ing dissolution, the law considers this as imposing upon the conscience of the declarant as great an inducement to speak the truth as could be imposed by any form adopted by the law. Wigmore on Evidence, § 1443; 21 Cyc. 992. The dying declaration may be discredited by any testimony which would be permissible to discredit the testimony of the declarant, were he in court testifying. This being the case, the dying declaration may be discredited by showing that the declarant was a nonbeliever; and such testimony is for the jury to pass on, and to say to what extent it shall be allowed to affect the value of the dying declaration as evidence. It can make no difference when this state of mind existed, in so far as it affects the admissibility of such evidence. It was not necessary, in order to render this testimony admissible, that it should show that the deceased was a nonbeliever at or near the time he made the dying declaration. It was admissible on the part of the defense to show that such a state of mind existed at any time during the life of deceased, and it was for the jury to say, under the facts, whether or not deceased had reformed or been converted to the faith, and what influence it should have. It can in no way affect the right to introduce the testimony by showing that this frame of mind existed a long time prior to the date the dying declaration was made. The time when this condition of mind is shown to have existed is a matter of argument, to be made to the jury, as showing or not showing that it existed at the time the dying declaration was made, and hence as to its weight; or it was open to the state to rebut this proof of nonbelief by other proof that the condition of the mind of the deceased had changed.

But all these matters were for the jury on the proof made, and could not affect the admissibility of the testimony. Wherever there is any serious doubt in the law as to whether or not certain proof is or is not permissible, a safe rule to pursue is to solve the doubt in favor of the accused and permit the testimony to go to the jury. What is here said in reference to admitting testimony in cases of serious legal doubt equally applies to the granting of instructions in favor of accused. If this policy was pursued by the trial court, it would save many reversals. On the facts in this case, we are not prepared to say, with this proof in, that the jury would have returned the same verdict; and because of this it is compulsory on us to reverse the case. The testimony offered was in impeachment of the most dangerous evidence in this case showing the guilt of the appellant. It was admissible, and it is not for us to say what weight would have been given to it by the jury. They had a right to hear this testimony, and to pass on it, and to give it such weight as in their judgment they deemed proper.

Reversed and remanded.

POYTHRESS et ux. v. MOBILE & O. R. CO. et al. (No. 13,262.)*

(Supreme Court of Mississippi. April 13, 1908.)

1. MUNICIPAL CORPORATIONS — CLOSING STREETS — COMPENSATION TO ABUTTING OWNERS.

Ann. Code 1892, § 2495 (Code 1906, § 3336), gives municipalities the authority to "close and vacate any street or alley, or any portion thereof," after first compensating "the abutting landowner upon such street or alley for all damages sustained thereby." *Held* that, before closing a portion of a street, a municipality need not compensate one who has no property abutting on such portion, even though he has property abutting on another portion of the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 929.]

2. SAME—STREETS—VACATION.

Where the municipal authorities believed that the safety of the public demanded it, it was in their power to order the closing of a street, and their action could not be interfered with by a citizen, who, if he were specially damaged, had his recourse against the municipality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1429.]

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

Bill for injunction, filed by J. D. Poythress and wife, seeking to restrain the city of Meridian from closing a portion of Twenty-Seventh avenue, and to restrain the Mobile & Ohio Railroad Company from constructing certain side tracks on said avenue and so using said avenue as that it may become unsafe or unsuitable for use by the public as a highway. The chancellor entered a decree dismissing the bill, and complainants appeal. Affirmed.

The facts as disclosed by the record are these: The complainants were the owners of lot 12, of block 25, of the Caldwell survey of the city of Meridian, at which point they had a storehouse and were engaged in the mercantile business. Said storehouse faced Second street to the south and Twenty-Seventh avenue on the east. The tracks of the Mobile & Ohio Railroad Company crossed Twenty-Seventh avenue and Second street just opposite the corner of complainants' store, running diagonally in a northeasterly and southwesterly direction, and the railroad company had maintained a crossing on Twenty-Seventh avenue for many years. The company owned a tract of land east of Twenty-Seventh avenue and south of its right of way on which it desired to construct roundhouses, a coal chute, and a large number of side tracks; and in order to more easily approach this lot it had purchased block 31, as shown by the accompanying plat, and across block 31 it proposed to lay its tracks. In order to carry out its plans the railroad company proposed to the city that, if the city authorities would permit the closing of Caldwell street and the closing of that portion of Twenty-Seventh avenue between the northern boundary of the right of way at the intersection of Twenty-Seventh avenue and Second

*Suggestion of error overruled May 28, 1908.

