500 on demand. This mort-

gage was filed the same day it was executed, at 3:30 o'clock P. M. Subsequently defendants, by Henry T. Thurber, their attorney and agent, took possession of said stock, being the same described in both mortgages. Plaintiff's testator, by James T. Keena, at the time of the sale, demanded said stock under his mortgage. Defendants refused to deliver the stock, and sold the same under their mortgage, expressly denying the validity of testator's mortgage, and in disregard of said mortgage. There was upon the property so sold by defendants, at the time of such sale, a chattel mortgage held by Eugene Deimel for $600, which was a prior lien to the defendants', and they sold such property under their chattel mortgage subject to the payment of the Deimel mortgage.

The defendants were, at and during the time the merchandise aforesaid was sold to Harris & Karpp, merchants in New York city, selling jewelry, etc., at wholesale, and Harris & Karpp were conducting the business of selling jewelry, etc., in Detroit, Mich., during such time, at retail. Such merchandise was sold in the usual course of business, and upon usual terms of sale.

Plaintiff's testator thereupon brought this action of trover against defendants for the conversion of said stock, which at the time of the seizure and sale by defendants was worth $3,200. The defendants composed the copartnership of Pforzheimer, Keller & Co. No part of the principal or interest secured by the mortgage of plaintiff's testator has been paid. The original plaintiff having died, the cause was revived in favor of his executor. Defendants' plea was the general issue. The case was tried before Hon. George Gartner, one of the Wayne circuit judges, without a jury, who made a finding of law upon the facts, which were stipulated, that the plaintiff

was entitled to recover against the defendants the sum of $2,520.

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 Id. 333; *Waite v. Mathews,* 50 Id. 392; *Talcott v. Crippen,* 52 Id. 633; *Crippen v. Jacobson,* 56 Id. 386; *Root v. Harl,* 62 Id. 420; *Johnson v. Stellwagen,* 67 Id. 10; *Brown v. Brabb,* Id. 17; *Cutler v. Steele,* 85 Id. 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 mortgage. 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 *Bank v. Bates*, 120 U. S. 560 (7 Sup. Ct. Rep. 679), 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.

A review of the cases in our own Court upon this subject may not be unprofitable. The contention of plaintiff that, in order to take advantage of the non-filing of the Borgess mortgage, the defendants must first have a lien upon the property *by process*, is based upon language used in *Thompson v. Van Vechten*, 27 N. Y. 568, and that case has often been referred to in our decisions on this subject, and is considered a leading case. It was there said that—

"The mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process."

The gist of the reason is that the creditor has no business with the debtor's property until he has obtained possession of it by some legal process that gives him a

lien upon it. This is not because of any right that the mortgagor, who has kept his mortgage from record, has against the other creditors, but because such creditors have no right to touch the debtor's property without his consent, without legal process; and where the debtor has turned out his property to a creditor in payment of his debt, or in pledge for its payment, or, as in this case, a chattel mortgage which authorizes him to take possession of it, it seems to me that the reason of the rule is satisfied, and that he has a right to defend against a prior mortgage which is void as against him. And I think some of our decisions decidedly tend in this direction, and that none of them militate against it.

In *Fearey v. Cummings*, 41 Mich. 383, Mr. Justice GRAVES uses this language:

"Still no one as creditor at large can question the mortgage. He can only do that by means of some process *or proceeding* against the property."

Is not the taking into possession of mortgaged property under the mortgage, for the purposes of foreclosure, a "proceeding" against the property?

In *Putnam v. Reynolds*, 44 Mich. 114, the Court refused to foreclose such a mortgage, declaring it void as to the mortgagor's creditors because it was kept from the record. The assignee for the benefit of creditors, who had no knowledge of this mortgage at the time the mortgagor made the assignment, defended against the mortgage. The complainant insisted that the assignee had no standing, because his rights were no greater than the assignor, and the mortgage was valid as against the mortgagor. Mr. Justice COOLEY, in speaking of this claim, said:

"The assignee is not a purchaser for value, and not a creditor; and even creditors, it is said, cannot attack the mortgage, except indirectly, through a seizure of the

property by attachment *or other suitable process.* This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor; *but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned.* It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control. But we do not think the question fairly arises in this case."

Here we have a pretty good index to the opinion of this learned jurist. It would seem that he doubted the necessity of any lien upon the property by the attacking or defending creditor in a case like the present.

In *Root v. Potter*, 59 Mich., at page 504, Chief Justice CAMPBELL says:

"It has always been held in this State that *general* creditors, having no judgment or *lien* on the debtor's property, cannot attack conveyances or other dealings for fraud;" citing *Tyler v. Peatt*, 30 Mich. 63; *Maynard v. Hoskins*, 9 Id. 485; *Griswold v. Fuller*, 33 Id. 268.

In the present case, the defendants cannot be said to be "general creditors." They are creditors having a lien on the property, and lawfully in possession under such lien. An examination of the cases above cited by Chief Justice CAMPBELL will show that they have no bearing upon the question at issue here.

In *Trowbridge v. Bullard*, 81 Mich. 456, Mr. Justice LONG says:

"It has many times been held by this Court that *general* creditors, having no judgment *or lien* on the debtor's property, cannot attack conveyances or other dealings for fraud;" citing a number of Michigan cases, in addition to those cited in *Root v. Potter, supra*, to wit: *McKibben v. Barton*, 1 Mich. 213; *Stoddard v. McLane*, 56 Id. 11; *Scott v. Chambers*, 62 Id. 532; *Krolik v. Root*, 63 Id. 562.

The main case is relied upon by the plaintiff in this case, but it does not touch the question here involved. The first case cited is of no importance to the issue here.

In *Stoddard v. McLane* an execution had been levid on personalty, and the aid of equity was invoked to set aside fraudulent conveyances of the property levied upon. Held, that a lien obtained by the levy of execution on personalty did not in general require the aid of equity for its enforcement, and that there was a remedy at law.

In *Scott v. Chambers*, 62 Mich. 532, 538, Chief Justice CAMPBELL uses this language:

"It is the settled law of this State that creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings; and, so far as these bonds are concerned, they could only be reached by judgment creditors."

This is the strongest language anywhere used in our reports in favor of plaintiff's contention; but the case was one where a creditor was proceeding in equity against a receiver of an assignor for the benefit of creditors (who stood in the place of an assignee who failed to qualify under the assignment) for neglect, and making him, with the assignor and others, parties defendant, for the purpose of reaching and bringing under the assignment certain lands and other property, including two United States bonds, issued in 1882 and 1885 to the wife of the assignor. It was held that the creditor had no right to implead the receiver without leave of the court, and no right to file the bill against the other parties, as that right belonged to the receiver alone. The property sought to be reached was in the name and possession of other parties than the debtor, and the language of the Court was applicable to that

case; but there is no reason why it should control this, where the property is lawfully in the hands of the defendants under a mortgage lien, reduced to possession for the purposes of foreclosure, and where the parties assailed have a right to a standing in court to defend their right to possession, and to attack the alleged prior lien of the plaintiff.

In *Krolik v. Root*, 63 Mich. 562, 567, the language of Mr. Justice SHERWOOD is:

"The complainants in this case never obtained a lien upon the property in question, or any part thereof, so far as appears upon this record. They are not in a situation to attack the validity of defendants' last mortgage *without such lien obtained in some manner.*"

It *Crippen v. Jacobson*, 56 Mich. 386, it was held that garnishee proceedings would reach assets covered by an unrecorded mortgage made before the debt was incurred for which the mortgagee was garnished, and the following language is used by Mr. Justice CAMPBELL:

"The law does not require previous proceedings to exhaust other remedies. The garnishee law is unconditional upon this subject, and garnishee proceedings will reach the assets if they exist. When the debt is not incurred on the credit of an apparently clear title, which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage, without taking some step *which puts the creditor on a different legal footing than that of a quiescent party.* But when a chattel mortgage exists, and is concealed, it is, under the statute, void, for the reason that it produces a false appearance of entire solvency, when, in fact, a person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security, and those who deal with such a debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void, *at all events,* against creditors who deal with

a debtor so situated. Such creditors are directly within the policy of the statute."

In view of this language, it seems absurd to hold that such a creditor, having possession of the debtor's property under a chattel mortgage, cannot defend against a chattel mortgage absolutely void as to him, unless he goes further, and attaches the property, or takes some legal process, other than the enforcement of his mortgage lien under the power of sale in the mortgage, to get a lien upon it.

In *Root v. Harl*, 62 Mich. 420, Harl & Stevens, merchants doing business at Muir, Mich., as copartners, had made an assignment. Chauncey Rumsey held a mortgage upon their stock. Between the date of this mortgage and its recording, Root & Co. and others gave credit to Harl & Stevens in ignorance of this mortgage. The complainants filed a bill for the appointment of a receiver of the assigned property, and claiming a preference of their debts, contracted as aforesaid in ignorance of the unrecorded mortgage, over the Rumsey mortgage, because it was void under the statute as against them. They had no lien, by legal process or otherwise, upon the property. They might be called "general creditors" of the debtors, except that they stood in a different relation to this mortgage than the others. In delivering the opinion in that case, it was said by Chief Justice CAMPBELL that the *general creditors* could not attack the mortgage, but that Root & Co. could.

"We have no doubt that, under our statutes, any creditors have a right to avoid an unrecorded mortgage who have, during its absence from the record, done anything material which they may be fairly considered to have done on the basis of its non-existence."

This doctrine was also enunciated in *Brown v. Brabb*,

67 Mich. 17, and in *Johnson v. Stellwagen*, Id. (opinion of Mr. Justice CHAMPLIN, at page 14).

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 possession 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.

I do not think that the fact that the defendants obtained their mortgage after the mortgage of plaintiff's testator was put on file cuts any figure in the case. The mortgage was a security for the payment of the debt, against which the Borgess mortgage had no standing and was void. The rights of defendants were not at all impaired by the taking of this security, but the security gave them a lien upon and possession of the property out of which to make their debt. If, instead of giving this mortgage, the debtors had turned out to them enough of the property to pay the debt, I think no one would seriously contend that the holder of this void mortgage could have demanded the goods of them, and, if the demand was refused, have sued them in trover

and recovered, although at the time the goods were so turned out to defendants the mortgage had been placed of record. I can see no difference in principle in the two cases.

But it is further contended that in taking this mortgage the defendants canceled the old indebtedness, under which they might have claimed the benefit of the statute, and with full knowledge of the Borgess mortgage, and its invalidity as against their debt, not only extended the time of payment of the old indebtedness, but made a new contract, looking towards further dealings with Harris & Karpp, thereby waiving their rights under the statute, and deliberately entering into another contract, to which the statute would not apply to give them preference to the Borgess mortgage; that by this dealing they elected their remedy, and must abide by such election, and cannot sell the property under their mortgage, and also claim as creditors without notice. It does not appear by the record that the taking of this mortgage was a cancellation or extinguishment of the first indebtedness, nor can there be any presumption that the mortgage and notes were taken in payment and extinguishment of the original indebtedness. The presumption would be that they were taken as security, rather than in payment.

The recital in the mortgage, also securing indebtedness that might be created thereafter, cuts no figure in the case, as there were no subsequent dealings between Harris & Karpp and the defendants. The mortgage recites that it is given in security of an indebtedness of $2,528.53, which is the exact amount of the indebtedness incurred between the dates of the execution and filing of the Borgess mortgage. Nor does the extention of the time of payment of the indebtedness alter the rights of the defendants as against the Borgess mortgage, because

such extension did not in any way impair the security of Borgess, or hinder him from proceeding to enforce such security the same as if no extension had been granted by defendants in the payment of their debt. Furthermore, part of the debt was made payable on demand, and the mortgage provided that, on default of the payment of any of the indebtedness at the day named for its payment, the entire amount should become due and payable at once; and it would seem that there was really no extension, and the only thing in view and accomplished was the securing of defendants' claim by a mortgage lien which would also give them possession of the property.

We think, 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.

The judgment in favor of the plaintiff is reversed, and a judgment will be entered here in favor of the defendants for the costs of both courts.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MCGRATH, J., did not sit.

INDEX.

Head-note references are to pages.

Cross-references are to *subjects;* and the number of the note is added in parenthesis, unless the reference is to all.

ABATEMENT.

Complainant filed a bill to remove a cloud from her title to certain land, which she afterwards conveyed by warranty deed, the grantee retaining $50 of the purchase price, to be paid when complainant cleared the title. The defendant answered upon the merits after the deed was recorded, and no question was raised as to the right of complainant to prosecute the suit after such conveyance until the hearing, upon which the right of complainant to the relief sought plainly appeared, and a decree was made accordingly; in affirming which it is held that the complainant had not parted with her whole interest in the subject-matter of the suit, and that, the defense being entirely technical, equity is best subserved by such affirmance. *Begole v. Hershey*, 130.

ACTION.

1. A son received $100 of the purchase price of a house and lot sold by his father, and the father delivered the balance of the money to his son's wife for safe-keeping, and, on their refusal to repay the money, sued them jointly to recover the same. And it is held that there is nothing in the record tending to show their *joint* liability. *O'Connor v. O'Connor*, 189.
2. An action for money had and received will lie against a

ACTION—Continued.

grantee for money received on the sale of land conveyed to him under a parol trust to make such sale, and divide the proceeds among the grantors. *Collar v. Collar*, 507.

ADJOURNMENT—See JUSTICES' COURTS.

ADVERSE POSSESSION.

Adverse possession is evidenced by the manner of the holding of the occupant, and not by the opinion of the neighborhood. *Atwood v. Canrike*, 100.

AFTER-ACQUIRED TITLE.

Where, after the conveyance of land with covenants of warranty, it is discovered that minor heirs have an interest in the land adverse to the grantor, which interest is acquired by the grantor at guardian's sale, the title thus acquired inures to the benefit of his grantee, who can recover nothing more than nominal damages under said covenants. *Pfirrman v. Wattles*, 254.

AGISTER—See BAILMENT.

ALTERATION IN WRITTEN INSTRUMENT.

1. A material alteration, made by the agent of one of the contracting parties without express or implied authority, will not avoid the contract. *White Sewing Machine Co. v. Dakin*, 581.
2. The insertion in the formal part of a bond, the penalty and conditions of which are fixed by its terms, of a promise to pay ten per cent. attorney's fees in case of suit on the bond, is an immaterial alteration, such promise being no part of the penalty, nor affecting the judgment to be rendered in case of suit, nor the amount of damages to be assessed. *Id.*

AMENDMENT.

1. The failure to allege that the children of a mortgagor, who are joined as defendants in a suit to foreclose the mortgage under an allegation that they claim rights as subsequent purchasers, incumbrancers, or otherwise, are his heirs at law, will be remedied by amendment in the appellate court. *Gray v. Franks*, 382.
2. The appellate court will regard an amendment to a declaration as having been made after judgment which might have

AMENDMENT—Continued.

been made before on motion, under the authority of How. Stat. § 7636. *Smith v. Pinney*, 484.

See EJECTMENT (6).

APPEALABLE ORDER.

1. An order sustaining a demurrer to a declaration, and directing final judgment for the defendant unless the plaintiff file an amended declaration within 20 days, is not a final order until after the expiration of the time allowed for such amendment. *Clark v. North Muskegon*, 29.
2. The decree in this case directs that a receiver be appointed to take certain cattle and their progeny, and cause the same to be put in proper condition for market, and to sell the same, and bring the proceeds into court, to abide the further order of the court concerning the same. This portion of the decree is in accordance with the prayer of complainant's bill, and therefore he is not in a position to appeal from it; while, on the other hand, the defendant, under the repeated rulings of this Court, could have regarded that portion of the decree as final, because it dispossesses him of the possession of the property, and he could have appealed, but he has not. *Webber v. Randall*, 58.
3. The further order, and that portion complained of by the appellant, requires an accounting to be had, and a sale of the cattle by the receiver, and directs that, when the cattle are sold, in case the amount realized from the sale shall be less than the value of the cattle at the time of the breach of the contract, together with the progeny, computed as therein directed, a personal decree shall pass against defendant for the deficiency, together with interest. There is nothing appearing upon the record by which this Court is authorized to say that it will injure the appellant in case this decree should be carried out as written, for it is among the possibilities that a computation of the amount due him, based upon this decree, may realize as much as he claims he would be entitled to under his construction of the contract; and until a final decree is made by the court fixing the amount of money which shall be due to him there is no final order or decree from which an appeal can be taken. *Id.*

ARREST WITHOUT WARRANT.

