MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 11 TO NOVEMBER 10 1880

HENRY A. CHANEY

STATE REPORTER

VOL 44

CHICAGO
CALLAGHAN & CO
1881

The head notes to opinions filed by Mr. Justice COOLEY at the June term of 1880 are by Judge COOLEY, and were written at the time of filing the opinions.

The Index to this volume is by Mr. ALBERT P. JACOBS of the Detroit Bar.

Rec. Jan. 2, 1882

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Robert McClelland

GOVERNOR OF MICHIGAN 1852.

At a session of the Supreme Court, held Tuesday, October 5, 1880,

Mr. THEODORE ROMEYN, in presenting resolutions of respect to the memory of Robert McClelland, adopted at a meeting of the bar, held in Detroit, August 31, 1880, spoke as follows:

ROBERT MCCLELLAND died August 30, aged 73 years, after a long life of active service during which, I think, no aspersion or suspicion ever attached to his name. I have little to say, your honors, beyond presenting these resolutions. With the permission of the court, I will read them:

At a meeting of members of the bar, held in the office of the secretary, without formal call, on the occasion of the death of ROBERT MCCLELLAND on the 30th day of August last, it was

Resolved, That the secretary should request the attendance of the bar at the funeral, and that resolutions adapted to the occasion should be presented to the courts in session in the city, and also at the next term of the Supreme Court of the State.

The resolutions proposed and approved are as follows:

ROBERT MCCLELLAND, born on August 1st, 1807, at Greencastle in the state of Pennsylvania, graduated at Dickinson College, Carlisle, in same state, in 1829, and was admitted at the bar at Chambersburg, Pa., in the year 1831. In the year 1833 he came to Michigan, and from that time was a most distinguished citizen, holding high and responsible public

offices. As early as 1835 he was an active and influential member of the convention which framed the constitution of the State. In 1838 he was elected a member of the State Legislature; in 1842, again a member of the State Legislature. He became the speaker of the House of Representatives. Shortly afterwards, when Michigan was allowed a second member of Congress, he was elected from Detroit district, over Jacob M. Howard. He was re-elected for the 29th Congress. His eminent capacity and industry were recognized, and he was placed at the head of the committee on commerce. In 1874 he was re-elected to Congress for a third term.

Although a strong party man, he declined to act with the majority of his party on the subject of slavery, and supported the *Wilmot Proviso* which was intended to prevent the extension of slavery into the territories.

In 1850 he was made a member of the State convention to frame a new constitution, and took a leading part in its deliberations.

In 1851, when the new constitution took effect, he was elected Governor for the short term, and in 1852 was re-elected to serve as Governor for a full term, and he continued as Governor until March, 1853, when he was made Secretary of the Interior under PRESIDENT PIERCE.

His administration as Governor was popular and conciliatory, and there was no organized opposition to his election.

His administration of his federal office was marked by industry, order, economy and efficiency.

He was elected a member of the convention which framed the constitution of 1867, and was, perhaps, its leading member.

During this long career of public service, to which he was called, with but a single exception, by the votes of the people, he was always efficient and industrious, discharging the duties of every station with ability and with such integrity of purpose and conduct as to secure the approbation and respect of men of all parties.

No shadow of suspicion was ever cast upon the purity of his motives and conduct.

During his long career of public life he never ceased to be a lawyer. In early life he had been a close student. Shortly after his admission to the bar he acquired a large general practice, and for a considerable time was the partner of Judge WING, subsequently of this court.

As an advocate at the circuit, as an adroit and skillful man-

ager of his cases before juries, and at the bar of this court, his learning, industry and tact were always made apparent. Great common sense, knowledge of human nature, capacity to understand the modes of thought of common people, and familiarity with legal principles and practice made him most effective and successful. If he had given to his profession what he gave to his public official duties, he would have occupied the very foremost place.

Take him for all in all—in the discharge of public official duties, and in the practice of his profession—he showed himself always skillful, industrious, able and efficient; and in all his varied relations he proved himself honorable, truthful, courteous and just.

