Appeal from circuit court, Wayne county, in chancery; Henry N. Brevoort, Judge.

Suit by Luther S. Trowbridge and others against the city of Detroit and Charles K. Trombly, receiver of taxes. Decree for complainants. Defendants appeal. Reversed.

T. T. Leete, Jr., for appellants. Henry M. Cheever, for appellees.

McGRATH, C. J. This is a bill to restrain defendants from selling certain lands upon assessments made in a street-opening proceeding. It is insisted that the proceedings are invalid.

1. Because in violation of section 14 of article 14 of the constitution, which provides that "every law which imposes, continues or revives a tax, shall distinctively state the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." Section 15 of Act No. 124 of the Laws of 1883, under which the proceedings were conducted, after providing for an assessment upon the owners or occupants of the taxable real estate in the district fixed by the council, for the benefits ascertained, in proportion to the advantage acquired, further provides that the assessment shall be made, and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when the street is graded. The act fixes both tax and object. It provides for the ascertainment of the amount of damage, for the determination of the amount to be assessed upon the particular locality deemed to be benefited, for fixing the district deemed to be benefited, and not only that the amount so determined shall be assessed upon the district so fixed, but how it shall be assessed. It then refers to the charter of the municipality for the machinery to be employed in making the assessment and levying and collecting the taxes, and for the forms to be observed in such proceedings.

2. Because the proceedings are taken under the general law of 1883, and not under Local Act No. 281 of the Laws of 1883. Section 24 of Act No. 124 expressly provides that any city incorporated under any other act may proceed under its own charter, or under the provisions of this act. In City of Detroit v. Daly, 68 Mich. 503, 37 N. W. 11, this option was expressly referred to, and the method of assessing benefits under Act No. 124 commended. See, also, City of Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986.

3. That the council changed the assessment district, after it had been once fixed, by including other property. We have no doubt of the power of the council to reconsider a resolution fixing an assessment district, and enlarge the district by subsequent action. Indeed, it would be strange if the council, with additional light upon the subject, should be concluded by the first resolution. The decree below will be reversed, and the bill dismissed, with costs of both courts to defendant. The other justices concurred.

HORTON et al. v. WILLIAMS.

(Supreme Court of Michigan. March 27, 1894.)

MUNICIPAL CORPORATIONS — ALLEYS—VACATION—RIGHT OF ABUTTING OWNERS TO COMPENSATION —MOTIVE FOR VACATING—LEGALITY.

1. How. Ann. St. §§ 2622, 2623, provide that a city council may alter or vacate any alley whenever deemed necessary; and if, in so doing, it shall be necessary to take private property, it may be taken in the manner provided for taking private property for public use. *Held*, that the council cannot vacate an alley without first compensating abutting property owners who are damaged thereby.

2. The vacation of an alley by the council in consideration of a division with the city of the property after the erection of a building thereon by the owner of the fee, is illegal and void.

Appeal from circuit court, Ingham county, in chancery; Rollin H. Person, Judge.

Action by James P. Horton and others against Henry M. Williams to enjoin the erection of a building on an alley in the city of Mason. From a judgment for defendant, plaintiffs appeal. Reversed.

Arthur D. Prosser, for appellants. Cahill & Ostrander, for appellee.

McGRATH, C. J. Complainants, who are owners of property abutting upon an alley in the city of Mason, file this bill to enjoin defendant from erecting a building in one of the main outlets of said alley. Complainants

own lots Nos. 1, 2, 3, 4, 8, and 9. The alley between A and B streets is 33 feet wide. The alley running from Ash to Maple streets is 8 feet wide. The block was platted in 1838, by one Noble. Since that time said alley has been used as a way to and from