1. To authorize an arrest without a warrant the offense must

ARREST WITHOUT WARRANT—Continued.

be committed in the *presence of the officer*, and the arrest must be made *immediately*. *People v. Johnson*, 175.

2. A village marshal is not justified in making an arrest, without a warrant, of a party who has been guilty of a breach of the peace by shouting on the public streets while out of sight of the officer, who acts upon information received from a third person in making the arrest. *Id.*

See BREACH OF THE PEACE (2).

ASSIGNMENT.

1. An assignment by a defendant in a replevin suit of all of his right, title, and interest in the suit conveys his right, title, and interest in the goods taken under the writ. *Cadwell v. Pray*, 266.

See BILLS AND NOTES (8).

ASSIGNMENT BY SUBCONTRACTOR—See CONTRACT (1).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The right of a creditor to complain of an assignment for the benefit of creditors in the execution of which there may have been fraud, and which may have been fraudulent as to creditors, may be lost by waiver or acquiescence. *Appeal of George T. Smith*, 149.

2. Where a creditor comes in under the assignment proceedings in such a way as to entitle himself to share in the dividends arising from the assets in the hands of the assignee, he waives all objection to his title to such assets. *Id.*

3. Under the general supervisory powers of a court of chancery over assignment proceedings, it may proceed upon *petition* to the removal of the assignee, and may, in the *same proceeding*, appoint a receiver. *Id.*

4. A finding in a proceeding for contempt under chapter 256, How. Stat., that the respondent has brought a suit against the receivers appointed upon the removal of assignees under an assignment for the benefit of creditors, and is prosecuting the same knowingly, and without leave of the court having control of the assignment, and that in so doing he has been and is guilty of contempt of said court, and of its jurisdiction and authority, but which fails to find that such misconduct was calculated to or did defeat, impair, impede, or prejudice the rights or remedies of any party in said assignment proceeding, is sufficient to warrant an order restrain-

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

ing the further prosecution of said suit, and directing its discontinuance, but does not authorize the imposition of a fine, and imprisonment in default of its payment; but, on the failure of the respondent to comply with such order, he can, upon proper showing and finding of facts, be subjected to such penalties within the statute as the court may impose. *Id.*

5. A bill of sale given in payment of *bona fide* indebtedness, and not purporting to cover nor in fact covering all of the debtor's property, cannot be tortured by any legal construction of the assignment statute into an assignment for the benefit of creditors, and thereby be declared void for an unlawful preference. *Bresson v. Musselman*, 186.

BAILMENT.

It is the duty of an agister who takes horses for pasture to know their condition as to health; and if he has knowledge of the prevalence of a distemper among them of a contagious character, and fails to inform a customer of the fact, whose horse takes the distemper from contact with the diseased horses, in consequence of which the animal dies, the owner is entitled to recover its value in an action on the case, notwithstanding the contract for such pasturage is void because entered into on Sunday. *Costello v. Ten Eyck*, 348.

BILLS AND NOTES.

1. An indorser of a promissory note before its delivery to the payee is an original promisor, and liable without protest. *Tredway v. Antisdel*, 83.
2. A payor is liable to an indorser who pays the note, whether legally protested or not. *Id.*
3. In a suit by the payee in a *judgment* note, commenced by declaration, to which a copy of the note is annexed, with a notice that it constitutes the plaintiff's sole cause of action, the execution of the note need not be proved unless denied under oath. *Conrad Seipp Brewing Co. v. McKittrick*, 191.
4. In such a case the promise is to pay money, and its non-payment constitutes the sole breach, and a recovery may be had under the common counts, under which the contract is admissible in evidence. *Id.* 192.
5. The admission of "for value received" in a judgment note

BILLS AND NOTES—Continued.

is *prima facie* sufficient to show that the promise contained in the note had an adequate consideration to support it. *Id.*

6. An instrument in form a promissory note, but which authorizes a confession of judgment for the amount due thereon, with costs and the usual attorney's fees, is not a promissory note under the Michigan decisions. *Id.*
7. One of several joint makers of a promissory note, to whom it is assigned by the payee, cannot, by its indorsement before maturity to a third party, convey any right except to bring suit for contribution, the appearance of his name as one of the makers being sufficient notice to his indorsee. *Stevens v. Hannan*, 305.
8. If the effect of the *assignment* of a promissory note is to make it thereafter non-negotiable, the assignee can bring suit thereon in his own name under the statute; and if such is not the effect, the indorsement of the note in blank by the assignee, and its delivery to a third party, entitles him, as holder, to bring suit in his own name. *Id.*

BOND.

A bond voluntarily executed by a village treasurer upon the order of the village council, which it had the power to make, is not a nullity because the council failed to pass and have recorded formal resolutions requiring and approving the bond, nor can the principal or sureties urge such neglect as a defense in a suit upon the bond. *Village of Evart v. Postal*, 325.

See ALTERATION IN WRITTEN INSTRUMENT (2).

BREACH OF THE PEACE.

1. In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. *People v. Johnson*, 175.
2. To be intoxicated and yelling on the public streets of a village, in such a manner as to disturb the good order and tranquillity of the village, is an act of open violence, and a

BREACH OF THE PEACE—Continued.

breach of the peace, which, if committed in the *presence* of an officer, will justify him in arresting the guilty party without a warrant. *Id.*

See ARREST WITHOUT WARRANT.

CERTIORARI.

Where the return of a justice to a writ of *certiorari* in a log-lien case does not contain the evidence taken before him, which was not reduced to writing, but states that the plaintiff was sworn in his own behalf, and that after listening to the testimony, and after due deliberation, he gave judgment for the plaintiff, the appellate court cannot presume that there was no evidence tending to support such judgment. *Sullivan v. Hall*, 7.

CHARGE TO JURY.

1. Where, in a suit to recover for professional services, the plaintiffs relied either upon an express contract covering the *entire* services or upon an implied one of the same extent, and their testimony related to the value of the *entire* services, the charge of the court, following such theory and proofs, is not open to the objection that the trial judge did not, of his own motion, introduce a theory supported only by defendant's testimony, which was denied by plaintiffs, which, if suggested, might have entitled plaintiffs to a verdict of $30, whereas their claim was for nearly $1,900. *Fraser v. Haggerty*, 521.
2. It is improper for the court to instruct the jury as to the weight they should give to particular testimony, or to the testimony of a particular witness, or to place a particular witness in undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony; nor has the trial judge a right so to instruct the jury as manifestly to reflect upon a particular witness. *Id.*
3. An instruction that, if the jury find that any witness has testified falsely as to any material fact in the case, they are at liberty to reject and disbelieve all of his testimony, clearly and sufficiently states the law upon the subject, and it is not error for the court to refuse to give a request applying such rule to a particular witness, and challenging the atten-

CHARGE TO JURY—Continued.

tion of the jury to particular portions of his testimony, which the request assumes as false. *Id.* 522.

See LIBEL AND SLANDER (2).

CHATTEL MORTGAGE.

1. A creditor who has the right to secure a lien by legal process *superior* to that of a chattel mortgage *then on file*, because his debt was contracted while the mortgage was *withheld from record*, may obtain a like lien by the execution to him by the debtor of a chattel mortgage to secure the same indebtedness *after* the filing of the first mortgage. *Dempsey v. Pforzheimer*, 652.
2. A note and mortgage given for an existing indebtedness will be presumed to have been taken as security, and not as payment, in the absence of a contrary showing. *Id.*

See DAMAGES (5).

CIRCUIT COURT RULE NO. 63—See PRACTICE IN CIRCUIT COURT (2).

CONSTITUTIONAL LAW.

1. The log-lien law of 1887 (Act No. 229) is constitutional. *Sullivan v. Hall*, 8.
2. A justice of the peace, having jurisdiction of the person and subject-matter of the suit, is not liable to respond in damages because, in the exercise of his honest judgment, he holds an unconstitutional ordinance constitutional, and enforces it by the arrest and imprisonment of one who violates its provisions; nor is the officer who executes the warrant of arrest, if fair upon its face, so liable. *Brooks v. Mangan*, 576.
3. An ordinance requiring hawkers and peddlers traveling on foot to pay a license of $10 for the first day and $5 for each subsequent day, and, if traveling with one horse, $20 and $15, and, if with two or more horses, $25 and $15, and which practically exempts residents of the municipality from its provisions, is invalid on account of its unreasonableness, and objectionable for making an unjust discrimination between residents and non-residents. *Id.*
4. Act No. 216, Laws of 1885, amendatory of the mechanics' lien law, as a whole, is not repugnant to the Constitution, and section three of the act, providing for the vacating of such

CONSTITUTIONAL LAW—Continued.

lien upon executing the bond therein described, is valid. *McHugh v. Gault*, 135.

CONTEMPT.

A finding in a proceeding for contempt under chapter 256, How. Stat., that the respondent has brought a suit against the receivers appointed upon the removal of assignees under an assignment for the benefit of creditors, and is prosecuting the same knowingly, and without leave of the court having control of the assignment, and that in so doing he has been and is guilty of contempt of said court, and of its jurisdiction and authority, but which fails to find that such misconduct was calculated to or did defeat, impair, impede, or prejudice the rights or remedies of any party in said assignment proceeding, is sufficient to warrant an order restraining the further prosecution of said suit, and directing its discontinuance, but does not authorize the imposition of a fine, and imprisonment in default of its payment; but, on the failure of the respondent to comply with such order, he can, upon proper showing and finding of facts, be subjected to such penalties within the statute as the court may impose. *Appeal of George T. Smith*, 149.

CONTRACT.

1. Defendant sublet the contract for erecting the piers of a bridge which it had contracted to build, which work, when completed, was to be free from labor or material liens. Fifteen per cent. of the contract price was reserved until the completion of the contract, and all payments might be refused until the subcontractor presented full releases or waivers of claims or liens of laborers and material-men. Provision was made for completing the contract in case of default on the part of the subcontractor. After commencing work the subcontractor assigned the reserved percentage to secure a loan made to enable him to prosecute the subcontract, and the assignee notified the main contractor of such assignment, and that it must retain the percentage to the extent of the assignee's lien; to which notice the main contractor replied that it could not undertake to retain any sum from the subcontractor if by so doing the work would

CONTRACT—Continued.

be impeded or jeopardized. In a suit by the assignee to recover from the contractor the reserved percentage, which was less than the amount of the loan, it is held:

a—That the plaintiff was in no better position than if he had been the assignee of the subcontractor, and had brought suit upon the contract; and that the defendant was entitled to set up in defense any matter which it might have availed itself of had such latter suit been brought, except, perhaps, voluntary payments to the subcontractor after notice of the assignment.

b—That the fact that the defendant, as a further protection to itself, in making payments to third parties, required the subcontractor's certificate of the correctness of the amounts, would not, of itself, preclude it from offsetting such payments, if shown to have been necessarily made in the prosecution of the work.

c—That the very object of the reservation was defendant's protection, and it was entitled to avail itself of the reserved fund to do what was actually necessary for the completion of the subcontract and its own protection, its lien thereon being prior to that of the plaintiff. *Fisken v. Bridge & Iron Works*, 199.

2. The agreement of defendants to pay the plaintiff 20 cents per ton in coal for all orders taken and delivered at their office, said coal to be delivered as ordered, is construed as an agreement to pay plaintiff the agreed commission upon the coal delivered upon said orders, and upon orders which defendants, by their own fault, refused or neglected to fill. *Lafferty v. Lorimer*, 591.

See DAMAGES (1, 2); SALE; SPECIFIC PERFORMANCE; SUNDAY CONTRACT.

CORPORATIONS.

1. The president of a lumber company, in the active management of its business, is held to have authority to employ sawyers for the season at an agreed price per day; no limitation upon his power to employ men being shown, nor that authority had been conferred upon any particular person with reference to such employment. *Ceeder v. Lumber Co.*, 541.

CORPORATIONS—Continued.

2. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:

a—The president of a manufacturing company, who is in the active conduct and management of its business, must be presumed to have all the powers of any agent exercising like control or management, and to have authority to do what is usually and ordinarily done by such agents or managers.

b—The primary intention of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and third persons are invited to deal with him upon that understanding.

c—The fact that a person having the general direction and active control of the business of a corporation is also its president does not operate as a limitation of the powers usually exercised by such agents or manager; nor is his authority limited to that possessed by virtue of his office, but it is incident to the management of the business. *Id.*

See VOLUNTARY ASSOCIATIONS (2).

COSTS—See TAXES (9).

CRIMINAL LAW.

1. A respondent cannot be convicted of larceny upon the admissions of his counsel, and it is error in such a case to instruct the jury either that the respondent took the property with felonious intent, or that the jury must find him guilty of the offense charged. *People v. Hall*, 132.
2. In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. *People v. Johnson*, 175.
3. To be intoxicated and yelling on the public streets of a village, in such a manner as to disturb the good order and tranquillity of the village, is an act of open violence, and a breach of the peace, which, if committed in the *presence* of an officer, will justify him in arresting the guilty party without a warrant. *Id.*
4. To authorize an arrest without a warrant, the offense must be committed in the *presence of the officer*, and the arrest must be made *immediately*. *Id.*
5. A village marshal is not justified in making an arrest,

CRIMINAL LAW—Continued.

without a warrant, of a party who has been guilty of a breach of the peace by shouting on the public streets while out of sight of the officer, who acts upon information received from a third person in making the arrest. *Id.*

6. Where a respondent is informed against for the crime of rape, and is also charged in the same information, under Act No. 153, Laws of 1887 (3 How. Stat. §§ 9314*b*, 9314*c*), with having committed an indecent assault upon the same female, without committing or intending to commit the first-named crime, his conviction of the latter offense acquits him of the former, and, in the absence of a *scintilla* of evidence to warrant such conviction, the judgment entered thereon must be reversed, and the respondent discharged. *People v. Partridge*, 243.

7. Until a respondent has exercised all of his peremptory challenges, he cannot be heard to complain of the retention of an alleged incompetent juror. *People v. Aplin*, 393.

8. A barn adjacent to the dwelling-house of the owner, and to which he has access by means of a gate or bars, and which he uses for the better enjoyment of the dwelling-house, as farmers commonly use such buildings in connection with their homesteads, is within the curtilage, and under the law will be regarded as a part of the dwelling-house. *Id.*

9. Where the question whether the confessions of a respondent to an officer were freely and voluntarily made is fairly submitted to the jury as an issue of fact, under proper instructions, evidence of such confessions is competent. *People v. Robinson*, 415.

10. Act No. 245, Laws of 1881, permitting a respondent in a criminal case to testify as a witness in his own behalf, repealed Act No. 125, Laws of 1861, permitting him to make an *unsworn statement* to the jury. *Id.*

11. A respondent who offers himself as a witness, and testifies in his own behalf, is subject to the same rules as to cross-examination as other witnesses.

So *held*, where the respondent so offering himself was permitted to make an unsworn statement to the jury, and was fully cross-examined thereon. *Id.*

12. The mere fact that a respondent's counsel is not present when further instructions are given to the jury is not reversible error, where it is impossible to secure his attendance

CRIMINAL LAW—Continued.

when the jury need further direction, if such instructions are taken down by the reporter and are unobjectionable. *Id.*

13. In a prosecution for assault with *intent* to do great bodily harm less than the crime of murder, it is competent for the people to show that the prior relations of the parties were unfriendly, and specific threats and acts of violence on the part of the respondent may be given in evidence. *People v. Deitz*, 419.