street, and the northern line of St. Andrews street, and if the city would provide suitable approaches for an overhead bridge for wagons and pedestrians, the railroad company would at its own expense construct an overhead bridge across the right of way of the railroad company at Twenty-Ninth avenue. Accordingly the city passed the following ordinance:

"Whereas, the Mobile & Ohio Railroad Company has recently acquired by purchase certain property adjacent to its existing yards and tracks in the city of Meridian, Mississippi, and bounded, generally speaking, by St. Andrews street on the east and Twenty-Seventh avenue on the northeast, for the purpose of enlarging its facilities for repairing, coaling, and generally caring for its locomotives and other rolling stock; and

"Whereas, it is absolutely necessary in carrying out of these plans for the addition to its facilities in the city of Meridian to construct certain tracks across Twenty-Seventh avenue, as it now exists at this point; and

"Whereas, the existing tracks, as well as those necessary to be constructed, will make the crossing of the Mobile & Ohio Railroad yards at Twenty-Seventh avenue dangerous to pedestrians and others traveling over and along said crossing; and

"Whereas, the Mobile & Ohio Railroad Company is the abutting owner on said Twenty-Seventh avenue, between the west side of the Mobile & Ohio railroad tracks on said avenue and the east side or end of said avenue, and as said abutting owner it is desirous that said avenue be closed; and

"Whereas, the officials of the Mobile & Ohio Railroad Company propose and hereby agree to construct an overhead crossing or bridge, which shall be constructed under plans subject to the approval of the engineer or other competent officer of the city of Meridian, commencing at or near the intersection of Second street and Twenty-Ninth avenue, to a point approximately 400 feet east of the tracks of the Mobile & Ohio Railroad Company at this point, it being the intention to hereby agree to span said railroad company's tracks by the said overhead bridge as aforesaid, the city agreeing to furnish the right of way necessary for the approaches on either side of the railroad tracks, and in consideration of the premises, and the fact that the said railroad company will construct said aforesaid bridge at the place aforesaid; Therefore

"Section 1. Be it enacted by the mayor and boards of councilmen and aldermen of the city of Meridian, upon the construction and completion of the aforesaid bridge, the said Twenty-Seventh avenue be and is hereby abandoned and closed as a highway in the said city from the east line of the Mobile & Ohio Railroad Company's right of way and other property to the west line thereof, or that part of the Mobile & Ohio Railroad Company's property in the said city crossed by the said Twenty-Seventh avenue.

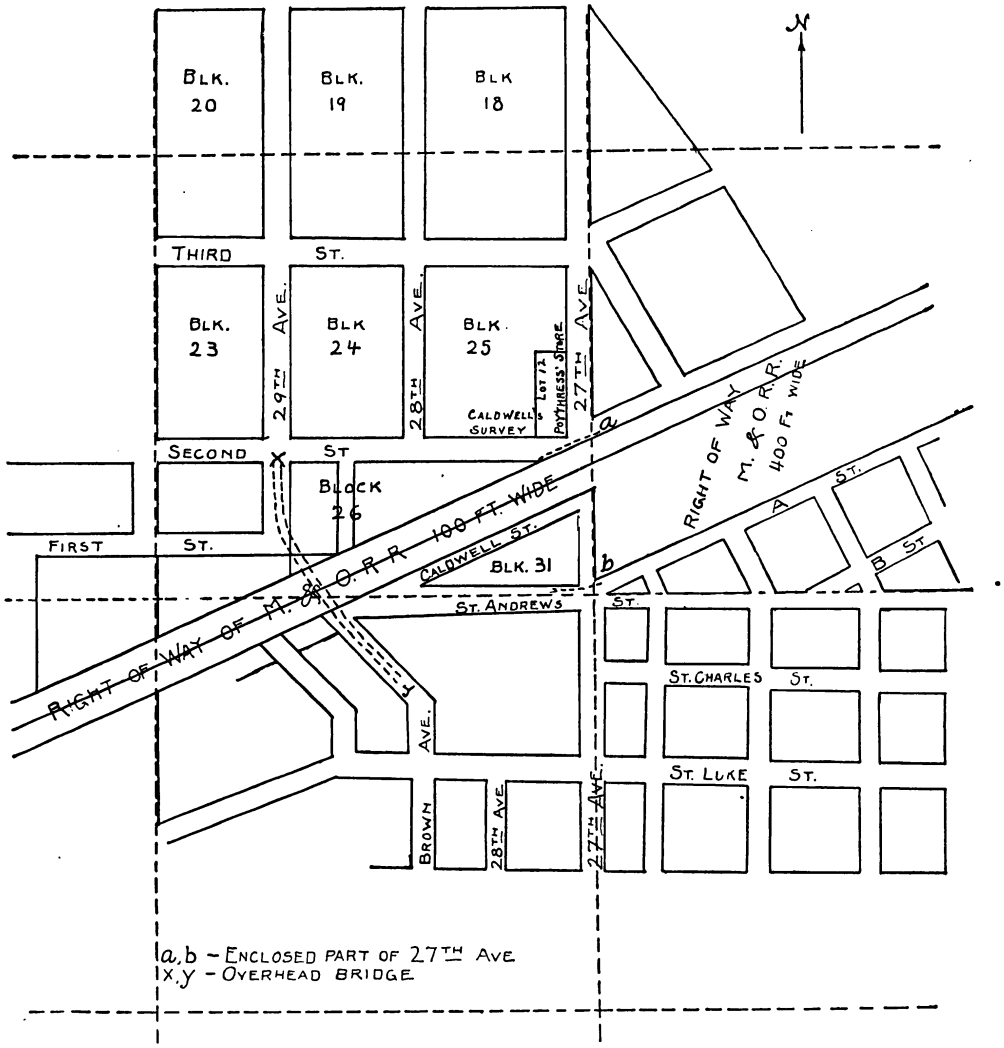
"Sec. 2. Be it further ordained that this ordinance take effect from and after its approval and publication as required by law in this behalf."