He was one of the class of men who in former days served the State of Michigan with honor to themselves and to the great benefit of the public. BARRY, MANNING and others, who filled high executive positions, have gone. ADAM, who so worthily served the state as treasurer and otherwise, in former days; FELCH, whose career of office went even beyond that of Governor McCLELLAND (for in addition to the highest legislative and executive trusts he was judge of this court), still survive, beloved and respected by all.

The private life of Governor McCLELLAND was without spot or blemish. Courteous, genial, unobtrusive, fulfilling all social obligations as husband, father and neighbor, "None named him but to praise."

If the sentiments of respect to his memory and regret for his death, could be crystallized and preserved, they would furnish his brightest and best memorial; and the members of the profession which he loved and with which he was so long connected, will keep his memory green.

Resolved That this expression of the feelings of respect and regard of the members of the Detroit Bar for his character and services, be presented to the Supreme Court of this State, at its next session, and that the judges may be asked that the same may be entered upon the journal of the court.

D. BETHUNE DUFFIELD, *Sec'y.*

I would say that I was Governor McClelland's nearest neighbor for many years, and had, perhaps, more intimate personal relations with him than almost any other person. Certainly nobody could know him intimately without having respect and high regard for the actions of his daily life. He was a man of marked character in all things, with a strong

sense of justice. While a person of decided feelings, perhaps prejudices, those feelings sprang from earnest convictions. He was frank in expression of thought, yet never uncharitable or utopian in any degree. In all things he seemed to be actuated by a desire to do what was right. His public career is, of course, well known. When he died, I lost my best friend.

Mr. ALFRED RUSSELL said: It is rather as a public man and a genial friend than as a lawyer, that we shall remember Governor McClelland. He was not engaged actively in contests at the bar after I came to the State, which was at the time when he filled the Governor's chair so acceptably. After his retirement from the cabinet of President Pierce, I remember meeting him a few times in the circuit at Detroit, and I call to mind the admiration which was expressed at his facility and quickness, and the extent of his recollection with regard to legal matters, in view of the fact that he had so long disused the practice of his profession. It is, however, as a neighbor and friend that we recall him most vividly. We cannot forget the winning smile, hearty laugh and warm greeting of Governor McClelland. I remember it was said of him that this smile and laugh were matters of great importance to him when he was conducting his political canvasses. His manner was quite irresistible, and he was highly esteemed even by his political opponents. He was a man of sound judgment, extensive acquisitions, high purposes and pure character, and these qualities secured for him elevated positions in the State and nation. It is meet that by us, members of the same profession to which he belonged, this tribute should be paid to his memory.

Mr. Justice CAMPBELL, by invitation of the Chief Justice, replied for the court and said: My acquaintance with Governor McClelland goes back to the time when he was in partnership with Judge Wing and Judge Christiancy at Monroe. At that early time I had more or less business with him, but I became much better acquainted with him after he came to

reside in Detroit. It so happened that for a good many years, down to the period when he was obliged to retire through sickness, that our offices were immediately adjoining. I was in the habit of seeing him very nearly every day. I became, therefore, not only very well acquainted with him in all his various ways, but attached to him, and obtained a very much higher respect, if it were possible, than I had before.

In the old political contests a great many hard things were said, but nothing was ever said against Governor McClelland that I now think strictly true. It was sometimes charged that he was not as firm as he might have been in some things. My own impression now is that he was misjudged in that regard, because I know he was very sincere in his utterances, and always exerted himself to have justice done in all matters of public as well as private policy. His opinions have been referred to by Mr. Romeyn in regard to certain matters which once agitated the country. Governor McClelland was, I believe, really the author of the *Wilmot Proviso.* Although not called by his name it unquestionably was introduced in such a way as to make him responsible for it. I know his feelings continued all through his life in harmony with the views he expressed in Congress, which caused the presentation of this measure. He has been sometimes censured for not living up to them, but like other men of his party, he found great difficulty in carrying out views of that sort. He was really not responsible for the failure of that movement.