14. Where, in such a case, the testimony fails to show a present intention of inflicting the threatened injury, but does show that the threat was conditional, depending for its execution upon the action of the injured party, and that it was not executed, and that the parties worked on adjoining farms for three years afterwards, during which time no ill feeling was shown to have been harbored by the respondent towards the complainaint, evdence of such a threat has no tendency to show the existence of such ill feeling, and should be rejected. *Id.*

15. If such evidence is admitted, and the respondent, instead of relying upon his objection and exception, goes upon the stand and denies making the threat, it is not competent for the people to show that it was made, on rebuttal, by way of impeachment of the respondent. *Id.* 420.

16. It is not correct practice to compel the defense to call witnesses present at the occurrence for which the party is upon trial. *Id.*

17. It is incumbent upon the prosecuting attorney not only to have such witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses; thereby affording the respondent an opportunity of cross-examination without prejudicing his case by the bias of the witness, if he should have any. *Id.*

18. It is incompetent for the prosecuting attorney, after refusing to call and swear a witness who was present at the occurrence for which the respondent is on trial, to comment upon the fact that such witness was sworn upon the preliminary examination, or that he was present in court, and was not called by the respondent. *Id.*

19. Evidence of experiments and observations made by witnesses two months after an affray, offered to show that cer-

CRIMINAL LAW—Continued.

tain witnesses who had testified to seeing the affray from the stoop of a neighboring dwelling-house could not have seen it, is inadmissible, unless it is shown that no change had taken place in the surroundings of the location between the time of the affray and the time when the experiments and observations were made. *Id.*

20. The satisfaction which a receiver of stolen property is permitted to make under How. Stat. § 9143, upon his first conviction, and thereby escape imprisonment in the State prison, may be made by the respondent individually, or by any one in his behalf; but it must be made for the purpose mentioned in the statute.

So *held*, where the respondent, prior to his conviction, loaned one of the thieves money with which to pay the owner for the stolen property, taking security for such loan, which is held not to be a compliance with either the letter or spirit of the statute. *People v. Hubbard*, 440.

21. A receiver of stolen property, in order to avoid imprisonment in State prison under How. Stat. § 9143, must make a showing to the circuit judge before sentence that it is his first offense, and that he has made satisfaction to the injured party. *Id.*

22. Where a larceny is committed in one county, and the stolen property is delivered to a receiver in an adjoining county, and within 100 rods of the line dividing the two counties, the receiver may be prosecuted in the county where the larceny was committed. *Id.*

23. Whether *certiorari* is the proper process to bring up for review the alleged wrongful action of a circuit judge in sentencing a receiver of stolen property to State prison who, as claimed, had made satisfaction to the injured party under the statute, is not decided, but, the circuit judge having made return to the writ, the Court dispose of the errors assigned upon such return. *Id.*

24. How. Stat. § 9418, provides that where an offense is committed on the boundary of two counties, or within 100 rods of the dividing line between them, it may be alleged in the indictment (information) to have been committed, and may be prosecuted and punished, in either county; and section 9520 provides for the indictment, trial, and conviction of a receiver of stolen property in any county where he received

CRIMINAL LAW—Continued.

or had such property, notwithstanding the theft was committed in another county. *Id.*

25. A jury in a criminal case, while going to, viewing, and returning from the premises where the offense was committed, should be kept under the supervision of an officer, so that no person can communicate with them, or express any opinion or give any direction in their hearing. *People v. Hull*, 449.

26. It is reversible error for a juror in a criminal case, while viewing the premises where the offense was committed, to drink liquor procured at a bar thereon owned by the principal witness for the prosecution, whether furnished by him in person or not. *Id.*

27. The lengthy examination by the court of the principal witness for the prosecution, after he had been cross-examined by the respondent's counsel, coupled with the remark, in answer to an objection by respondent's counsel to certain questions, that it was made because the facts would be prejudicial to respondent, are held objectionable, as tending to prejudice the rights of the respondent, and as conveying to the jury the idea that, if the facts were drawn out as proposed by the court, they would be injurious to the respondent's case. *Id.*

28. A portion of a charge in a criminal case which is argumentative, and tends to impress the jury that, in the opinion of the court, the respondent has not testified truthfully, is objectionable. *Id.*

See LIQUOR TRAFFIC.

CROSS-EXAMINATION—See PRACTICE IN CIRCUIT COURT (2).

DAMAGES.

1. Under a log-running contract between a boom company and a contractor, it was the duty of the company to run the logs down to the mouth of a river, emptying into a lake, where they were confined by means of a "trip boom," so called, and were boomed out by the contractor by running a "bag boom," so called, out into the lake, and opening the trip boom, and running out enough logs to fill the bag boom, which was tied up and towed across the lake, another bag boom being left at the mouth of the river to receive the

DAMAGES—Continued.

logs from the trip boom. The contractor claimed that under the term "booming out" all he had to do was to swing the bag boom, open the trip boom, and keep men at the gap to run the logs out of the trip boom and pack them into the bag boom; while the boom company contended that it was his duty to go up the river far enough to get the logs required to fill the bag boom, and sought to recoup damages for his failure so to do. The meaning of the term "booming out," as used in the contract, was left for the jury to determine, who found in favor of the contractor, which finding is held to eliminate that claim of damage from the case, under the testimony. *Gainor v. Boom Co.*, 112.

2. Where a boom of logs broke and the logs were scattered in a lake in the fall of the year, and on the refusal of the contractor to pick them up and deliver them to the boom company it gathered up a small portion of the logs at an expense of 91 cents per thousand feet above the contract price for their towing and delivery, such excessive cost being caused by the lateness of the season and the inclemency of the weather, and the boom company fails to show any damage growing out of the delay in the delivery of the remainder of the logs, which was made by the contractor the following spring, its action in attempting to gather up the logs cannot be justified, nor can it recoup, as damages, the expense thereby incurred in a suit by the contractor upon the contract. *Id.*

3. Where, after the conveyance of land with covenants of warranty, it is discovered that minor heirs have an interest in the land adverse to the grantor, which interest is acquired by the grantor at guardian's sale, the title thus acquired inures to the benefit of his grantee, who can recover nothing more than nominal damages under said covenants. *Pfirrman v. Wattles*, 254.

4. The measure of damages in a suit by the vendor in a land contract for its breach is the difference between the contract price and the value of the land at the time of re-entry, less the payments made thereon. *Allen v. Mohn*, 328.

5. The measure of damages in a trover suit brought by a mortgagee against an attaching creditor is the market value

DAMAGES—Continued.

of the property at time of its seizure, not exceeding, however, the amount of the mortgage lien. *Showman v. Lee*, 557.

See LIBEL AND SLANDER (1).

DEED.

1. The recording by a father of a warranty deed which he has executed to his minor children, with a reservation of a life-estate in the land for himself and their mother, is as effectual a delivery as could be made, and there could be no stronger evidence of his intention to convey the fee to the grantees. *Compton v. White*, 33.
2. An objection to a deed on the ground that it purports to convey 42 acres of land, described by metes and bounds, being more than the grantor is shown to have owned at the time of its execution, is untenable, it being admitted that the grantor then owned 40 acres of the land. *Atwood v. Canrike*, 99.
3. Where in describing land reference is had to a highway as one of the boundaries, the presumption is that the description refers to the highway as it existed upon the ground at the time the deed was executed, and not to the line as shown by the record of its survey in the proper office. *Id.*
4. A deed from a father and mother to their daughter, containing the following clause immediately after the description of the land, namely: "This deed is given for the full support and care of parties of the first part during their natural life-time. Also said party of the second part shall pay all funeral expenses of parties of the first part,"—is held a conveyance upon condition, which was broken when the grantee abandoned the premises, of which she had taken possession and entered upon the performance of the condition; and that the retention of possession by the parents, and their subsequent conveyance of the land to their son on a similar condition, constituted a sufficient entry for the breach, and terminated the legal right of the daughter under the deed, whose equitable rights are held to have been barred by a settlement made with her parents after such breach. *Blum v. Bush*, 206.
5. Where, after the conveyance of land with covenants of warranty, it is discovered that minor heirs have an interest in

DEED—Continued.

the land adverse to the grantor, which interest is acquired by the grantor at guardian's sale, the title thus acquired inures to the benefit of his grantee, who can recover nothing more than nominal damages under said covenants. *Pfirrman v. Wattles*, 254.

DEFINITIONS.

1. Booming out. 112 (1).
2. Breach of the peace. 175 (1).

DELIVERY.

The recording by a father of a warranty deed which he has executed to his minor children, with a reservation of a life-estate in the land for himself and their mother, is as effectual a delivery as could be made, and there could be no stronger evidence of his intention to convey the fee to the grantees. *Compton v. White*, 33.

DEMAND.

One who, in answer to a demand for personal property, admits that it is in his possession and under his control, but refuses to deliver it to the demandant, and thereby induces him to incur the expense of a suit for its value, is estopped from claiming as a defense in such suit that he did not, at the time of such demand, have possession and control of the property. *Cadwell v. Pray*, 266.

DESCRIPTION.

Identity of description of property in the writ of attachment and declaration in a log-lien suit is some evidence of the identity of the property described. *Sullivan v. Hall*, 7.

DETROIT BOARD OF PUBLIC WORKS—See MUNICIPAL CORPORATIONS (11–13).

DIVORCE.

1. The circuit courts may, in their discretion, upon application as in other cases, divorce from the bonds of matrimony any party who is a resident of this State, and whose husband or wife shall have obtained a divorce in another state, and may order alimony as in other cases. *Van Inwagen v. Van Inwagen*, 333.

DIVORCE—Continued.

2. Where a divorce is sought by the wife on other grounds than the granting of a prior divorce to the husband in another state, which fact he sets up in a cross-bill in bar of the relief sought, the complainant is not required to answer such new matter, nor is the court ousted of jurisdiction to decree the payment of temporary alimony and expenses, and to enforce such payment by contempt proceedings. *Id.*
3. Where the proofs show that, at about the time a bill for divorce was filed, the husband was the owner of several parcels of land of considerable value, and was possessed of considerable personal property, and of an interest in his father's estate worth at least $7,000, an award of $2,000 permanent alimony is reasonable. *Reed v. Reed*, 600.

DRUGGISTS—See PHARMACY ACT.

EJECTMENT.

1. Ejectment will not lie in this State for anything that is not tangible or capable of being delivered to the plaintiff by the sheriff under the writ of possession, nor for a mere trespass, right of way, or easement. *Harrington v. Port Huron*, 46.
2. A city constructed a sewer through land owned by the government without its consent, and, to protect the end at which sewerage was discharged into the river upon which the land fronted, erected a structure of masonry extending from the bank into the stream, and protected by a system of piling, which structure prevented the land being used for dockage purposes, for which it was valuable. The land was afterwards sold and patented, and a grantee of the patentee brought an action of ejectment against the city to recover the possession of the land, which was described by metes and bounds in his declaration. No other possession or claim of ownership by the city was shown upon the trial than as above stated. And in reversing a judgment in favor of the plaintiff the Court hold:

   a—That upon the construction of the sewer it immediately belonged to the owner of the soil, and when the government conveyed the land the whole of the premises passed to its grantee.

   b—That a writ of possession, under the judgment, would only put the plaintiff in possession of the land, which he

EJECTMENT—Continued.

could have had at any time without the aid of the court, and which land would be still incumbered by the sewer, through which the water would continue to be discharged.

c—That, if the city had obtained the right to construct the sewer across the land to discharge the water passing therein, it would have created an easement upon the land; and if it constructed it without authority, thus discharging the water upon and across the land, the act would be a trespass, but not an ouster of the plaintiff from the land.

d—That the plaintiff's title, as riparian owner, extends to the boundary line in the river, and gives him the right to erect docks and employ the land for any purpose not inconsistent with the rights of navigation; and if the city is in possession, and sets up a claim of right to maintain the sewer in the river in front of the land, and to drive and maintain the piles there for its protection, ejectment will lie for the land so appropriated.

e—That the mere fact that the sewer has been used continuously to discharge water into the river, without any other acts or claims by the city, would not amount in law to keeping the plaintiff out of the possession of the premises. *Id.*

3. Possession under a warranty deed, executed by one in peaceable possession and claiming title at the time of its execution, is *prima facie* evidence of title in the grantee as against an intruder who shows no better title in himself. *Cook v. Bertram*, 356.

4. A defendant in ejectment cannot defeat a recovery by a plaintiff, who shows a *prima facie* title to the land, by the introduction of a government patent, under which he claims no rights, but which he seeks to introduce for the sole purpose of defeating such recovery by showing an outstanding title. *Id.*

5. A defendant in ejectment who obtained possession by collusion with the assignee of a land contract which he had concluded to abandon, and who claims no rights under said contract, is not in a position to raise any question that might be raised between the vendee and the plaintiff. *Id.*

6. A verdict and judgment in an ejectment suit in favor of the plaintiff's administrator, who was admitted to prosecute the case, will be amended on appeal, the defendant not being

EJECTMENT—Continued.

prejudiced, as under such verdict and judgment the *real* title is in the heirs, subject to the payment of debts and expenses of administration. *Id.*

EQUITY.

Where a grantee contracts for and supposes that he is purchasing half of a lot of a specified depth, and that a fractional lot in the rear is separate and distinct from the land so purchased, and the deed describes the land as half of the lot, without specifying its depth, and on a survey being made some two or three years afterwards, during which time the grantors have occupied the fractional lot, it is discovered for the first time that the land as conveyed covers said fractional lot, equity will correct the mistake, and reform the deed so as to carry out the agreement of the parties. *West v. Mahaney*, 121.

EQUITY PLEADING.

A sworn answer is not conclusive, and, while treated as evidence, is subject to the same rules, as to weight, as any other evidence. *Newlove v. Callaghan*, 301.

See AMENDMENT (1).

EQUITY PRACTICE.

1. Under the general supervisory powers of a court of chancery over assignment proceedings, it may proceed upon *petition* to the removal of the assignee, and may, in the *same proceeding*, appoint a receiver. *Appeal of George T. Smith*, 149.
2. In this case the court is held not to have abused its discretion in refusing to set aside an order *pro confesso* on application made after the entry of decree, where the proposed answer fails to meet the case made by the bill, and the affidavit of one of the defendants filed in support of the application is met by the affidavit of complainants' solicitor to an understanding with the defendant, and with his solicitor, that the bill was to be taken as confessed to save unnecessary expense, and by the affidavit of defendant's solicitor that, after an examination of the case, he advised the defendant that complainants were entitled to the relief prayed for, and was instructed not to file an answer, but to

EQUITY PRACTICE—Continued.

endeavor to secure a settlement without a defense. *Mills v. McLeod*, 290.

3. Verifying an answer in chancery gives it no greater effect than if unsworn, where an answer under oath is waived in the bill. *Van Inwagen v. Van Inwagen*, 333.
4. A demand for the examination of the witnesses in a chancery suit in open court, not made within ten days after the cause is at issue, is of no force. *Gray v. Franks*, 382.
5. A defendant who has failed to make such a demand is not entitled to the benefit of one made by a co-defendant, who may have waived it, or as to whom the suit has been discontinued. *Id.*

ESTATES IN ENTIRETY.

Estates in entirety cannot be created at the expense of creditors, and held in fraud of their rights. *Newlove v. Callaghan*, 297.

ESTATES OF DECEASED PERSONS.

1. An administrator cannot waive the statute of limitations, nor can he waive the provisions of the statute which prohibit a claimant against the estate from testifying to facts, tending to support the claim, which were equally within the knowledge of the deceased. *McHugh v. Dowd Estate*, 412.
2. A claim against the estate of a deceased person, based upon an open account, should give the items of which it is composed, with the dates when they accrued and the respective amounts. *Id.*

See WRIT OF ERROR (2).

ESTOPPEL.

1. One who, in answer to a demand for personal property, admits that it is in his possession and under his control, but refuses to deliver it to the demandant, and thereby induces him to incur the expense of a suit for its value, is estopped from claiming as a defense in such suit that he did not, at the time of such demand, have possession and control of the property. *Cadwell v. Pray*, 266.
2. The failure of a manufacturing company to keep in a situation for delivery an engine ordered to be manufactured and delivered at a given point, to which it had been shipped,

ESTOPPEL—Continued.

and, on the refusal of the proposed purchasers to accept it, reshipped to the company, is held to estop the company from claiming title to an engine which, by the terms of the order, was to be taken as a cash or down payment on the engine so ordered. *Palmer v. Roath*, 602.