After the adoption of this ordinance complainants filed their bill praying an injunction alleging in substance the following grounds: First, that the mayor and the boards of councilmen and aldermen were without power to adopt the said ordinances; second, that the municipality has not (at the time of the filing of the bill) furnished the approaches for the bridge at Twenty-Ninth avenue as provided by the ordinance, and is without power or authority to furnish same, and does not intend to furnish said approaches; third, that the municipal authorities are proceeding to enforce the provisions of said ordinance by vacating and closing that portion of Twenty-Seventh avenue described in said ordinance; fourth, that notwithstanding the conditions upon which only was granted the vacation and closing of such portion of said Twenty-Seventh avenue as is described in said ordinance have not been complied with, the said defendant Mobile & Ohio Railroad Company is proceeding to erect certain alleged obstructions in and upon said avenue, by and with the tacit consent of the said mayor and boards of councilmen and aldermen. The principal grounds of damage as alleged in the bill are that the closing of Twenty-Seventh avenue would require complainants to travel further in going to and from their place of business, since they lived on the south side of the railroad, and that complainants would suffer loss of trade by reason of the inconvenience to their customers in shutting off the approach along Twenty-Seventh avenue from the south, and compelling their customers to go by a more circuitous route by way of the overhead bridge on Twenty-Ninth avenue. All the material allegations of the bill were denied.

On the trial the defendants contended that complainants had no right to maintain their suit in chancery, first, because they were not abutting owners of that portion of the street proposed to be closed, entitling them to object in this or any other proceeding; second, because complainants were only a part of the general public, and had not alleged or proven any special damages to themselves different in kind or greater in degree than that suffered by the general public, such as would entitle them to proceed in private suit to abate a public nuisance; third, that, inasmuch as the closing or obstruction of the street complained of was a public nuisance, no one but the public authorities could proceed in the courts to have it abated, without showing special damages different in kind and greater in degree than those suffered by the public generally. After taking testimony, the chancellor dismissed the bill.

Section 2945 of the Annotated Code of 1892 gives municipalities the authority to "close and vacate any street or alley, or any portion thereof." Section 3336 of the Code of 1906 adds the following to the above section: "But no street or any portion thereof shall be closed or vacated except upon due compensation being first made to the abutting landowners upon such street or alley for all damages sustained thereby."

The following is a plat of the locality in question:



Amis & Dunn, for appellants. Miller & Baskin and Neville & Wilbourn, for appellees.

MAYES, J. Section 2945 of the Annotated Code of 1892 (section 3336, Code of 1906), empowers the municipality to vacate any street, or alley, or any portion thereof. This controversy arose under the law as it stood under the Code of 1892; but, even if this were not the case, Mr. Poythress is not an abutting landowner upon this street, entitling him to have compensation first made to him before the closing of the street, within the meaning of section 3336, Code of 1906, as he owns no property abutting the closed portion. Cram v. City of Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282.

We are unwilling to hold that a municipality cannot close a street, when in its judgment it is for the public good. In such case the individual right of the citizen must yield. The ordinance providing for the closing of this street was passed, as the ordinance declares, because the municipal authorities believed that the safety of the public demanded it. Under these conditions it was in the power of the municipality to order the street closed. If the complainant has suffered any special damage by the closing of this street, not shared in by all the public, he has his recourse against the municipality; but, in the meantime, it is within the power of the municipality to close the street, if in their judgment it is dangerous to pedestrians and others, and

this can be done without interference by Mr. Poythress. To deny the municipality this right would be to deny to them the power to exercise one of the most important protective duties that it owes to the public.