Governor McClelland all through his life was, I think, more than usually acquainted with the minutiæ of public affairs all over the country, and in fact all over the world. During the last twenty years of his life he had a great deal of leisure, and he spent most of it in studying political matters and in keeping informed in regard to the course of events. He was in the habit of keeping large scrap books containing clippings from newspapers, and whenever anything of importance came up, either in the shape of a document or leading editorial, or anything else, he was in the habit, not of abstracting, but of cutting it out bodily and

keeping it in these books properly indexed. It was always possible for you, if you wished to find out the character of any important political movement, to go to Governor McClelland, and he could give you all the information to be obtained about it. He always took a lively interest in what was going on, and with strong political feelings he would often differ from you on questions of general importance, but I never knew Governor McClelland to show the slightest bitterness against those who differed from him politically or otherwise. He was a man of singularly warm heart, always willing to do what he could to relieve the wants of those in distress.

As a companion I never knew any one his superior, either in genial qualities, or in the facility of making himself agreeable to all with whom he conversed. His knowledge was various, not only of things, but of men. He had a happy faculty of describing the characteristics of men whom he had seen, and of picturing incidents which had come under his observation, and you could listen to him with great pleasure and profit.

It was not until very serious domestic misfortunes—the loss of a favorite daughter by sudden death—that he changed in any of these qualities. From that time he practically disappeared from among his friends, and the last portion of his life was under somewhat melancholy surroundings. All who knew him personally will remember him with kindness and affection, and no one can fail to honor his memory.

THE COURT directed that the resolutions be entered on the record.

JUNE TERM 1880.*

WOODRUFF CLARK v. JOHN SABLE, JR.

Costs—Attorney fee.

Defendant in error is entitled to an attorney fee as for hearing in the Supreme Court, where, after being served with notice thereof, he appears in good faith to argue the case, and plaintiff in error neglects to file the record and fails to appear.

Motion for costs on continuance. Submitted and granted June 8.

Fraser & Gates for the motion cited *Griswold v. Fuller*, Chaney's Digest, 735 (6).

PHILOPENA NEGLEY v. COMMON COUNCIL OF STURGIS.

Liquor bonds—approval of security.

Mandamus to compel a municipal council to act on a liquor bond offered for its approval will not be granted where the ground on which the council refused is not clearly shown.

MANDAMUS. Motion for order to show cause. Submitted and denied June 8.

W. W. Osborn for the motion.

* Continued from Vol. 43.

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JACOB MICHELS v. HENRY STORK.

Attachment—Return of service—Appearance generally—Appraisal—Liability for trespass in serving writ.

A return of a justice's writ of attachment not personally served, does not confer jurisdiction, under Comp. L., § 5276, if it appears only that it had been left at defendant's "usual place of abode, with his wife," who is informed of its contents.

A general appearance before a justice cannot be considered a submission to the jurisdiction in attachment, when taken in connection with defendant's motion to dismiss the writ for want of proper service.

An officer levying an attachment on property of which a certain amount is exempt from execution, must appraise it and give the defendant an opportunity to select that which he is entitled to retain, whether a writ is issued by a justice or from the circuit court. Comp. L., §§ 6102–3.

The plaintiff in attachment is not liable as a trespasser for the omissions of the officer to serve the writ properly, or to give the defendant an opportunity to select such property as he was entitled to under the statutory exemption. If the writ was valid when issued, the officer's subsequent acts or omissions will not render the plaintiff a trespasser *ab initio*.

Error to Superior Court of Detroit. Submitted April 27. Decided June 11.