EVIDENCE.

1. The appellate court will not presume that there was a total want of evidence to support a justice's judgment where that officer's return to a writ of *certiorari* states that the plaintiff was sworn in his own behalf, and that, after listening to the testimony, the justice gave judgment for the plaintiff. *Sullivan v. Hall*, 7.
2. Where in a log-lien case the description of the property is the same in the writ of attachment and the declaration, there is no force in an objection that there was no evidence tending to prove that the property mentioned in the writ and the declaration was identical. *Id.*
3. Where a logging contract provides that the logs shall be scaled by a competent scaler, to be mutually agreed upon by the parties, and the testimony is conflicting as to the making of such agreement, evidence of other scales is admissible, and may be considered by the jury in case they find that a scaler was not agreed upon. *Sovereign v. Mosher*, 36.
4. A scaler, in reliance upon measurements made by an assistant of the opposite ends of logs on a skid-way, which he called off, as also any apparent defects, measured the ends of the logs next to him; which scale is held to be incompetent evidence, in the absence of proof that the measurements were accurately made by the assistant, and the defects correctly reported. *Id.* 37.
5. Where a plaintiff testifies that a street-car did actually move while he was attempting to alight, and that such movement threw him to the ground, causing the injury for which suit is brought, the question of the probability or possibility of the movement of the car is for the jury, and not for the court. *Finn v. Railway Co.*, 75.
6. In a suit upon a promissory note the defendant gave no notice of set-off, and on the trial his counsel stated to the court that he wished to show that the plaintiff had sent his check to the defendant for the difference between the amount

EVIDENCE—Continued.

due on the note and his indebtedness to the defendant, which proposed testimony is held properly rejected, the statement failing to show either payment or settlement, for which purpose it was alone admissible. *Tredway v. Antisdel*, 82.

7. In a suit by an indorser to recover from the maker the amount which he had been obliged to pay on a note, the defendant sought to introduce in evidence the testimony of the plaintiff taken in another suit, in which he testified to mortgaging his property to raise money to pay the note in question, which he deposited to the credit of the firm of which he and the defendant were members, and immediately gave the firm check to pay the note; the claim being that the testimony tended to show that the note was paid from partnership funds. No other testimony was offered in support of such contention. And it is held that the court would not have been justified in admitting the testimony, and permitting the jury to find from it that the note was so paid. *Id.*

8. An objection to a deed on the ground that it purports to convey 42 acres of the land, described by metes and bounds, being more than the grantor is shown to have owned at the time of its execution, is untenable, it being admitted that the grantor then owned 40 acres of the land. *Atwood v. Canrike*, 99.

9. Where in describing land reference is had to a highway as one of the boundaries, the presumption is that the description refers to the highway as it existed upon the ground at the time the deed was executed, and not to the line as shown by the record of its survey in the proper office. *Id.*

10. In such a case the record is admissible, but becomes immaterial in the absence of proof that the road had been opened or was in use on the recorded line at the time the deed was made, or proof that no such highway as is referred to in the deed was then open or in use. *Id.* 100.

11. It is proper for a surveyor who testifies to running out lines for the purpose of settling a disputed boundary to present a plat of his survey, which is admissible in evidence, and, if inaccurate, such fact may be shown by the opposite party, and the question of its correctness is for the jury. *Id.*

12. Adverse possession is evidenced by the manner of the

EVIDENCE—Continued.

holding of the occupant, and not by the opinion of the neighborhood. *Id.*

13. Where in a suit upon a bond given in an attachment suit in justice's court, to which the principal's name was signed by the attorney who commenced the suit, the principal denies its execution under oath, and the testimony tends to prove the agency of the attorney, and the ratification of his act in bringing the suit by the principal, the bond should be received in evidence, as also testimony showing the manner of its execution. *Hutchinson v. Smith*, 145.

14. "A party seeking to modify the operation of the instrument, and prove himself entitled, against the terms of his own deed, to an equity of redemption, is not only bound to make out that the transaction was, in truth and justice, nothing more than the giving of security, but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind." *Elheridge v. Wisner*, 166.

15. In this case it is held, from a careful reading of the record, that the complainant has *wholly* failed to establish an agreement between himself and defendant that the deed of March 6, 1878, was to be held or treated as a security, and that the evidence to the contrary is overwhelming. *Id.*

16. In a suit by the payee in a *judgment* note, commenced by declaration, to which a copy of the note is annexed, with a notice that it constitutes the plaintiff's sole cause of action, the execution of the note need not be proved unless denied under oath. *Conrad Seipp Brewing Co. v. McKiltrick*, 191.

17. The admission of "for value received" in a judgment note is *prima facie* sufficient to show that the promise contained in the note had an adequate consideration to support it. *Id.* 192.

18. Evidence of matters pertaining to the history of the case in which it is offered is held unobjectionable. *Cadwell v. Pray*, 266.

19. In this case it is held that there was some evidence tending to support the finding that the claimant was the contracting party with the garnishee defendant, instead of her husband, who acted solely as her agent, and that she was

EVIDENCE—Continued.

entitled to the money due on said contract. *Dietz v. Bignall*, 292.

20. A sworn answer is not conclusive, and, while treated as evidence, is subject to the same rules, as to weight, as any other evidence. *Newlove v. Callaghan*, 301.

21. In a suit to recover the amount secured by a Canadian mortgage, under which, in case of default, the mortgagee was authorized to sell the land at private sale without notice, a summons issued by the solicitors for the plaintiff in a former suit in Canada, and served upon the defendant, with a statement of the particulars of plaintiff's claim, from which it appeared that the action was brought to recover the same indebtedness, less a specified sum received on the sale of the land, is competent evidence tending to show such sale, and that the defendant is entitled to credit for the sum realized thereon. *Hamilton Provident & Loan Society v. Northwood*, 315.

22. In such a case the defendant is entitled to have the papers go to the jury as admissions by the plaintiff of such sale, and it becomes the duty of the plaintiff to prove that the admissions were made by mistake, or without authority on the part of the solicitors to make them, and that in fact no sale had been made. *Id.*

23. The fact of such non-sale cannot be established by showing two attempts to make a sale of the land when the witness was present, and the withdrawal of the land because of the inadequacy of the bids, and that, three months before the trial at which he testifies, he examined the books of the plaintiff, and found that there had been no sale made, such testimony being incompetent. *Id.*

24. Verifying an answer in chancery gives it no greater effect than if unsworn, where an answer under oath is waived in the bill. *Van Inwagen v. Van Inwagen*, 333.

25. In a suit involving the ownership of a colt, the mother of which the plaintiff testifies to having purchased, and to being the sole owner of the same, evidence of conversations between the vendor and third parties, not in plaintiff's presence, tending to show that the sale was not made to the plaintiff, is inadmissible. *Merritt v. Stebbins*, 342.

26. Possession under a warranty deed, executed by one in

EVIDENCE—Continued.

peaceable possession and claiming title at the time of its execution, is *prima facie* evidence of title in the grantee as against an intruder who shows no better title in himself. *Cook v. Bertram*, 356.

27. The record of the order for subpœna, order *pro confesso*, final decree and order of sale, and order confirming sale in a foreclosure suit, and copies of the mortgage and assignment, with evidence of the calendar entries, are competent evidence where the original files are lost, and sufficient to show jurisdiction and the regularity of the proceedings. *Id.*

28. A quitclaim deed conveys only the grantor's interest, and the grantee cannot change its terms by proof of a contemporaneous verbal agreement by which the grantor was to refund a proportionate share of the purchase price in case of the failure of the title to ten acres of the land then in dispute, and which afterwards failed. *Putnam v. Russell*, 389.

29. It is not competent for a witness to testify to the supposed motive which influenced the action of another. *McHugh v. Dowd Estate*, 412.

30. Where a trust is evidenced and defined by a written agreement, parol testimony regarding its terms should be excluded. *Collar v. Collar*, 507.

31. In a suit to recover for legal services rendered under an agreement made with the defendant's solicitor by her authority, as the solicitor testified, and which defendant denied giving, it is competent to introduce in evidence, as a part of the cross-examination of the solicitor, his agreement with the defendant, made the same day that he claimed to have received authority to employ the plaintiffs, to conduct to a successful issue, for a specified sum, the suits in which plaintiffs claimed to have rendered the services, as bearing upon the credibility of the witness. *Fraser v. Haggerty*, 521.

32. Parol testimony is admissible to show to whom a deed or mortgage ran, and, if material, in whose custody the instruments were placed. *Showman v. Lee*, 557.

33. Invoices of goods show their cost, rather than their value, and are not the *best* evidence of the market value of the goods. *Id.*

34. In this case it is held that the market value of a general stock of drugs is the cost of replacing it with a like stock

EVIDENCE—Continued.

at the time of its seizure, and not what it could be sold for as a whole to an occasional purchaser, who would buy only because he saw a large margin in the purchase. *Id.*

35. A witness who testifies that he has been in the drug business for a number of years, and is very familiar with a stock of drugs, which he assisted in inventorying at the time of their purchase, and is acquainted with the value of such goods, is competent to testify as to their market value. *Id.*

36. The right of the plaintiffs to give in evidence the statements and representations of the agents of the manufacturing company as to the kind, character, and condition of an engine ordered of the company, not varying or contradicting the description in the order, is sustained under the ruling in *Phelps v. Whitaker*, 37 Mich. 72. *Palmer v. Roath*, 602.

37. Testimony cannot be said to be undisputed, when inconsistent with some established fact in the case, or one regarding which testimony has been admitted. *Hagan v. Railroad Co.*, 615.

38. Where, in a suit against a railroad company to recover the value of buildings destroyed by fire communicated from its engine, it appears that the buildings were insured, and that the loss has been paid to the plaintiff, evidence of the amount paid is immaterial; the question being ruled by *Perrott v. Shearer*, 17 Mich. 48, 55. *Id.*

39. A city (township) treasurer may testify to the *fact* and time of making a return or statement of unpaid personal property taxes to the county treasurer in a suit for their collection. *City of Muskegon v. Lumber Co.*, 625.

See CRIMINAL LAW (9-11, 13-15, 17, 19); ESTATES OF DECEASED PERSONS (1); NEGLIGENCE (1-3, 14, 16).

EXECUTION.

1. Plaintiff sued defendant to recover the amount of a judgment rendered against him, as surety upon a guardian's bond, which he had paid to defendant, who was the attorney for the ward in prosecuting the suit, under a threatened levy of execution, as he claims, which judgment was afterwards reversed on appeal. The jury found by their verdict under the questions submitted that the defendant did not know of the principal's intention to appeal the suit when he went with the sheriff to collect the execution, nor when he after-

EXECUTION—Continued.

wards accounted to the ward for the avails of the judgment, and that he made no misrepresentations to the plaintiff at the time of such payment; and that the judgment in favor of the defendant is affirmed. *Kalmbach v. Foote*, 240.

2. The failure of an execution issued upon a judgment upon a guardian's bond to state that it is for the use of the ward, as provided by How. Stat. § 5998, cannot be urged by the defendant in the execution where no levy is made, and the money is voluntarily paid. *Id.*

EXECUTION OF TRUST.

All of the trustees must join in the execution of the trust in absence of authority for a less number to act. *Shaw v. Canfield*, 1.

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS.

FALSE IMPRISONMENT—See UNCONSTITUTIONAL ORDINANCE.

FALSE REPRESENTATIONS.

The doctrine is settled in this State that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the injured party being as serious as though it had proceeded from a *vicious* purpose, he would have a right of action for the damages caused thereby, either at law or in equity. *Ripley v. Case*, 261.

FINAL ORDER.

An order sustaining a demurrer to a declaration, and directing final judgment for the defendant unless the plaintiff file an amended declaration within 20 days, is not a final order until after the expiration of the time allowed for such amendment. *Clark v. North Muskegon*, 29

See APPEALABLE ORDER (2).

FINDINGS OF FACT.

Findings of fact cannot be disturbed by the appellate court upon the ground that the weight of the evidence is against them, or because that court would have arrived at a different conclusion in passing upon the testimony. It is sufficient if

FINDINGS OF FACT—Continued.

there is some testimony tending to establish the facts as found. *Dietz v. Bignall*, 292.

FIRE INSURANCE.

A manufacturing firm applied verbally to an insurance broker for insurance, who had a conversation with an attorney engaged in making collections for an insurance company, but who was not its agent or authorized to make contracts of insurance, about insuring the applicants' property. The attorney took a memorandum of the proposed risk in pencil, as he obtained it from the broker, and either gave it or showed it to the secretary and agent of the company at its office, after which he wrote to the broker, inclosing an application partially filled out, and which contained a blank space in which to state the day from which the applicants desired the policy to run. He signed the name of the secretary to this letter, in which it was stated that the application could not be completed or policy sent for want of knowledge of the applicants' names, and the broker was requested to complete the application, and return it, and the policy would be sent. The broker sent the application to the applicants, who filled it out, excepting as to the date from which the policy was to run, and it was returned to the company by the broker, and upon examination by the secretary was marked as rejected. Two or three days afterwards the property was destroyed by fire, and in a suit to recover the insurance it is held:

a—That the sending and retention of the application did not constitute a contract of insurance.

b—That the contention of the applicants that the letter containing the application was a proposition from the company to insure, which was accepted by the applicants by filling out and returning the application, is untenable.

c—That the applicants could not have been compelled to pay the premium until the delivery of the policy, and had not become members of the company. *Faughner v. Insurance Co.*, 536.

FIXTURES.

Where the parties to a mining lease have agreed to treat the engine, boiler, and their attachments put in by the lessee as

FIXTURES—Continued.

personal property, the manner of their annexation to the soil or to the buildings erected thereon becomes immaterial. *Lake Superior, etc., Co. v. McCann*, 106.

FOREIGN CORPORATION.

A person who is acting as agent for a foreign insurance company in receiving pay for assessments, and who delivers the receipts of the company therefor to the payors, which are sent to such person by the company to be so delivered, is an agent of the corporation upon whom service of process may be made under the statute. *Vorheis v. People's Mut. Ben. Society*, 31.

FOR VALUE RECEIVED.—See EVIDENCE (17).

FRAUD.

A denial of actual intent to defraud will not avoid the consequences of an act which is in effect a fraud. *Newlove v. Callaghan*, 301.

FRAUDULENT CONVEYANCES.

1. Parties who take security from insolvents, or from persons who are indebted to others, must act in good faith, and in such a manner as not unnecessarily to hinder, delay, or deceive other creditors; and taking a mortgage for an amount in excess of the debt or of the assumed liability is a badge of fraud, and is a fraud in law if the purpose is to protect the mortgagor's interest from other creditors. *Showman v. Lee*, 556.
2. The honesty of one of two mortgagees will not save the mortgage, if there was any fraud or wrong in the other. *Id.*

GUARDIAN AND WARD.

1. Where the probate court acquired jurisdiction to license the sale of real estate by a foreign guardian under How. Stat. § 6067 *et seq.*, it is not perceived how the validity of the sale can be attacked in collateral proceedings by defendants who do not represent the minors, and when no one having a right to represent them is complaining of such sale, or of the proceedings by which it was consummated. *Pfirrman v. Wattles*, 254.
2. Under How. Stat. § 6798, which authorizes a judge of pro-

GUARDIAN AND WARD—Continued.

bate, in the absence of a statute directing the manner of giving notice of proceedings in probate court, if notice is required by law or by him deemed necessary to be given, to order it to be given in such manner and for such length of time as he shall deem reasonable, a valid notice may be given by publication to non-resident heirs of an application for the appointment of a guardian for an alleged incompetent person. *Munger v. Probate Judge*, 363.