The case of Laurel v. Rowell, 84 Miss. 435, 36 South. 543, is quite distinct from the case made by this record. In the case above cited it was not shown that there was any public necessity for the closing of the alley, and, the complainant in that case being an abutting owner, the court said that the action of the mayor and board of aldermen was unwarranted.

Affirmed.

MOBILE, J. & K. C. R. CO. v. JACKSON.

(No. 12,920.)

(Supreme Court of Mississippi. April 13, 1908.)

1. EVIDENCE—WEIGHT AND SUFFICIENCY—UNCONTROVERTED EVIDENCE—JURY'S DUTY.

Juries cannot arbitrarily and capriciously disregard testimony which is unimpeached and supported by all circumstances in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Evidence, § 2431; vol. 46, Trial, § 452.]

2. CARRIERS—DRUNKEN PASSENGER DROWNED AFTER ALIGHTING—ACTION FOR DEATH—EVIDENCE—SUFFICIENCY.

Evidence in an action against a railroad company for a passenger's death alleged to have resulted from the company's wantonness in ejecting him from a train when he was drunk to insensibility under conditions necessarily resulting in his drowning or freezing *held* insufficient to sustain a verdict for plaintiff.

3. TRIAL—INSTRUCTIONS NOT SUSTAINED BY EVIDENCE.

Instructions not sustained by evidence are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–612.]

4. SAME—JURY'S PROVINCE—WEIGHT OF EVIDENCE.

Juries are the judges of the weight of the evidence submitted to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 322–336.]

5. SAME—INSTRUCTIONS.

An instruction which submits as a doubtful question a matter on which there is no conflicting evidence is improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–602.]

6. SAME—CREDIBILITY OF WITNESSES.

Juries are the judges of credibility of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 414–419.]

7. CARRIERS—DRUNKEN PASSENGER — ACTION FOR DEATH—INSTRUCTIONS.

In an action against a railroad company for the death of a drunken passenger, who was drowned after alighting, it was error to instruct that the jury should not consider his drunkenness, but should view his conduct in the same light as they would that of a sober man in similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1415, 1454, 1497.]

8. SAME—CONDUCTOR'S DUTY.

If a railway conductor knew that an alighting passenger was so drunk that he was unable to care for himself, the conductor should have dealt with him according to the condition he was then in, and with view of what would reasonably happen to him if left at the place where he desired to alight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1454.]

Appeal from Circuit Court, Union County; J. B. Boothe, Judge.

Action for death by Mrs. V. C. Jackson against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fontaine & Fontaine and May, Flowers & Whitfield, for appellant. C. Lee Crum, for appellee.

WHITFIELD, C. J. Learned counsel for the appellee says frankly in his second brief that "the case at bar is for injuries resulting from the action of the conductor and crew in putting off deceased after he had passed Ecru, his destination, at a time and place and under conditions that would not only reasonably lead to his death, but must necessarily have resulted in drowning or freezing him to death"; and the declaration itself plainly shows that the suit is practically, if not exclusively, for punitive damages for the alleged willful and wanton wrong of the appellant company in ejecting the deceased from the cars of appellant when the deceased was drunk to insensibility and utterly incapable of sitting, walking, or standing, the appellant well knowing of these facts, and at a time and place—that is to say, in the nighttime and at a flag station, with the ground covered with ice, sleet, and snow—when to so put him off in such condition meant death.

Now, what is the case made by the testimony? Practically this: The deceased, Jackson, a section hand 58 years old, strong and robust, and one Purvis, 21 years old, got to drinking Peruna in the town of New Albany on the 2d of February, 1905, the day of the night on which Jackson was drowned, and drank along through the day a good deal of Peruna. They boarded the cars, having purchased tickets from New Albany to Ecru. After they got on the car they drank about a bottle and a half more of Peruna, making about four bottles or more of Peruna that the two consumed during the day and this part of the night. The conductor took up Purvis' ticket. He did not take up Jackson's ticket; but Jackson told him he had, and the conductor yielded the point. It is clearly shown that Jackson's ticket was found in his pocket after his death. It is further clearly shown, by the uncontradicted testimony of the conductor, that after the train had passed Ecru the conductor asked these two men where they were going, and they told him they were going to Ball's Crossing, whereupon he collected the cash fare from each, from Ecru to Ball's Crossing. Learned counsel for appellee says, in the passage just above quoted, that the suit was for putting off the deceased after he had passed