B street. The 8-foot alley, beginning at the alley in question, and running south to Ash street, is a private alley, and is impassable, by reason of a platform and stairway at the rear of the store occupied by Howard & Son; and the 8-foot alley running from the alley in question north to Maple street is a private alley, and at times impassable, by reason of various articles placed therein for purposes of convenience by occupants of stores adjoining the same. If the east 66 feet of said alley is occupied with a building, as proposed by defendant, all means of ingress and egress through that part of said alley to the main business street of said city, heretofore used by complainants, will be entirely cut off, and complainants claim that their said property will thereby be depreciated in value. In 1886, Noble conveyed to one Barnes certain other blocks and lots in this same subdivision. The deed contained a general clause conveying all other lands in the subdivision "not heretofore conveyed" by Noble. In April, 1892, defendant procured from Barnes a deed covering the lands in the alley. Defendant also obtained from the owner of the lot adjoining the vacated strip on the south a deed of all interest in the alley. In May, 1892, defendant made a proposition to the common council of the city of Mason that, if said council would vacate the east 66 feet of said alley, he would construct a brick building therein, and devote the use of the south 14 feet of the lower story and a part of the upper story of said building to the use of said council by lease for 99 years, or to convey to said city said portion of said building by quitclaim deed. On May 9, 1892, the common council adopted the following resolution: "Resolved by the common council of the city of Mason, that it is advisable to vacate, discontinue, and abolish the east sixty-six feet of the alley running between lots five (5) and ten (10), block thirteen, in the city of Mason, according to the original recorded plat thereof, and that said common council will meet on Monday evening, June 13th, at the council room, to hear all objections that may be urged against said vacating, discontinuing, and abolishing said sixty-six feet of said alley. All objections to be in writing, and filed with the city clerk." A meeting to consider any objections that should be made was held, and at such meeting 8 of the 9 owners and 23 others appeared, and filed a written protest against such vacation. On June 13, 1892, defendant entered into an agreement with the city, which recites that, in consideration of the vacation of the east 66 feet of the alley, Williams agrees that he will carry out the proposition made by him as aforesaid. Afterwards, on June 20, 1892, the council adopted the following resolution: "Be it resolved by the common council of the city of Mason, that the east sixty-six feet of the alley running between lots 5 and 10, of block 13, of the city of Mason, be, and the same is hereby, vacated, discontinued, and abolished, and that said vacating, discontinuing, and abolishing of said east 66 feet of said alley is a public improvement." It is admitted that the east 66 feet of said alley is worth, for business purposes, at least $2,500. The sections of the statute[1] under which the council is supposed to have acted are as follows: "Sec. 2622. The council shall have authority to lay out, open, widen, extend, straighten, alter, close, vacate or abolish any highway, street or alley in the city, whenever they shall deem the same a public improvement, and if in so doing, it shall be necessary to take or use private property, the same may be taken in the manner in this act provided for taking private property for public use. Sec. 2623. When the council shall deem it advisable to vacate, discontinue or abolish any street, alley or public ground, or any part thereof, they shall by resolution so declare, and in the same resolution shall appoint a time not less than four weeks thereafter when they will meet and hear objections thereto."

An alley is not meant primarily as a substitute for a street, but only as a local accommodation to a limited neighborhood, and the public has no general right of way through it. Paul v. Detroit, 32 Mich. 108; Beecher v. People, 38 Mich. 289; Bagley v. People, 43 Mich. 355, 5 N. W. 415. Hence a claim made by a member of that limited neighborhood is not open to the objection that his injury is of a like character to that which any member of the community is subjected, differing only in degree. The cases of Phillips v. Commissioners, 35 Mich. 15; Goss v. Commissioners, 63 Mich. 608, 30 N. W. 197; and Kimball v. Homan, 74 Mich. 700, 42 N. W. 167, recognize the rights of persons the access to whose property may be disturbed by vacation proceedings. In the last case cited it is said: "We have always regarded a person as having property adjoining a discontinued way when, although the body of his land does not touch it, there is no way of access reasonably open to him except by some passage opening into it, when the intermediate passage may be properly regarded as a continuation of his possession." It is well settled that when the owner of a parcel of land plats the same into lots, laying out streets and alleys thereon, dedicating the same to public use, and recording said plat, then conveys by reference to said plat, the grantee acquires by such conveyance not only the title to the lot conveyed, but the right to the use of the ways dedicated for the purposes of ingress and egress, and the beneficial use and enjoyment of the lot conveyed. In re Lewis St., 2 Wend. 472; Livingston v. Mayor, etc., 8 Wend. 85; Haynes v. Thomas, 7 Ind. 38; Rhea v. Forsyth, 37 Pa. St. 503; Clements v. Village of West Troy, 16 Barb. 251. Property does not consist merely in the right to the soil, but in the right, as well,

[1] 1 How. Ann. St.

to its beneficial use and enjoyment. Booming Co. v. Jarvis, 30 Mich. 320. In Kimball v. Homan, supra. Mr. Justice Campbell says: "Each plat stands by itself, and in vacating any portion of it the persons concerned are always regarded as those owning property in the plat itself." It can hardly be said that the easement acquired by such a conveyance is a mere right of way in the street frontage only. What is acquired is a right of ingress and egress, and such access as the plat and dedication provides a right of way in the street upon which the lot abuts. It is not a license merely, but an easement appurtenant to and running with the land. It does not arise alone from the necessities of the grantee, and lie by implication, but rests in express grant, evidenced by the conveyance referring to the plat. When a right of way has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easements belonging to it, whether mentioned in the deed or not, although not necessary to the enjoyment of the estate by the grantee. 2 Washb. Real Prop. § 29; Kent v. Waite, 10 Pick. 138; Webster v. Stevens, 5 Duer, 553. In Haynes v. Thomas, supra, the building had been erected 500 feet from the plaintiff's lot, under a vacation by act of the legislature, but it was held that the right to use the street was as much property as the lot itself, and the legislature had as little power to take away the one as the other. In Re Lewis St., supra, the court say a covenant may well be implied that the purchaser shall have an easement or right of way in the street to the full extent of its dimensions. Complainants have an interest in the land embraced in this alley, and the taking thereof can only be effected by a proper regard for the constitutional provision respecting the taking of private property.