3. The object of notice to the heirs of an alleged incompetent person of an application for the appointment of a guardian is principally to protect such person in his rights; and while such heirs ought to have notice, because of their presumptive interest in the estate of the alleged incompetent, such notice to non-resident heirs is not absolutely necessary to the jurisdiction of the court, where a majority of those thus interested are residents of this State, and are duly notified of the proceedings. *Id.*

4. The language used in the cases of *In re Bassett*, 68 Mich. Mich. 348, and *In re Myers*, 73 Id. 401, which may seem to warrant the assumption that some kind of a notice must be given to all of the next of kin or presumptive heirs of such incompetent person in order to confer jurisdiction to make such appointment, must be considered in reference to the facts of those cases. *Id.*

5. The probate court will not be ousted of jurisdiction in proceedings for the appointment of a guardian for an incompetent person because of the failure to serve notice upon the guardian of two minor heirs, whose name and place of residence is not shown in the record, where one of said heirs is of age when the case is heard in the appellate court, and the guardian of the other appeared on the hearing in the probate court, and testified to the incompetency of the alleged incompetent, although not served with notice, which was served on both of the minors. *Id.*

6. The omission of the name of the person appointed guardian of an incompetent person from the decree is a mere clerical error, which the probate court can correct at any time. *Id.*

7. A statement in an order for the appointment of a guardian for an incompetent person, that it satisfactorily appears to the court that such person is mentally incompetent to have the charge and management of his property and person, and

GUARDIAN AND WARD—Continued.

that a guardian should be appointed for the reason that he is mentally incompetent to have the charge and management of his person and estate, is a sufficient adjudication of such facts. *Id.* 364.

HIGHWAYS.

1. Where the declaration in an action of trespass prosecuted under How. Stat. § 1371, for an encroachment upon a highway, describes the highway and the encroachment, which encroachment as described is not in said highway as described, to which declaration the defendant pleads the general issue, with a denial of any encroachment upon the highway as described in the declaration, the defect is fatal to the plaintiff's recovery. *Varden v. Ritchie*, 197.
2. Proceedings for discontinuing a highway are void unless it appears from the return of the commissioner that he viewed the premises, and determined the public necessity for such discontinuance. *Furman v. Furman*, 391.
3. It is no defense to a suit for encroaching upon a highway, claimed to have become such by use prior to the encroachment, that travel had not *then* been continuous over its entire length for the statutory period, if it appears that travel over the portion of the street encroached upon had been so continuous. *Village of Grandville v. Jenison*, 567.

HOMESTEAD.

A wife who abandons her husband and her home without legal cause—that is, not under circumstances that would entitle her to a divorce—does not carry with her her marital rights in the homestead. *Farwell Brick, etc., Co., v. McKenna*, 283.

HUSBAND AND WIFE.

1. A wife who abandons her husband and her home without legal cause—that is, not under circumstances that would entitle her to a divorce—does not carry with her her marital rights in the homestead. *Farwell Brick, etc., Co. v. McKenna*, 283.
2. Where real estate is purchased by and conveyed to a husband and wife jointly, in the absence of any showing to the contrary the husband will be presumed to have paid one-half of the purchase price. *Newlove v. Callaghan*, 297.
3. Where a husband supports his family, he is entitled to the

HUSBAND AND WIFE—Continued.

compensation for services rendered by himself and family (including his wife) in nursing and caring for a boarder, in the absence of an agreement to the contrary. *Barnes v. Moore Estate*, 585.

4. In such a case the wife cannot maintain a claim against the estate of the deceased boarder for such services without proof of the husband's consent and relinquishment, which cannot be shown by the commissioners' report on claims, wherein it appears that no claim has been filed by the husband for such services. *Id.*

INCOMPETENT PERSON—See GUARDIAN AND WARD (2–7).

INSURANCE—See FIRE INSURANCE; MUTUAL FIRE INSURANCE COMPANIES.

JOINT DEBTORS.

A son received $100 of the purchase price of a house and lot sold by his father, and the father delivered the balance of the money to his son's wife for safe-keeping, and, on their refusal to repay the money, sued them jointly to recover the same. And it is held that there is nothing in the record tending to show their *joint* liability. *O'Connor v. O'Connor*, 189.

JUDGMENT NOTE—See BILLS AND NOTES (3–6).

JURY.

1. How. Stat. §§ 7567, 7575, obviously intend—

a—That a jury shall be obtained from the whole body of the county.

b—That the names of those first placed in the boxes shall be exhausted before returning to the boxes the names of those previously drawn.

The first of these requirements is as important as the second, but it was held in *People v. Coffman*, 59 Mich. 1, that the failure of a township to return a list of jurors is not a good ground for challenge even in a criminal case. *Wise v. Lumber Co.*, 40.

2. Where in drawing a jury the names returned from a township are exhausted, the clerk should draw the jury for a second term during the same year from the remaining townships; but his failure so to do is not good ground for chal-

JURY—Continued.

lenge to the array, as the rights of litigants can be fully protected by challenging the twice-drawn jurors on the ground that they have served as jurors within the previous year. *Id.*

JUSTICES' COURTS.

After a mutual agreement for the adjournment of a case in justice's court to a specified day and hour, the plaintiffs' attorney obtained the consent of the attorneys for defendant by telephone to the extension of the time of adjournment for one day, which fact plaintiffs' attorney communicated to the justice before the expiration of the hour allowed for the appearance of a defendant, and in the afternoon of the same day a clerk of the defendant's attorneys, who had appeared with the defendant when the agreement for the adjournment was first made, appeared before the justice, and stated that the case was adjourned to the latter date; whereupon the justice changed his minutes of the adjournment accordingly. The same clerk appeared before the justice on the day and hour to which the case was first agreed to be adjourned for the purpose of adjourning it as per the telephonic agreement, and was informed that such adjournment had been made. The plaintiffs appeared pursuant to said adjournment, and the defendant did not appear, and judgment was rendered in favor of the plaintiffs, which the circuit judge reversed on special appeal, which latter judgment is reversed, and a trial ordered upon the general appeal, the Court holding:

a—That the justice acted upon the consent of both parties in adjourning the case to the latter date, and would have been justified in so doing had the consent been in writing.

b—That consent given individually by the respective parties to the justice, and where there is no dispute as to the fact of consent, is as efficacious to waive irregularity as if it were in writing.

c—The defendant's attorneys are not in a situation to question the authority of their clerk to consent to the latter adjournment. *Simon v. Sempliner*, 136.

See CERTIORARI.

LAND CONTRACT.

Under a land contract authorizing the vendor to declare the

LAND CONTRACT—Continued.

contract void and to take possession on failure of the vendee to perform the conditions, the vendor, upon the abandonment by the vendee of the contract and of the premises, has the choice of three remedies:

a—A bill for specific performance.

b—Suit to recover the purchase price.

c—Repossession of the premises, and a suit to recover damages for the breach of the contract. *Allen v. Mohn*, 328.

See DAMAGES (4); EJECTMENT (5); SPECIFIC PERFORMANCE.

LANDLORD AND TENANT—See MINING LEASE.

LIBEL AND SLANDER.

1. The publication of a statement that the party therein named, giving his street and number, has been arrested for theft, is libelous *per se*, and, if false, the person thus described is entitled to nominal damages, if no actual damages are proved. *Davis v. Marxhausen*, 281.
2. In such a case it is error to instruct the jury that, if from the evidence they believe another person of the same name was libeled, the plaintiff cannot recover; as under the evidence the article referred to the plaintiff, it describing him both by name and the number of the street where he resided. *Id.*

LIEN.

Act No. 216, Laws of 1885, amendatory of the mechanics' lien law, as a whole, is not repugnant to the Constitution, and section three of the act, providing for the vacating of such lien upon executing the bond therein described, is valid. *McHugh v. Gault*, 135.

LIEN OF ASSIGNEE OF SUBCONTRACTOR—See CONTRACT (1).

LIQUOR TRAFFIC.

1. It was evidently the intention of the Legislature, by the provisions of section 14 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 7), to make the proprietor or keeper of a saloon liable for the acts of his clerk or agent in permitting any student in attendance at any public or private institution of learning in this State, or any minor, to play at cards, etc., in said saloon; but whether such proprietor or keeper can be made liable in a *criminal* prosecution for such

LIQUOR TRAFFIC—Continued.

act committed in his absence is not decided. *People v. Hughes*, 180.

2. The omission of the words "clerk or agent" from section 15 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 8), which makes it unlawful for any person to allow any minor to visit or remain in any room where liquors are sold or kept for sale, unless accompanied by his or her father or other legal guardian, raises the presumption that the Legislature did not intend to make the proprietor of a saloon liable *criminally* for the act of his clerk or agent in violation of said section, committed in his absence, and without his knowledge or consent. *Id.*

3. Section 24 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*e* 7), making persons engaged in liquor selling, whether as owner or as clerk, agent, servant, or employé, equally liable as principals for any violation of the provisions of the act, and making any principal liable for the acts of his clerk, servant, agent, or employé amounting to such violation, was intended to enlarge the liability of the proprietors of saloons so as to extend it to the acts of servants, clerks, agents, or employés in *civil*, but not in *criminal*, actions. *Id.*

4. An objection that the complaint and warrant against a liquor-dealer for engaging in the business without paying the required tax do not negative his being a druggist, etc., cannot be raised upon the trial, where the information contains such negative averment, but should be made by a motion to quash the information before pleading. *People v. Drennan*, 445.

5. The burden of proof is upon the people to show beyond a reasonable doubt that the respondent was engaged in the business, and had not paid his tax, and a refusal so to instruct the jury is error. *Id.*

LOGS AND LOGGING—See DAMAGES (1, 2).

MANDAMUS—See MUNICIPAL CORPORATIONS (11–13); TAXES (4).

MECHANICS' LIEN—See LIEN.

MINING LEASE.

Complainant, as lessor of a mining lease, filed a bill to enjoin the removal by the defendants of an engine and boiler and

MINING LEASE—Continued.

their attachments, purchased by them at a sale under an execution issued on a judgment against the assignee of the lessee, from the engine and boiler house, in which the property was set in masonry and firmly attached to the land, claiming that it became a fixture by such annexation, and passed to complainant on the termination of the lease. The lease provided for the surrender of the leased premises at the expiration of the term or other termination of the lease, "with all the stopes, supports, shafts, and other improvements and erections that may be thereon, engines, boilers, machinery, tools, implements, and other movable personal chattels excepted," and gave the lessor a lien upon all ores that should be mined, and all improvements and fixtures, and upon all machinery, implements, and personal chattels of the lessee that should be on the premises, as security for rent, etc., which lien might be enforced against such property in like manner as liens conferred by chattel mortgage. And in affirming a decree dismissing complainant's bill the Court hold:

a—The parties having agreed to treat the engine, boiler, and their attachments as personal property, as shown by the lease, the manner of their annexation to the soil or to the buildings errected thereon becomes immaterial.

b—No steps having been taken to reduce the property to possession prior to the levy, the lien, being unrecorded, was worthless as against the defendants; the case being ruled by *Booth v. Oliver*, 67 Mich. 664. *Lake Superior, etc., Co., v. McCann*, 106.

MISTAKE—See EQUITY.

MORTGAGE.

1. A father purchased 240 acres of land, and at his request it was stated in the deed, following the description, that the land was deeded to the father in trust for an infant son, naming him. The father made the down payment, and secured the balance of the purchase price by a mortgage on the land, after which he removed valuable timber, and at the time of the foreclosure of the mortgage was living on the land, of which he had had possession since the purchase. And in affirming an ordinary foreclosure decree, except as modified as to order of sale, the Court hold that no tech-

MORTGAGE—Continued.

nicalities can be invoked in favor of the minor, who has no interest in the land except as a gift from his father, which must be subordinated to complainant's lien, which certainly attaches to the premises as a vendor's lien for the unpaid purchase money. *Strong v. Ehle*, 42.

2. "A party seeking to modify the operation of the instrument, and prove himself entitled, against the terms of his own deed, to an equity of redemption, is not only bound to make out that the transaction was, in truth and justice, nothing more than the giving of security, but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind." *Etheridge v. Wisner*, 166.

3. How. Stat. § 6750, which provides that, if any person making the highest bid at a chancery sale shall neglect or refuse to make immediate payment, the officer making the sale may immediately or upon an adjourned day proceed to resell the real estate, affords ample protection against straw bidding, and is construed as follows:

a—The statute does not contemplate that each bid, whether the highest or not, shall be accompanied with the money, nor is it unusual to allow time within which to produce the amount of the bid.

b—A party attending such a sale cannot know that he will be the successful bidder, and should not be expected to be ready with the money at the time of making his bid, the amount of which cannot be ascertained until the bidding is concluded.

c—The statute does not contemplate that the officer making the sale, by an unreasonable demand, shall prevent competition, or a sale of the property in parcels and to the best advantage. *Converse v. Clay*, 375.

4. A resale of mortgaged premises is held to have been properly ordered where a parcel was struck off to the wife of the mortgagor upon his bid made in her behalf, and upon immediate payment being demanded by the commissioner the bidder announced that he did not have the money with him, whereupon the sale was adjourned for half an hour, at the expiration of which time the bidder announced that he did not have the money, but would produce it by the time the deed was made out, and the commissioner offered another parcel, upon which the mortgagor made a like bid,

MORTGAGE—Continued.

which was refused unless accompanied by the money, which was not produced, and the entire mortgaged premises were sold in one parcel to a bidder who had been present during the entire sale, after which the mortgagor caused a tender to be made to the commissioner of the amount of his bids, which was refused. *Id.*

5. The failure to allege that the children of a mortgagor, who are joined as defendants in a suit to foreclose the mortgage under an allegation that they claim rights as subsequent purchasers, incumbrancers, or otherwise, are his heirs at law, will be remedied by amendment in the appellate court. *Gray v. Franks*, 382.
6. A mortgage was executed by the parties in the full belief that it covered, in addition to three small lots worth only a small portion of the sum secured, adjacent hotel property, which constituted the chief value of the supposed security, and of which the mortgagor was, and for many years had been, in the actual possession, claiming title, which failed, and he secured a quitclaim deed of the premises, perfecting his supposed title; which subsequently acquired title is held to have inured to the benefit of the mortgagee under his mortgage. *Id.* 383.
7. Parties who take security from insolvents, or from persons who are indebted to others, must act in good faith, and in such a manner as not unnecessarily to hinder, delay, or deceive other creditors, and taking a mortgage for an amount in excess of the debt or of the assumed liability is a badge of fraud, and is a fraud in law if the purpose is to protect the mortgagor's interest from other creditors. *Showman v. Lee*, 556.
8. The honesty of one of two mortgagees will not save the mortgage, if there was any fraud or wrong in the other. *Id.*

MUNICIPAL CORPORATIONS.

1. The statute gives to villages control of sidewalks, of their grade, width, material, and manner of construction. Owners of lots may be required to construct, maintain, and repair sidewalks in the streets adjacent to such lots; and, if an owner fails to construct or repair, the village may do

MUNICIPAL CORPORATIONS—Continued.

so at his expense, and assess the amount of such expense upon his lot. *Lombar v. Village of East Tawas*, 14.

2. Land-owners may construct sidewalks in the absence of any direction by the village, subject, however, to such regulations regarding the same as may and should be prescribed by the village; and when so constructed the village must use reasonable care to prevent them from becoming dangerous, and cannot escape liability on the ground that it did not build the walk or direct its construction. *Id.* 15.

3. The duty imposed upon cities and villages to keep their sidewalks in repair and reasonably safe for travel is an imperative one, and involves the duty of providing all that is necessary to that end, including not only the necessary ordinances regulating their construction, but a "full complement of officers and employés," as well as the necessary funds for that purpose. *Id.*

4. On the incorporation of a village, and on assuming control over the corporate territory, it becomes its duty, in view of the statute, to take prompt measures for its observance, to supply the necessary employés, to remedy any existing defects by reason of any disconnected system, to supply the necessary regulations, and to raise the necessary funds; and after having had 15 months within which to do this, and having failed, it cannot be allowed to plead its own negligence to defeat a recovery by a plaintiff who has been injured by reason of a defective walk. *Id.*

5. The public interests do not demand that, in order to afford prompt relief to one person requiring the use of a city ambulance, other persons may be run down and injured by the fast and reckless rate of speed of the ambulance in going to the assistance of such person. *People v. Little*, 125.