TRESPASS ON THE CASE by Stork against Michels for damages resulting from the wrongful levy of an attachment on machinery of the plaintiff, whereby he was prevented from carrying on his business. The return to the writ of attachment, which was issued from a justice's court, was as follows: "By virtue of the within attachment, I, John Gnau, on the 10th day of August, 1874, seized the goods and chattels of the defendant mentioned in the inventory, of which the annexed is a copy, and on the 12th day of August, 1874, I served upon the defendant personally a copy of the within attachment, and of the said inventory, duly certified by me, by leaving the same at his usual place of abode, with his wife, a suitable person, of age and discretion, whom I informed of its

contents. John Gnau, constable." The statutory requirement as to service of writs of attachment issuing from a justice's court is as follows: "If the defendant cannot be found within the county, the constable shall leave a copy of the attachment and inventory, certified by him, at the last place of residence of the defendant, if there be any such place within the county, and if not, then by leaving the same with any person in whose possession such goods and chattels, moneys and effects, may be found." Comp. Laws, § 5276. Plaintiff below recovered judgment and the defendant brings error. Reversed.

Wm. B. Jackson and *Henry M. Cheever* for plaintiff in error. A party to an attachment proceeding is not liable *ab initio* for the misdoings of the officer in making service. Freeman on Judgments 481; *Bank of Missouri v. Franciscus* 15 Mo. 308; *Simpson v. Hornbeck* 3 Lans. 53; *Kaley v. Shed* 10 Met. 317; *Bringard v. Stellwagen* 41 Mich. 56.

B. T. and *Geo. H. Prentis* for defendant in error.

MARSTON, C. J. The return made by the constable to the writ of attachment did not show proper service of the writ, and gave the justice no jurisdiction to proceed and render judgment in the cause. *Nicolls v. Lawrence* 30 Mich. 396; *Town v. Tabor* 34 Mich. 263; *Adams v. Abram* 38 Mich. 302–4.

On the return day the defendant appeared and moved to dismiss the writ because no proper service was shown by the return. This was not such an appearance as would give the justice jurisdiction. A justice of the peace may acquire jurisdiction over the person either on a return showing proper service of the writ, or on the voluntary appearance of the defendant. But where the defendant appears and objects to the jurisdiction because no proper service of the writ appears to have been made, we do not see how this can be considered as a submission to the jurisdiction. It has been assumed that the defendant must declare that he appears

specially for the purpose of making his motion or objection, and for no other purpose, or that jurisdiction will be conferred because of his general appearance. No doubt a general appearance would confer jurisdiction, but the appearance and objection then made should be considered together; and so considered the objection or motion made limits and explains the appearance, and clearly indicates an intention not to confer a jurisdiction where one is wanting. This, to my mind, is the more reasonable and sensible doctrine, does away with needless technicality, and certainly injures no one, while it promotes justice and prevents a grasping at shadows.

The levy having been made upon property of a species exempt from execution to a specified value, it was the duty of the officer to have the property appraised and give the defendant an opportunity to make his selection under the statute. Comp. L., §§ 6102–3. These provisions are equally applicable to justice court as to circuit attachments. The fact that the defendant may, at the time of the levy, have said the property seized belonged to his brother, would not be conclusive and would not excuse the officer. If the officer believed such statement, then he had no right whatever to seize the property at all, as his writ did not command him to take any but the property of the defendant therein; and if he seized it as his property under the writ, then it was his duty to give the defendant an opportunity to make his selection under the statute.

The defendant in this case was present at the time of such seizure and directed the same, but we do not understand that he was in any way the cause of the errors thereafter committed by the officer. If the officer did not give the defendant in the attachment suit an opportunity to make his selection, or did not properly serve the writ on the defendant, for such omissions he would be responsible, but the plaintiff in the attachment proceedings would not thereby become liable as a trespasser. At the time the levy was made under the attaching plaintiff's instructions, the writ was a valid one and protected both himself and the officer in such seizure. And the

acts of the officer afterwards in failing to perform his duty would not render the plaintiff a trespasser *ab initio*.

Under this view the other questions raised are not material, and will not be passed upon.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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HENRY PATTON AND MILES C. HUYETT v. FRANCIS J. CHAMBERLAIN AND JANE E. CHAMBERLAIN.

Recognition of parol trust in lands—Rights of creditors.