There is another and fatal objection to the proceedings taken by the common council. It shows upon its face that the inducement for the council's action was the division of the property attempted to be acquired by the vacation between the defendant and the city. The council was set in motion by the defendant, whose apparent motive was to procure a valuable frontage for his own use, and in order to secure it he proposed to the council to divide the land acquired. It was held in Shue v. Commissioners, 41 Mich. 638, 2 N. W. 808, that every road must be opened or closed upon its own merits. "It is easy to see," says the court, "how great mischief and wrong might be done by uniting several different schemes. Combinations of separate interests are not allowed." The affidavits of the five aldermen who voted for the resolution of vacation appear in this record, and, while they depose that the alley was unsightly, they also say that the city would thereby acquire a valuable property interest in the way of a city hall and engine house, without expense to the city. The same motive might suggest the vacation of any street. The advantage which the public derives from the discontinuance of a way must arise from the vacation itself, rather than from the use to which the property is put, or from the fact that the city, through a deal with the individual specially interested, is to have an interest in the property acquired by such vacation. A city cannot barter away streets and alleys, nor can it do indirectly, by invoking its power of vacating ways, what it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must, at least upon the face of the record, be free from affirmative evidence that such discretion was invoked for individual gain, and its exercise influenced by an offer to divide the property acquired. The decree below is therefore reversed, and a decree entered here for complainants, with costs of both courts.

LONG, MONTGOMERY, and HOOKER, JJ., concurred with McGRATH, C. J. GRANT, J., concurred in the result.

see transcription on next page

IRONWOOD WATERWORKS CO. et al. v. TREBILCOCK, Mayor, et al.

GEAREY et al. v. SAME.

(Supreme Court of Michigan. March 27, 1894.)

CITIES—LIMIT OF INDEBTEDNESS — BUYING MORTGAGED PROPERTY.

A city empowered to buy from the waterworks company operating therein all its pipe laid in streets, stock, and franchises, and provide for payment by bonding, except that its total debt for borrowed money shall not exceed 5 per cent. of the assessed valuation of property therein, cannot buy the company's equity of redemption from a bonded debt which, as a debt of the city, would be excessive.

Certiorari to circuit court, Gogebic county; Norman W. Haire, Judge.

Mandamus on relation of the Ironwood Waterworks Company and another to William Trebilcock, mayor, and others, and by C. M. Gearey and others against same defendants. Writs granted. Respondents bring certiorari. Reversed.

Charles E. Miller, for petitioners in certiorari. Thomas Kissane and Charles M. Humphrey (Lewis L. Delafield and F. A. Baker, of counsel), for respondents.

GRANT, J. The city of Ironwood, Mich., and the unincorporated village of Hurley, in the state of Wisconsin, are situated on the opposite sides of the Montreal river, the boundary line between Michigan and Wisconsin. The Ironwood Waterworks Company is a private corporation, duly organized October 10, 1890, under chapter 84, How. St., for the purpose of constructing, maintaining, and operating waterworks in the city of Ironwood, and supplying the city and its inhab-

There is another and fatal objection to the proceedings taken by the common council. It shows upon its face that the inducement for the council's action was the division of the property attempted to be acquired by the vacation between the defendant and the city. The council was set in motion by the defendant whose apparent motive was to procure valuable frontage for his own use and in order to secure it he proposed to the council to divide the land acquired. It was held in Shue v. Commissioners, 41 Mich. G38, 2 N.W. 808, that every road must be opened or closed upon its own merits. "It is easy to see," says the court, "how great mischief and wrong might be done by uniting several different schemes. Combinations of separate interests are not allowed." The affidavits of the five aldermen who voted for the resolution of vacation appear in this record, and, while they depose that the alley was unsightly, they also say that the city would thereby acquire a valuable property interest in the way of a city hall and engine house, without expense to the city. The same motive might suggest the vacation of any street. The advantage which the public derives from the discontinuance of a way must arise from the vacation itself rather than from the use to which the property is put, or from the fact that the city through a deal with the individual specially interested is to have an interest in the property acquired by such vacation. A city cannot barter away streets and alleys nor can it do indirectly by invoking its power of vacating ways what it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must at least upon the face of the record be free from affirmative evidence that such discretion was invoked for individual gain and its exercise influenced by an offer to divide the property acquired. The decree below is therefore reversed and a decree entered here for complainants with costs of both courts.