6. An ambulance is within the terms and scope of a city ordinance prohibiting the driving of any horse, carriage, sleigh, or other vehicle through any street or avenue in the city at a faster rate than six miles per hour, and the effect of such an ordinance is not modified by a subsequent ordinance giving to every ambulance or other vehicle used for the transportation of sick and wounded persons and animals the right of way over all other vehicles upon every public street. *Id.*

MUNICIPAL CORPORATIONS—Continued.

7. The presentation to the council of a city incorporated under chapter 80, How. Stat., of a verified claim for money paid under protest for taxes assessed against the claimant, as provided in How. Stat. § 2528, is a condition precedent to bringing suit for the recovery of the money so paid. *Crittenden v. City of Mt. Clemens*, 220.

8. An ordinance which makes any owner, agent, lessee, or manager of any building, boat, locomotive, or other structure in the city, who shall cause or permit dense smoke, or smoke containing soot or other substance, to be emitted from such structure, or from any other place, and which shall damage the property or injure the health of any person, or shall especially annoy the public, liable to fine or imprisonment, or both in the discretion of the court, on the complaint of any citizen or officer of the city, in case of especial annoyance, is not invalid on the ground that it exempts dwelling-houses and steam-boats from its operation, and thus makes an unreasonable discrimination between classes of persons residing in the same municipality; and the common council of the city of Detroit had power under section 42, chap. 7, Act No. 326, Local Acts of 1883, to pass such an ordinance. *People v. Lewis*, 273.

9. A bond voluntarily executed by a village treasurer upon the order of the village council, which it had the power to make, is not a nullity because the council failed to pass and have recorded formal resolutions requiring and approving the bond, nor can the principal or sureties urge such neglect as a defense in a suit upon the bond. *Village of Evart v. Postal*, 325.

10. A city is not liable for the negligence of a contractor and his men while performing work in which the city is in no way interested, the relation of master and servant not existing between the parties. *Harvey v. City of Hillsdale*, 330.

11. A writ of *mandamus* to compel the board of public works of the city of Detroit to vacate its approval of a plat of land adjoining those owned by relator is denied, because—

a—Neither the makers of the plat, nor the purchasers of lots as established by the plat, are before the Court.

b—After its approval and adoption of a plat, the respondent has no power to vacate it, and can only change it by a res-

MUNICIPAL CORPORATIONS—Continued.

olution of the common council, passed by a three-fourths vote of its members.

c—Relator has no such interest as would entitle him to the writ. *Campau v. Detroit Board of Public Works*, 372.

12. Where a land-owner has complied with the statute in making a plat, and the streets thereon correspond with the general plan of the other streets of the city of Detroit, as made and adopted by the board of public works, *mandamus* will lie to compel the approval of the plat by said board. *Id.*

13. The board of public works of the city of Detroit has no power to direct where a land-owner shall establish an alley when platting land; and the fact that the city assumes the burden of cleaning and caring for such alley affords no legal excuse to the board of public works for declining to approve the plat. *Id.*

14. The provision of the charter of Bay City that the office of alderman shall become vacant on the removal of the incumbent from his ward applies to a removal effected by a change of the boundaries of the wards by the Legislature as well as to a voluntary removal of the alderman. *Ross v. Barber*, 380.

15. An alderman, who is *ex officio* a member of the common council, cannot, by resigning his office prior to the expiration of the term for which he was elected, render himself eligible to receive the appointment of chief of police, whose salary is paid from the city treasury, where the charter of the city provides that no alderman shall be elected or appointed to any other office in the city during the term for which he was elected, and that no member of the common council shall, during the like period, be appointed to or be competent to hold any office of which the emoluments are paid from the city treasury. *Ellis v. Lennon*, 468.

16. Where a city, acting through its authorized agents, lets a contract for a public improvement for a grossly extravagant price, or permits fictitious items to be included in the sum to collect which an assessment is levied, a fraud is perpetrated upon the property-owners, which may call upon a court of equity to interfere and vacate the assessments, or reduce the amount which the complainants should pay. *Dixon v. City of Detroit*, 516.

17. This Court has never interfered with the discretion of the

MUNICIPAL CORPORATIONS—Continued.

authorized agents of municipalities in the exercise of the powers granted by the Legislature, except when there was a want of jurisdiction in the proceedings. *Id.*

18. It is no defense to the enforcement of an assessment for a public improvement that the work and material were not such as the contract called for. *Id.*

19. An ordinance of the city of Detroit providing that all bread, manufactured by the bakers of the city for sale, shall be made into loaves of one, two, and four pounds, and no other, avoirdupois weight, and forbidding them to sell or expose for sale any bread that shall be deficient in weight, is sustained as within the provision of the charter empowering the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." *People v. Wagner*, 594.

MUTUAL FIRE INSURANCE COMPANIES.

1. The petition filed by the Commissioner of Insurance under section 15 of Act No. 82, Laws of 1873, as the foundation of proceedings to wind up the business of a mutual fire insurance company, need not be verified. *Wardle v. Cummings*, 395.

2. Proceedings for the appointment of a receiver for a mutual fire insurance company, and for assessments to pay its outstanding debts and obligations, are not rendered invalid by a failure to give *personal* notice to the members of the company of the application for such appointment and of the assessments, they having assented to the provisions of the act under which the company is organized, which does not provide for such personal service. *Id.*

3. The title to Act No. 82, Laws of 1873, entitled "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," embraces within its scope the organization of mutual fire insurance companies to insure property in cities and villages *exclusively*. *Id.*

4. The intent of Act No. 38, Laws of 1877, amendatory of Act No. 82, Laws of 1873, was to authorize the organization of other mutual fire insurance companies than those provided for in the original act, for the insurance of property in cities and villages exclusively. *Id.* 396.

NEGLIGENCE.

1. In a negligence case for injuries sustained by reason of a defective sidewalk, it is proper for the plaintiff to produce and identify the defective plank, and to show that it was taken from the walk at the place where the plaintiff claimed to have been injured. *Lombar v. Village of East Tawas*, 14.
2. Plaintiff in this class of cases should be required to show the nature of the defect at the time of and before the accident, and when this is done, and liability is disclosed, it is unnecessary to go further, and if not done it is error to predicate the existence of an actionable defect upon the fact of repairs subsequent to the accident. But where there is abundant proof of the existence of the defect prior to the accident, the admission of testimony showing such repairs is error without prejudice. *Id.*
3. Evidence that others had stepped into the same hole in the walk before the time of plaintiff's injury is competent as bearing upon the existence and character of the defect complained of. *Id.*
4. Passengers upon street-cars are entitled to sufficient time in which to get off, and the duty of the carrier is not discharged until the passenger is free from the car. *Finn v. Railway Co.*, 74.
5. In this case the plaintiff was a brakeman upon a logging railroad train, and was injured by the falling of a log from the center car of the train, which threw the car from the track. He testified that the falling of the log was the cause of the accident, and that he did not know whether the log was released because one of the stakes loosed or not. And it is held that if such was the case, and if the stake came out because carelessly put in, that carelessness was directly chargeable to plaintiff, who placed most of the logs, or to one of his fellow-trainmen; and that if the log was thrown off by the jolting of the car over the rough road, as claimed, the jolting was, under the testimony, aggravated by the high rate of speed of the train, contrary to the rules of the defendant, of which plaintiff had notice, which negligence was that of plaintiff's fellow-servants, and chargeable to him; and that a verdict was properly directed for the defendant. *Conger v. Railroad Co.*, 76.
6. A train standing upon a highway, with an engine attached,

NEGLIGENCE—Continued.

is of itself notice of danger; and, in the absence of a special assurance on the part of the railroad company to one desiring to cross between two cars, over the couplings, that he may safely do so, so far as any movement of the train is concerned, he assumes all risks incident to such an attempt. *Bird v. Railroad Co.*, 79.

7. A passenger who voluntarily jumps on or from off a moving street-car does so at his own peril, and that construction of the car cannot be said to be defective which is only unsafe in view of such conduct. *Werbowlsky v. Railway Co.*, 236.

8. It is the duty of street-car companies to allow their patrons an opportunity to get on and off the cars, and the starting of the car while the passenger is so doing is clearly negligent; but such act does not make defective a construction of the car which, under other circumstances, is reasonably safe. *Id.*

9. Negligence will not be presumed from the bare fact of the accident. There must have existed before its occurrence some suggestion of danger in order to make the defendant liable as for negligence. *Id.*

10. The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence. *Id.*

11. In this case it is held that the court erred in submitting to the jury, under the evidence, the question of defendant's negligence in adopting the style of car in question, and in having the apertures therein, described in the opinion, into one of which the plaintiff claimed his foot was forced by the sudden movement of the car before he had an opportunity to alight, whereby he was thrown from the car, and dragged some distance before he could extricate his foot. *Id.*

12. A city is not liable for the negligence of a contractor and his men while performing work in which the city is in no way interested, the relation of master and servant not existing between the parties. *Harvey v. City of Hillsdale*, 330.

13. This Court has frequently held that knowledge of the existence of a defect is not conclusive evidence of the plaintiff's negligence. *Argus v. Village of Sturgis*, 344.

14. It is not necessary, in a suit to recover damages for injuries received by reason of defects in a sidewalk, for the plaintiff to show that the municipality whose duty it was to keep

NEGLIGENCE—Continued.

the walk in repair either constructed it or ordered its construction. *Id.*

15. Plaintiff was injured by defendant's engine at a highway crossing, and recovered a judgment, which is reversed, Chief Justice CHAMPLIN holding that the case should have been submitted to the jury, under all of the facts and circumstances, for them to say, under all of the testimony in the case, whether or not the defendant was negligent, and whether plaintiff materially contributed to the injury by his own negligence. GRANT, J., concurred in the result reached by the Chief Justice. MORSE, J., filed an opinion, concurred in by MCGRATH, J., concurring in a reversal, and holding that if the defendant ran the engine at a dangerous rate of speed without giving the statutory signals before reaching the crossing, and without a sufficient headlight, it was guilty of such gross negligence as entitles the plaintiff to recover; and that, if defendant was not so negligent, plaintiff could not recover, because of his want of care in failing to look and listen, and in not having his team in such a state, as to driving, that he could stop them at once, if necessary. *Thomas v. Railway Co.*, 496.

16. In a negligence case for injuries sustained by reason of the breaking of a bridge, statements of the overseer of highways at the time of the accident, made some 18 months thereafter, that "he had not regarded the bridge as safe," are inadmissible, under the rule laid down in *Stebbins v. Township of Keene*, 55 Mich. 552. *O'Neil v. Township of Deerfield*, 610.

17. While the age of a bridge may suggest probable infirmity, and impose the duty of inspection upon a township, and its condition may be such as to charge the township with knowledge, yet it cannot be charged with knowledge or notice in the absence of anything suggestive of weakness, and in spite of the lack of knowledge of or notice to either its agents or the general public of such weakness, while at the same time positive acts on the part of the township are shown indicating proper care and careful inspection. *Id.*

18. How. Stat. § 3378, making railroad companies liable for all loss or damage to property by fire originating from its engines, unless proof is made to the satisfaction of the jury that the machinery, smoke-stack, or fire-boxes of such engines were in good order and properly managed, contem-

NEGLIGENCE—Continued.

plates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances and in the management and operation of trains; and it fixes the standard of condition and management, but does not attempt to establish a standard of kind or quality of appliances. *Hagan v. Railroad Co.*, 615.

19. Before a railroad company can be made liable by reason of its failure to adopt other appliances, they must be shown to have been well and popularly known, and their efficiency must have been demonstrated by actual use. *Id.*

20. It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of 40 miles an hour for this purpose is not in itself negligence. *Id.* 616.

21. In this case the following instructions should have been given to the jury, and their refusal was error:

"*a*—You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely, but the business cannot be done at all unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays, and it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather.

"*b*—The engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their train as nearly on time as possible; and in case of a way freight, whose length of stops at the stations is necessarily irregular, they are not to be considered negligent by reason of using natural and reasonable means to make time." *Id.*

NOTARY PUBLIC.

1. The failure of a notary public appointed by the Governor under Act No. 117, Laws of 1887, before whom a statement of lien purports to have been sworn to, and which contains no caption showing in what county or state it was made, to designate in the jurat the county from which he is appointed, will not invalidate the statement of lien. *Sullivan v. Hall*, 7.

2. The verification of a statement of lien before a notary pub-

NOTARY PUBLIC—Continued.

lic who is also an attorney at law is not affected by the after appearance of the notary as attorney for the claimant in a suit in justice's court to enforce the lien. *Id.*

NOTICE.

Notice by publication is authorized by statute in certain cases, but when given without such authority it is of no value. *Munger v. Probate Judge*, 363.

NUISANCE.

From the testimony returned in this record, it is evident that the court very properly found that the manner in which the defendants conducted their business, producing smoke and soot, was a nuisance in *fact*, and the defendants were properly convicted. It was the *manner* in which they conducted their business of which complaint was made, and it is shown that it was so conducted as to be injurious to the property of the people in that vicinity, as well as a great annoyance. *People v. Lewis*, 273.

OUTSTANDING TITLE—See EJECTMENT (4).

PARENT AND CHILD—See DEED (1, 4); MORTGAGE (1).

PAROL TRUST—See ACTION (2).

PARTNERSHIP.

1. While an agreement to share in the profits of a venture will not constitute a partnership as between the parties if contrary to their intention that there should be no such relation, it is strong evidence of the intent, and sufficient, where there is a community of interests and capital, to establish such relation, unless rebutted by satisfactory evidence. *Corey v. Cadwell*, 570.
2. An agreement by which one of the parties is to furnish money for the purchase of a certain tract of timbered land and of certain standing timber, and the other is to manufacture the timber into lumber and shingles, and, after the sale of the land and manufactured products, the proceeds remaining, after payment of the expense of manufacture and sale and the repayment of the money so advanced with interest, are to be equally divided between the parties, constitutes them copartners in the special venture. *Id.*
3. The question involved in this case is the liability of one of

PARTNERSHIP—Continued.

three partners upon an accommodation indorsement of a note in the firm name, made by another partner with the knowledge of the third. It was shown that other like indorsements had been made for the same maker, and that he had made and also indorsed paper for the accommodation of the firm, for the purpose of showing the knowledge or assent of the third partner to the indorsement in question. The jury, in answer to special questions, found a want of such knowledge or assent on his part, and answered that they were unable to find whether he authorized his partners to sign the firm name as accommodation indorsers to promissory notes for third parties, although instructed that they might infer such fact from the facts shown, and rendered a general verdict for the plaintiff.

Mr. Justice LONG filed an opinion, concurred in by MORSE, J., holding:

a—As a general rule, if a party takes negotiable paper indorsed by one partner in the firm name, knowing that it was indorsed merely as a surety, he does so at his peril, and cannot charge the members of the firm who did not assent to the transaction.

b—The possession of the note by the maker after such indorsement is sufficient to charge a bank which discounts it with notice that it is an accommodation indorsement, and the payment of the avails to the maker is evidence that the transaction was purely in his interest.

c—In such a case a legal presumption arises against the assent of all of the partners to such use of the firm name, and the burden of proving it is cast upon the bank, which assent may be shown by the circumstances of the case.

d—In this case, the jury having been directed that they could infer such consent from the facts shown, and not having done so, there is nothing upon which the general verdict can rest, and it amounts to a mistrial.

e—It is error for the court to direct the jury that their answers to special questions must agree with their general verdict.

CHAMPLIN, C. J., and MCGRATH, J., concurred in a reversal, on the ground that the appellant, William H. Barnes, is not liable under the facts proven, and that the judgment should have been in his favor. *Mechanics' Bank v. Barnes*, 632.

PAYMENT—See CHATTEL MORTGAGE (2).

PHARMACY ACT.

1. A physician cannot claim to have any vested right to compound or sell drugs and medicines to one not his patient, contrary to Act No. 134, Laws of 1885, entitled "An act to regulate the practice of pharmacy in the State of Michigan." *People v. Moorman*, 433.
2. Sections 6 and 7 of said act do not authorize the pharmacy board to fix the license fees arbitrarily, but the same must be uniform, and apply to all persons of each of the designated classes alike. *Id.*
3. Whether the provisions of Act No. 196, Laws of 1887, limiting the exemption of retail dealers of patent and proprietary medicines from the operation of the pharmacy act, as contained in the original act, to dealers of three years' standing or more, is constitutional, *query;* but, if not, the remainder of the act would not be invalidated, and the law of 1885 would remain in force. *Id.*

PHYSICIAN—See PHARMACY ACT.