Although by statute a parol trust in lands is void, the trustee may recognize it, and other persons, whose equities are not affected thereby, cannot interfere.

Lands held in parol trust, by a father for his daughter, were exchanged for others, which he conveyed to his brother, on like trust. Creditors of the father sought to reach it. *Held*, that the equities of the daughter were equal to those of the creditors, and she would be protected as against their claims.

The admission of the trust by the brother, in an answer in chancery, is a sufficient declaration of the trust in writing to answer the requirements of the statute of frauds.

Appeal from Superior Court of Detroit. Submitted April 27. Decided June 11.

JUDGMENT CREDITORS' BILL. Defendants appeal. Reversed.

Joslyn & Freeman for complainants.

Atkinson & Atkinson for defendants.

COOLEY, J. We have not been brought by the evidence in this case to the conclusion reached by the judge of the Superior Court. We are convinced that the testimony of Francis

J. Chamberlain is truthful, and that it defeats the complainants' case.

From this evidence it appears that, some twelve years or more ago Chamberlain's first wife caused to be conveyed to him an eighty acre lot of land in St. Joseph county, which she had purchased with money received from her father, on a trust declared orally, that he would hold the same for their infant daughter, then six years of age or thereabouts. This the wife did in expectation of her speedy decease, and she actually deceased six months thereafter. In Chamberlain's hands this lot was occupied and cultivated as part of a farm of 131 acres; the remaining 51 acres being owned by himself. It was all mortgaged by him for some $2,000. Becoming embarrassed in his circumstances he made an arrangement with his brother A. H. Chamberlain, whereby he exchanged the farm for certain property in Detroit, and caused the Detroit property to be conveyed to the defendant Jane E. Chamberlain, who is cousin to his daughter, on a verbal understanding that it should be held in trust for the daughter. It is this Detroit property which complainants, as judgment creditors of Francis J. Chamberlain, seek to reach.

If the farm in St. Joseph county had been in equity the property of Francis J. Chamberlain, a trust in respect to the Detroit property would have arisen in favor of his creditors when the exchange was made: *Maynard v. Hoskins*, 9 Mich. 485. But he had encumbered the farm to an extent that exhausted his interest, and in equity the daughter was entitled to the avails of the encumbered place when it should be disposed of. So far as concerns the controversy with these complainants, it is immaterial that the trust was a verbal one; it could not have been enforced against him, but it was nevertheless his duty to recognize and execute it; and when he did recognize it in the exchange made for other property, his creditors could not complain. The claim of his daughter that he should perform the trust was quite as strong in equity as any claim of creditors can be.

Jane E. Chamberlain defends this suit in the interest of the daughter, and avows the trust in her answer. That is a

sufficient declaration of trust in writing to answer the requirements of the statute of frauds: *McLaurie v. Partlow* 53 Ill. 340; *Whiting v. Gould* 2 Wis. 552; *Woods v. Dille*, 11 Ohio 455; *Cozine v. Graham* 2 Paige 177; *Chetwood v. Brittan* 1 Green Ch. 450; *Winn v. Albert* 2 Md. Ch. 169; *Kingsbury v. Burnside* 58 Ill. 310.

The decree must be reversed, and the bill dismissed, with the costs of both courts.

The other Justices concurred.

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EPHRAIM NELSON ET AL. v. THE CHEBOYGAN SLACK-WATER NAVIGATION COMPANY.

Improvement of navigable streams—Tolls.

It is not competent for the State to give the control of one of its navigable streams to private parties for improvement, with power to charge toll at discretion. *Semble.*

But it is competent to authorize such parties to charge toll, at rates fixed by the legislature, for the use of improvements made by them. And the provision in the Ordinance of 1787 that the navigable waters of the Northwest Territory shall be "forever free" does not interfere with this, as the meaning of that provision is that the use of the waters in their natural condition shall be free. *Benjamin v. Manistee etc. Co.* 42 Mich. 628.