PLEADING.

1. Where the declaration in an action of trespass prosecuted under How. Stat. § 1371, for an encroachment upon a highway, describes the highway and the encroachment, which encroachment as described is not in said highway as described, to which declaration the defendant pleads the general issue, with a denial of any encroachment upon the highway as described in the declaration, the defect is fatal to the plaintiff's recovery. *Varden v. Ritchie*, 197.
2. Declarations in justice's courts are to be liberally construed, and, though informal, when they fairly apprise the defendant of the claim made against him, may be held sufficient. *Costello v. Ten Eyck*, 348.
3. A declaration in a plea of trespass on the case, claiming $100 damages, and, while informal, evidently intended by the pleader to claim damages for defendant's wrongful act in permitting plaintiff's horse to be turned into a pasture, with knowledge of the existence of disease among the other horses therein, is held a declaration in case, and not *assumpsit*. *Id.* 349.

See AMENDMENT; SET-OFF.

PRACTICE IN CIRCUIT COURT.

1. On the re-examination of a witness upon whose credibility, and the weight which the jury should give to his testimony, the whole defense to the action depended, the attorney for plaintiff objected to the testimony as not re-examination, and added, "I know such things have occurred as a witness going out and getting posted, and then coming back and testifying. I do not suppose any member of this bar would do that." And it is held that such remarks could have had no other than a prejudicial effect upon the jury, in leading them to believe, or in suggesting to them, that the witness might have been tampered with between the time of his examination in chief and his re-examination, and may have led the jury to discard the testimony of the witness, and to give weight and credence to that of the plaintiff, which was directly contradicted by that of the witness, thus influencing the result of their verdict. *Sullivan v. Deiter*, 404.

2. Where a witness has been cross-examined by one of the attorneys for the opposing party, and excused, and is recalled, and examined on a matter not elicited on his former examination, the refusal of the court to permit the other attorney to cross-examine him upon such new matter is in accordance with the letter and spirit of Circuit Court Rule No. 63, which limits the right of examination and cross-examination to one counsel on each side. *Cook v. Insurance Co.*, 554.

3. Before counsel can properly comment upon the absence of witnesses, there must be some facts or circumstances shown from which the jury would have the right to infer that their testimony would be important and material, and it is the duty of the court to prevent such comment, in the absence of such showing. *Id.*

4. Where, on the second trial of a case, it was shown that two witnesses, who were sworn on the first trial in behalf of the defendant, were in the city where the trial was being had, but it did not appear upon what points they were examined, and the plaintiff's counsel was permitted to comment to the jury upon their absence, the error thus committed, being the only one in the case, is held not to be of sufficient importance to justify a reversal, as the appellant could easily have shown, if such was the fact, that the witnesses were unimportant and immaterial, when the testimony was

PRACTICE IN CIRCUIT COURT—Continued.
offered showing their presence in the city, and that they were sworn on the former trial. *Id.*

PRACTICE IN SUPREME COURT.

1. Where the record does not purport to contain all or substantially all of the testimony taken on the trial, the Court will presume that the evidence introduced was sufficient to sustain the judgment. *Conger v. Railroad Co.*, 76.
2. A judgment should not be reversed for allowing leading questions regarding matters not material to plaintiff's case, and which work no injury to the defendant. *Tredway v. Antisdel*, 82.
3. An exception in a criminal case, based on an objection to testimony for which no reasons are given, and the ground of which is not reasonably apparent, will not be considered. *People v. Moore*, 134.
4. An exception to the refusal of the court to give a portion of defendant's requests, "that the court thereupon refused to charge the jury as requested by the defendant, to which refusal defendant excepted," is too indefinite to base an assignment of error upon. *Edgell v. Francis*, 232.

PRINCIPAL AND AGENT.

1. A person who is acting as agent for a foreign insurance company in receiving pay for assessments, and who delivers the receipts of the company therefor to the payors, which are sent to such person by the company to be so delivered, is an agent of the corporation upon whom service of process may be made under the statute. *Vorheis v. People's Mut. Ben. Society*, 31.
2. Where in a suit upon a bond given in an attachment suit in justice's court, to which the principal's name was signed by the attorney who commenced the suit, the principal denies its execution under oath, and the testimony tends to prove the agency of the attorney, and the ratification of his act in bringing the suit by the principal, the bond should be received in evidence, as also testimony showing the manner of its execution. *Hutchinson v. Smith*, 145.
3. Where, after the payment of a claim under an accident insurance policy, the insured is prosecuted criminally for obtaining the money under false pretenses upon the complaint of the State agent of the company, and upon his dis-

PRINCIPAL AND AGENT—Continued.

charge sues the company for false imprisonment, and on the trial fails to show that the agent acted as such in making the complaint, or his authority so to act, or the ratification of his act by the company, and the agent testifies that he acted individually in making the complaint, there is no room for inference from the mere fact of agency that the agent represented the company in instituting the criminal proceeding, the burden being upon the plaintiff to show that fact. *Travis v. Insurance Co.*, 288.

4. Where, upon examining an engine ordered through an agent of a manufacturing company, and shipped to the firm of which he was a member, and from whose statements the proposed purchasers were alone informed as to the identity of the engine examined with the one ordered, the agent informs them that if they do not wish to take the engine they need not do so, they claiming that it did not fulfill the requirements of the order and of the representations made in addition to the order, they have the right to assume that the agent has authority to make such statement. *Palmer v. Roath*, 602.

See TRUSTEES (2).

PROCESS.

A person who is acting as agent for a foreign insurance company in receiving pay for assessments, and who delivers the receipts of the company therefor to the payors, which are sent to such person by the company to be so delivered, is an agent of the corporation upon whom service of process may be made under the statute. *Vorheis v. People's Mut. Ben. Society*, 31.

PUBLICATION—See GUARDIAN AND WARD (2); NOTICE.

QUESTION FOR JURY.

Where a plaintiff testifies that a street-car did actually move while he was attempting to alight, and that such movement threw him to the ground, causing the injury for which suit is brought, the question of the probability or possibility of the movement of the car is for the jury, and not for the court. *Finn v. Railway Co.*, 74.

QUITCLAIM DEED.

A quitclaim deed conveys only the grantor's interest, and the grantee cannot change its terms by proof of a contemporaneous verbal agreement by which the grantor was to refund a proportionate share of the purchase price in case of the failure of the title to ten acres of land then in dispute, and which afterwards failed. *Putnam v. Russell*, 389.

QUO WARRANTO.

The incumbent of a municipal office created by statute, who is elected or appointed in the manner therein prescribed, for a definite term fixed by the statute, and who exercises functions derived therefrom in addition to those derived from the by-laws of the municipality, must be deemed a public officer within the meaning of How. Stat. § 8635, authorizing proceedings by *quo warranto* against any person who shall usurp, intrude into, or unlawfully hold or exercise any public office, etc. *Ellis v. Lennon*, 468.

RAILROAD COMPANIES.

Neither the mortgagee of a railroad, nor the purchaser under a foreclosure of the mortgage, acquires any lien upon or title to a side track built by the company upon adjoining land, under an agreement that it is to become the property of the land-owner. *Spoon v. Railway Co.*, 309.

See NEGLIGENCE (4–8, 10, 11, 15, 18–21).

REFORMATION OF DEED—See EQUITY.

REPLEVIN.

An assignment by a defendant in a replevin suit of all of his right, title, and interest in the suit conveys his right, title, and interest in the goods taken under the writ. *Cadwell v. Pray*, 266.

RETURN—See CERTIORARI.

SALE.

1. Plaintiffs sold defendant a quantity of cedar posts, and agreed to deliver them free on board the cars at the place of shipment, as wanted. The posts were to be subject to inspection by a person appointed by the defendant at the time and place of loading, whose inspection was to be final, and were to be paid for upon such delivery and acceptance

SALE—Continued.

as fast as each five cars were loaded, at an agreed price per post. The defendant agreed to commence shipping the posts on or about May 1, and to tally up and pay for and receive on the ground where they lay any posts remaining unshipped on July 15 following, on or before which date the plaintiffs were to deliver the posts. Defendant failed to inspect or take any of the posts, and plaintiffs sold them for less than the contract price, and brought this action to recover the difference. The jury rendered a verdict in their favor, and also found specially that the defendant did not go to the place of shipment on July 15 to receive, tally, and pay for the posts, nor did plaintiffs have any one there to deliver and receive payment for the posts, which were not there in a condition to be counted by the defendant. The trial court set aside the general verdict, and directed the entry of a verdict of no cause of action, which latter verdict is set aside, and the court is directed to enter judgment on the original verdict; the Court holding that the agreement of the defendant as to shipment, inspection, and payment was a condition precedent to her agreement to tally up and pay for and receive the unshipped posts on July 15, and having failed to make any shipments by that date, on which the contract was to be fully completed, defendant was bound to tally up all the posts where they lay, and receive and pay for them on July 15, the evidence showing that it was through her fault that the posts were not then in a condition to be counted, and that defendant's agent did not go to the place of shipment on that day intending to receive, pay for, and tally the posts. *Madden v. Lemke*, 139.

2. One of two partners sold his interest in the business, and the vendee sued him to recover expenses incurred in enforcing his rights under the sale against the other partner, claiming that the vendor agreed *verbally* to pay such expenses. On the trial he testified to several conversations tending to prove the agreement, and the defendant's evidence tended to show that at the time the bill of sale was executed it was agreed that $100 should be deducted from the purchase price in full for such anticipated expenses. And it is held that the fact that the bargain was not binding upon either party until the execution of the bill of sale did not affect the verbal agreement, which became valid upon such execution,

SALE—Continued.

and would have become so if not mentioned at that time; that the sole question for the jury was whether such an agreement was made, and that it was of no consequence whether it was made before or at the time of the execution of the bill of sale; and that the jury might consider all of the conversations, including the last one, in determining that question. *Brittain v. Kelly*, 278.

3. The mere exhibition of testimonials by a dealer on the sale of goods cannot be considered as a warranty that they shall conform to such testimonials, unless there is something said which expressly or impliedly guarantees that the goods shall equal in quality or performance the praise of the testimonials. *Richey v. Daemicke*, 647.

4. A guaranty attached to a bill of goods, insufficient in itself to constitute an agreement, will not be considered the entire contract between the parties, when the contrary is conclusively shown. *Id.*

SCALE—See EVIDENCE (3, 4).

SET-OFF.

1. A purchaser of standing timber who had agreed to pay all taxes and assessments imposed upon the land from and after October 7, 1886, until the timber was removed, or until the expiration of the time limited for its removal, assigned the contract, and contracted to cut and deliver the timber to the assignees, who paid the taxes assessed on the land for 1886 and 1887, those for 1887 being paid before they became a lien upon the land, and before the removal of all of the timber or the expiration of the time limited for its removal; which payments are held a proper set-off in a suit by the assignor against the assignees upon the logging contract. *Sovereign v. Mosher*, 37.

2. In a suit to recover an agent's percentage upon orders for coal it appeared that plaintiff had asked and received money from defendants from time to time on the contract, which was paid without examining the account, and upon the assumption that the orders would be filled, which payments exceeded the commissions on the coal actually delivered. And it is held that the payments were a proper subject of

SET-OFF—Continued.

set-off, having been made under a mistake of fact, and that the defendants were entitled to judgment for the excess. *Lafferty v. Lorimer*, 591.

SIDEWALKS—See MUNICIPAL CORPORATIONS (1–4); NEGLIGENCE (1–3).

SPECIFIC PERFORMANCE.

1. The omission from a memorandum agreement for the sale of real estate, otherwise sufficient, of a provision for possession, is such a common incident of such a sale that it will not invalidate the agreement. *Munro v. Edwards*, 91.
2. Where parties to an agreement have not expressly stipulated that performance at a particular time shall be an essential part of the agreement, and where from the nature and circumstances of the contract and the situation of the parties there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced, a court of equity, so far as performance at the time is concerned, will aid the party in default. *Id.*
3. Courts have refused to enforce contracts which are unequal, where the consideration is inadequate, where the provisions are unreasonable, and where there are indications of overreaching or unfairness. *Id.* 92.
4. An agreement, signed by the parties, by which one agrees to sell to the other a parcel of land fronting on Warren avenue, and being on the south-east corner of Crawford street, and having a frontage of 90 feet on Warren avenue, and running to the alley in the rear, and to furnish an abstract and a good and sufficient warranty deed, all for the sum of $5,150, payable $100 down, and $300 as soon as the abstract is completed, or within 14 days from the date of the contract, and $1,500 by the assumption by the vendee of a mortgage for that sum on the premises, which he agrees to assume, and the balance within six years, interest to be at six per cent. per annum, payable semi-annually, but containing no *express* agreement on the part of the vendee to pay or to buy, contains all of the essential elements of a contract, and its specific performance will be enforced in equity. *Id.*
5. Delay, or even great delay, to assert or to take steps to

SPECIFIC PERFORMANCE—Continued.

enforce a vendee's rights under a contract for the conveyance of land, is not always a reason for courts of equity to refuse specific performance of the agreement. Each case must depend upon its own circumstances, and the court must be influenced and controlled by those equitable principles which, while doing justice to one, will not do injustice to others. *Cook v. Stafford*, 163.

6. On May 9, 1853, complainant's father executed a bond conditioned for the conveyance to the complainant of a parcel of land therein described in consideration of his labor from that date until November 1, 1853, which labor was performed. Both parties exercised acts of ownership over the land, and the father paid the taxes from 1844 to the time of his death, in 1889, and cut large quantities of fire-wood from the premises, which he sold and received the avails of such sales. In 1857 he purchased a large farm, on which was a hotel, and secured the payment of the purchase price by executing a mortgage upon the land described in the bond and upon other land, with the knowledge of the complainant, who moved into the hotel, and assisted in paying off the mortgage, and received a deed from the father of a part of the farm so purchased. He never requested his father to deed him the land described in the bond, and after waiting for 36 years filed a bill to enforce the specific performance of the agreement, when his father and all other witnesses having any knowledge of the facts were dead; which delay is held fatal, and the bill is dismissed. *Id.*

7. Equity will not decree the performance of a contract into which a party has been led by misrepresentation; and parties asking for such relief must exhibit a contract free from any charge or suspicion of unfairness or fraud. *Hicks v. Turck*, 214.

8. Where a party to a land contract has delayed performance on his part until there has been such a change in the value of the property as to render the contract unequal if made when its performance is sought to be enforced, equity will refuse relief. *Van Buren v. Stocking*, 246.

9. The mere assertion of a claim, unaccompanied by any act to give it effect, cannot avail to keep alive a right which would otherwise be precluded. *Id.*

10. After waiting 35 years, a bill was filed for the specific per-

SPECIFIC PERFORMANCE—Continued.

formance of a contract by which the defendant had sold to complainant an undivided half interest in about 25 acres of land, which was to be platted, and the lots sold, and one-half of the proceeds credited upon the purchase until a specified amount was paid, when defendant was to deed to complainant an undivided one-half interest in all land remaining unsold. The complainant was to look after the property and make sales. The contract was destroyed, and parol evidence was given of its contents. The defendant testified that it was to be fully performed within six years from date, while the complainant testified that no time was fixed for such performance. At the time the bill was filed a large city had grown up, and the land was a part of its territory, and a portion of it had been sold, and buildings had been erected, and the property had become valuable. And in affirming a decree dismissing the bill, the Court find that the contract ended after the lapse of six years from its date, during which time complainant had not made sufficient sales to meet his payments due thereon, and that since that time the contract has been treated by the defendant as having no force. *Id.*

See LAND CONTRACT.

STATEMENT BY RESPONDENT—See CRIMINAL LAW (10).

STATUTES CONSTRUED.

1. The appearance of an attorney in a suit to enforce a log lien will not invalidate the prior verification before him as a notary public of the statement of such lien, How. Stat. § 637, prohibiting notaries who are also attorneys from administering oaths in causes in which they may be professionally engaged, not applying to such a case. *Sullivan v. Hall*, 7.
2. How. Stat. §§ 7567, 7575, obviously intend—

a—That a jury shall be obtained from the whole body of the county.

b—That the names of those first placed in the boxes shall be exhausted before returning to the boxes the names of those previously drawn.

The first of these requirements is as important as the second, but it was held in *People v. Coffman*, 59 Mich. 1, that the failure of a township to return a list of jurors is not a

STATUTES CONSTRUED—Continued.

good ground for challenge even in a criminal case. *Wise v. Lumber Co.*, 40.

3. Where in drawing a jury the names returned from a township are exhausted, the clerk should draw the jury for a second term during the same year from the remaining townships. *Id.*

4. It was evidently the intention of the Legislature, by the provisions of section 14 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 7), to make the proprietor or keeper of a saloon liable for the acts of his clerk or agent in permitting any student in attendance at any public or private institution of learning in this State, or any minor, to play at cards, etc., in said saloon; but whether such proprietor or keeper can be made liable in a *criminal* prosecution for such act committed in his absence is not decided. *People v. Hughes*, 180.

5. The omission of the words "clerk or agent" from section 15 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*d* 8), which makes it unlawful for any person to allow any minor to visit or remain in any room where liquors are sold or kept for sale, unless accompanied by his or her father or other legal guardian, raises the presumption that the Legislature did not intend to make the proprietor of a saloon liable *criminally* for the act of his clerk or agent in violation of said section, committed in his absence, and without his knowledge or consent. *Id.*

6. Section 24 of Act No. 313, Laws of 1887 (3 How. Stat. § 2283*e* 7), making persons engaged in liquor selling, whether as owner or as clerk, agent, servant, or employé, equally liable as principals for any violation of the provisions of the act, and making any principal liable for the acts of his clerk, servant, agent, or employé amounting to such violation, was intended to enlarge the liability of the proprietors of saloons so as to extend it to the acts of servants, clerks, agents, or employés in *civil*, but not in *criminal*, actions. *Id.*

7. The presentation to the council of a city incorporated under chapter 80, How. Stat., of a verified claim for money paid under protest for taxes assessed against the claimant, as provided in How. Stat. § 2528, is a condition precedent to bring-

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ing suit for the recovery of the money so paid. *Crittenden v. City of Mt. Clemens*, 220.

8. The provisions of the tax law of 1889 as to the time, manner, and place of assessment of personal property are mandatory; but it cannot be said that a property-owner can avoid assessment at the place of his actual residence by assuming and claiming a residence in another place for the very purpose of escaping taxation. *Id.*

9. Under How. Stat. § 6798, which authorizes a judge of probate, in the absence of a statute directing the manner of giving notice of proceedings in probate court, if notice is required by law or by him deemed necessary to be given, to order it to be given in such manner and for such length of time as he shall deem reasonable, a valid notice may be given by publication to non-resident heirs of an application for the appointment of a guardian for an alleged incompetent person. *Munger v. Probate Judge*, 363.

10. How. Stat. § 6750, which provides that, if any person making the highest bid at a chancery sale shall neglect or refuse to make immediate payment, the officer making the sale may immediately or upon an adjourned day proceed to resell the real estate, affords ample protection against straw bidding, and is construed as follows:

a—The statute does not contemplate that each bid, whether the highest or not, shall be accompanied with the money, nor is it unusual to allow time within which to produce the amount of the bid.

b—A party attending such a sale cannot know that he will be the successful bidder, and should not be expected to be ready with the money at the time of making his bid, the amount of which cannot be ascertained until the bidding is concluded.

c—The statute does not contemplate that the officer making the sale, by an unreasonable demand, shall prevent competition, or a sale of the property in parcels and to the best advantage. *Converse v. Clay*, 375.

11. An appeal is authorized by the tax law of 1889 from a decree for delinquent taxes, and *mandamus* will not lie to compel the circuit judge to review such a decree, and allow the land-owner to answer, he alleging in his petition that

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the tax is illegal, and that he was not served with subpœna, but not that the petition and tax-list were not published. *Wiley v. Circuit Judge*, 381.

12. The petition filed by the Commissioner of Insurance under section 15 of Act No. 82, Laws of 1873, as the foundation of proceedings to wind up the business of a mutual fire insurance company, need not be verified. *Wardle v. Cummings*, 395.

13. The intent of Act No. 38, Laws of 1877, amendatory of Act No. 82, Laws of 1873, was to authorize the organization of other mutual fire insurance companies than those provided for in the original act, for the insurance of property in cities and villages exclusively. *Id.* 396.

14 A physician cannot claim to have any vested right to compound or sell drugs and medicines to one not his patient, contrary to Act No. 134, Laws of 1885, entitled "An act to regulate the practice of pharmacy in the State of Michigan." *People v. Moorman*, 433.

15. Sections 6 and 7 of said act do not authorize the pharmacy board to fix the license fees arbitrarily, but the same must be uniform, and apply to all persons of each of the designated classes alike. *Id.* 434.

16. Whether the provisions of Act No. 196, Laws of 1887, limiting the exemption of retail dealers of patent and proprietary medicines from the operation of the pharmacy act, as contained in the original act, to dealers of three years' standing or more, is constitutional, *query;* but, if not, the remainder of the act would not be invalidated, and the law of 1885 would remain in force. *Id.*

17. The appellate court will regard an amendment to a declaration as having been made after judgment which might have been made before on motion, under the authority of How. Stat. § 7636. *Smith v. Pinney*, 484.

18. How. Stat. § 3378, making railroad companies liable for all loss or damage to property by fire originating from its engines, unless proof is made to the satisfaction of the jury that the machinery, smoke-stack, or fire-boxes of such engines were in good order and properly managed, contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances and in the management and

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operation of trains; and it fixes the standard of condition and management, but does not attempt to establish a standard of kind or quality of appliances. *Hagan v. Railroad Co.*, 615.

STATUTE OF FRAUDS.

A parol agreement for the purchase and disposition of land, while executory, is void under the statute of frauds. *Collar v. Collar*, 507.

STREET RAILWAY COMPANIES—See NEGLIGENCE (4, 7, 8).

SUBJECT-MATTER OF SUIT—See ABATEMENT.

SUNDAY CONTRACT.

How. Stat. § 2015, avoids Sunday contracts, which cannot be ratified upon a subsequent week-day. *Costello v. Ten Eyck*, 348.

See BAILMENT.

SUPPORT OF PARENTS—See DEED (4).

TAXES.

1. The presentation to the council of a city incorporated under chapter 80, How. Stat., of a verified claim for money paid under protest for taxes assessed against the claimant, as provided in How. Stat. § 2528, is a condition precedent to bringing suit for the recovery of the money so paid. *Crittenden v. City of Mt. Clemens*, 220.
2. The provisions of the tax law of 1889 as to the time, manner, and place of assessment of personal property are mandatory; but it cannot be said that a property-owner can avoid assessment at the place of his actual residence by assuming and claiming a residence in another place for the very purpose of escaping taxation. *Id.*
3. The fact that a county clerk certified bank-stock to a supervisor who had no right to assess it will not invalidate its assessment to the owner where legally assessable, although not certified to the supervisor making such assessment. *Id.*
4. An appeal is authorized by the tax law of 1889 from a decree for delinquent taxes, and *mandamus* will not lie to compel the circuit judge to review such a decree, and allow the land-owner to answer, he alleging in his petition that the tax is illegal, and that he was not served with subpœna,

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but not that the petition and tax list were not published. *Wiley v. Circuit Judge*, 381.

5. The court fail to see how the failure of a township treasurer to set forth in his return of unpaid taxes on personal property, pursuant to section 44 of Act No. 153, Laws of 1885, "the amount of all moneys collected by him on account of taxes," and to state "that the amount of moneys collected by him upon such tax roll is truly stated," can prejudice the tax-payer, or, under section 89 of the same act, render the return insufficient to authorize the county treasurer to issue a warrant for the collection of such tax. *Boyce v. Stevens*, 549.

6. Replevin will not lie for property seized by a tax collector, under a tax roll and warrant fair upon their face, to satisfy a *legal* tax, even though the defendant claims also to hold the property by virtue of a county treasurer's warrant for the collection of a *valid* personal property tax, the issuance of which was not authorized by a proper return by the township treasurer; and in such a case the defendant, on waiving a return of the property, may take a judgment for the *entire* tax. *Id.*

7. In a suit by a township treasurer for the collection of a personal property tax, brought under section 35 of the tax law of 1885, the production and identification of the tax roll, and of the assessment and levy of such a tax thereon against the defendant, makes a *prima facie* case for the plaintiff. *City of Muskegon v. Lumber Co.*, 625.

8. Where a city treasurer bases his right to bring a suit for the collection of a personal property tax upon section 47 of the tax law of 1885, and the supplemental warrant issued to him thereunder by the county treasurer, he must show that he made a verified return or statement of the unpaid personal property taxes remaining upon his roll, pursuant to section 44 of the act; and the statutory presumptions arising under section 89 of said tax law do not apply to such a case. *Id.* 626.

9. Where a city treasurer institutes a suit for the collection of personal property taxes in the name of the municipality without authority, no costs can be awarded against it upon a reversal of the judgment. *Id.*

TRANSFER OF CAUSE.

Where, on an application to a circuit court commissioner for the transfer of a cause on account of the disqualification of the circuit judge, a counter-application is presented asking for such removal, and both are within the statute, it is within the discretion of the commissioner to select the place of removal; and the convenience of the parties and the residence of witnesses are proper matters for his consideration. *Bolles v. Loan & Trust Co.*, 229.

TRUSTEES.

1. Where several persons are appointed to execute a power or trust, and no authority is given to a less number that the whole to act, all must join in the execution. *Shaw v. Canfield*, 1.
2. Permission by two of three trustees to their co-trustee to extend the term of a lease and collect the rents cannot be construed as giving him authority to purchase a house on the leased premises. *Id.*
3. An action for money had and received will lie against a grantee for money received on the sale of land conveyed to him under a parol trust to make such sale, and divide the proceeds among the grantors. *Collar v. Collar*, 507.

UNCONSTITUTIONAL ORDINANCE.

A justice of the peace, having jurisdiction of the person and subject-matter of the suit, is not liable to respond in damages because, in the exercise of his honest judgment, he holds an unconstitutional ordinance constitutional, and enforces it by the arrest and imprisonment of one who violates its provisions, nor is the officer who executes the warrant of arrest, if fair upon its face, so liable. *Brooks v. Mangan*, 576.

See CONSTITUTIONAL LAW (3).

VACANCY.

The provision of the charter of Bay City that the office of alderman shall become vacant on the removal of the incumbent from his ward applies to a removal effected by a change of the boundaries of the wards by the Legislature as well as to a voluntary removal of the alderman. *Ross v. Barber*, 380.

VENDOR'S LIEN.

A father purchased 240 acres of land, and at his request it was stated in the deed, following the description, that the land was deeded to the father in trust for an infant son, naming him. The father made the down payment, and secured the balance of the purchase price by a mortgage on the land, after which he removed valuable timber, and at the time of the foreclosure of the mortgage was living on the land, of which he had had possession since the purchase. And in affirming an ordinary foreclosure decree, except as modified as to order of sale, the Court hold that no technicalities can be invoked in favor of the minor, who has no interest in the land except as a gift from his father, which must be subordinated to complainant's lien, which certainly attaches to the premises as a vendor's lien for the unpaid purchase money. *Strong v. Ehle*, 42.

VERIFICATION.

The appearance of an attorney at law who, as notary public, had sworn a claimant to a statement of lien, as attorney for the claimant in a suit in justice's court to enforce said lien, will not affect such verification. *Sullivan v. Hall*, 7.

VOLUNTARY ASSOCIATIONS.

1. The *main* question in this case is whether, under the general laws governing the Ancient Order of Foresters, the trustees for the subsidiary high court are authorized to maintain an action for money claimed to be in an ex-treasurer's hands, without showing his refusal to pay over the same on presentation to him of an order therefor pursuant to the laws of the society; which question is decided in the negative, the only evidence of a refusal to pay pursuant to *any* authority being his refusal to make such payment to the secretary of the subsidiary high court, who demanded such payment pursuant to a resolution of the executive council, but presented no order as required by the laws of the society, and the evidence failing to show that the subsidiary high court authorized the bringing of such suit. *Smith v. Pinney*, 484.
2. No member or number of members of an unincorporated society can maintain a suit for its benefit to enforce a contract made in its name or for its benefit, or for property

VOLUNTARY ASSOCIATIONS—Continued.

belonging to the society, unless there is some warrant or authority for such action on their part in the organization of the society, and the terms and conditions of the agreement by which its members are united. *Id.* 485.

WARRANTY—See DAMAGES (3); SALE (3, 4).

WATERS AND WATER-COURSES.

A land-owner has no right, under any circumstances, to transfer his wet and untillable land to his neighbor by the digging of an artificial ditch, and carrying the water at once upon his neighbor's land, so that it will not overflow or percolate his own soil. *Yerex v. Eineder*, 24.

WILL.

1. A will by which the testator, after providing for the payment of his debts, bequeaths the residue of his estate to his wife, "and after her death, or sooner, if she chooses to, to be divided among his children or their heirs, share and share alike," conveys a life-estate to the widow. *Cousino v. Cousino*, 323.
2. An action brought by foreign executors before the will is probated in this State is made good by subsequent probate before hearing. *Gray v. Franks*, 383.
3. The statute providing for the probate of foreign wills does not require any bond on the part of the executor. *Id.*
4. Courts should not seek out technicalities, or arrive at forced or far-fetched conclusions, in order to destroy a will, because of any idea that the testator has done his next of kin injustice, or conveyed his property away from his relatives, and given it to those having no claim upon his bounty. *Stebbins v. Stebbins*, 474.
5. The testator, if of sound mind and not unduly influenced, has a right to dispose of his property as he sees fit; and it is the duty of courts to ascertain his intention from the will construed as a whole, and to harmonize all of its provisions, if possible, to that intent. *Id.*
6. While a legacy may not be a debt of the testator during his life-time, and while, in the strict sense, there is a difference in the definitions of debts and legacies against his estate after his death, yet both are charges upon the estate, which may be enforced and collected; and, in the use of

WILL—Continued.

terms by a layman in drafting his will, the legacies which he has provided for therein may well appear to him as debts against his estate, and be so defined by him in after portions of the will. *Id.* 475.

7. A testator directed the payment of his debts and funeral expenses out of his "means," which might be in the hands of a designated person, specifying certain notes and other choses in action, and a mortgage, given upon the house and three lots of land on which his brother then lived, to secure a loan of $1,500. The will then provided that the brother and his wife were to hold and enjoy *all of said property* during their natural lives, and that after their decease it should be sold, and the avails divided between certain missionary boards. And it is held that the term "*all* of said property" referred to the $1,500 mortgage, and that the evident intent of the testator was that the mortgagors should have the use and enjoyment of the entire mortgaged premises during their life-time, without being harassed by the mortgage. *Id.*
8. The probate court has jurisdiction to direct the payment of a specific legacy if such payment is withheld, and the construction placed upon the will in the exercise of such jurisdiction is *res judicata*, unless an appeal is taken. *Byrne v. Hume*, 546.
9. A bequest to the father and mother of the testator of a legacy, to be paid out of the testator's life insurance as soon as collected, is held a general legacy, payable out of the general assets of the estate, if the insurance is not collected. *Id.*

WITNESS—See CHARGE TO JURY (2, 3).

WRIT OF ERROR.

1. An order sustaining a demurrer to a declaration, and directing final judgment for the defendant unless the plaintiff file an amended declaration within 20 days, is not a final order until after the expiration of the time allowed for such amendment. *Clark v. North Muskegon*, 29.
2. Proceedings for the appointment of an administrator cannot be reviewed on writ of error. *Woolley v. Crane*, 360.

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[1] See Statutes Construed.

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