Tolls for the use of the improvement of a navigable stream may be charged, notwithstanding the stream was capable of such use in its natural condition, provided the improvement facilitated it.

The question whether a navigable stream has been dammed without permission of the board of supervisors will not be considered on error, when the record does not show it was raised in the court below.

Error to Cheboygan. Submitted April 28. Decided June 11.

TRESPASS ON THE CASE. Plaintiffs bring error. Affirmed.

Watts S. Humphrey and *Atkinson & Atkinson*, for plaintiffs in error.

G. W. Bell and *C. I. Walker* for defendants in error.

COOLEY, J. This is a suit to recover of the defendant a considerable sum of money which the plaintiffs have paid under protest, as tolls for passing through a canal around a dam constructed by defendant across the Cheboygan river about a mile above its mouth where, before the construction of any dam, there were rapids. To an understanding of the legal questions it is necessary to have some knowledge of the water-courses which find an outlet by way of this river.

The stream named the Cheboygan is eight miles long, passing from Mullett lake to Mackinaw straits. Mullett lake is twelve miles long by three or four wide, and is connected with Burt lake of like size by Indian river, a stream five miles long. Crooked river, five miles long, connects Crooked lake, six miles long and a mile wide, with Burt lake. Round lake, about a mile in diameter, is near Crooked lake and connected with it. About five miles above the mouth of the Cheboygan river, Black river comes into it. This is a stream sixty miles long, and passes through Black lake, which is ten miles long and three wide. Rainy river, thirty miles long, empties into Black lake. Pigeon river, forty miles long, empties into Mullett lake. Sturgeon river, seventy miles long, empties into Indian river. Maple river, thirty miles long, empties into Burt lake. Two small steamers, capable of carrying a hundred passengers each, navigate the waters from the head of Crooked lake to the straits of Mackinaw. All the waters mentioned are made use of for floating logs and lumber on their way to the place of manufacture or to market, and vessels drawing five feet of water run up to the head of Mullett lake, and those drawing two and a half feet to the head of Crooked lake. Freight boats and lighters are also used on Black river.

In the year 1847 a dam was built by one McLeod across the Cheboygan river where that of the defendant now stands. It was not so high as defendant's dam now is, but high enough to raise the water so that such craft as the plaintiffs now make use of on the river could navigate it to Mullett's lake.

The case does not show how or why McLeod came to build this dam, nor how the defendant comes to be now in possession of its site with a higher dam. In 1867 an act of the Legislature was passed to provide for the incorporation of slack-water navigation companies for the improvement of rivers in the counties of St. Joseph, Cass, Berrien and Cheboygan, and in the following year defendant was organized and constructed the dam complained of. By the act of incorporation any company that should be formed was authorized to take possession of any navigable river proposed to be improved, and to improve the same by the erection of dams and the construction of locks, and it was provided that "said river, when so improved, and the lock constructed by such company, shall be deemed and taken to be public highways, and free to all persons whatever, to pass and repass with their boats and other water craft, and with their produce, goods and chattels, wares and merchandise, such persons conforming to such rules and regulations as may be established by the company for the navigation of such river, and paying such tolls as may be established and required for the same by such company:" 2 Laws of 1867, p. 840. As the act did not in any way limit the tolls that might be charged by the companies formed under it, or confer upon any public officer or authority the right to limit them, or to supervise the action of the companies in any manner, it was in effect an act to transfer to voluntary organizations the control of navigable streams, with power to levy burdens upon commerce at discretion, and was probably inoperative under the principles laid down in *Ames v. Port Huron etc. Co.* 11 Mich. 139. But in 1871 this power was restricted, and a schedule of tolls which might be charged was fixed by legislation: General Laws 1871, p. 176. The constitutional validity of these acts was contested, but the lawful existence of defendant as a corporation was affirmed in *Nelson v. Cheboygan etc. Co.* 38 Mich. 204.

To prove a personal grievance the plaintiffs gave evidence tending to show that they owned a mill above the dam, and used in their business a tug and several lighters; that in 1876 the tug made a hundred and sixteen trips each way, and the

lighters two hundred and six trips up and two hundred and four trips down; that in 1877 the lighters made forty-eight trips up and forty-nine trips down; that in going up they were light and drew ten to twelve inches of water; that in going down they were loaded and drew from three to three and a half feet of water; that plaintiffs sent over the waters of the Cheboygan in 1876, 7,596,000 feet of lumber and a considerable quantity of wood, bark and shingles, 1,151,000 feet of the lumber being shipped on the lighters and the remainder on rafts to the mouth of the river; that the dam, so far as vessel navigation and rafts were concerned, completely obstructed the stream, and to get around it with their tugs, lighters and merchandise, plaintiffs were compelled to use defendant's canal, for which defendant compelled them to pay tolls, amounting in all to $2767.70; that in the natural stage of water in the Cheboygan river without any dam the lighters used by the plaintiffs could have passed in the condition they were in on their up trips—that is, unloaded—and that rafts of lumber could have been run down. This constituted the case for the plaintiffs.

It was decided in *Benjamin v. Manistee River etc. Co.* 42 Mich. 628, that the State might lawfully authorize corporations to make improvements of navigable rivers and to charge tolls for the use of the same, notwithstanding the compact in the Ordinance of 1787 that the navigable waters of the Northwest Territory should be forever free. The tolls, it was said in that case, are not charged for the use of the navigable river thus made free, but are imposed in respect of the improvements, and to obtain the benefit thereof, and the compact itself might have been a curse to the Territory instead of the blessing it was meant for, had it required the water highways of the Territory to remain unimproved in order that they might be used in their natural condition without toll or impost. That case governs this, to the extent at least of determining the general question of the right to take tolls.

But it is insisted on the part of the plaintiffs that the right to the free navigation of public streams must still exist, notwithstanding the improvements, as to whatever property or

vehicle of commerce might previously have navigated them. Also that defendant can have no right to stop at its dam and require tolls for the passage through its canal of that which before the dam was built would have floated in the river at that point, thereby making the improvement a burden on such navigation as did not need it. The true construction of the act under which defendant is organized is claimed to be, to give the company a right to charge tolls to those who need and use its improvements, and it is only permitted to obstruct such navigation as the stream in its natural condition is capable of, on condition that it provides locks for getting around its obstructions, and makes them free.

We do not think the broad question which the plaintiffs attempt to raise is in the case. There was no attempt in the court below to show that the commerce carried on by the plaintiffs was not facilitated by the improvement, or that any portion of it was burdened with tolls for the use of that which did not benefit it. It was shown, negatively at least, that the tug and lighters required the facilities of the canal in passing down, and though it was proved the lighters could have passed up unloaded before the dam was constructed, it did not appear that their going up, when they could not also go down, would be of advantage to the interest of any one. The rafts, it was shown, could have passed down before, but whether as conveniently and safely did not appear. It is consistent with everything appearing in the record that every use made by the plaintiffs of the river was facilitated by the construction of the dam and canal. If they were so, the exaction of tolls for the use of the canal was as proper and just as it would have been if the dam had first made the use of the waters practicable. The tolls are charged in respect to the enjoyment of benefits conferred by the expenditures of defendant; and whether these benefits originate with the improvement the defendant has made, or are only enhanced by it, is immaterial to the justice or legality of the impost.

It is further contended that defendant is the successor and assign of McLeod in respect to this dam, and is charged with all his duties; and that there was legislation under which

McLeod built which required him to construct a lock for the passage without charge of whatever navigated the river. The deduction is that defendant must maintain such a free passage now. But in the first place no such legislation appears to have been brought to notice in the court below, and in the second place it is not shown that defendant is the assign of McLeod. The supposition that McLeod may have abandoned his dam as useless, is consistent with anything that appears in the evidence; and in that case the appropriation of it by any one else who should find it a convenience in improving the river would have been perfectly proper, provided the authority of the appropriator from the State was such as would justify the erection as a new one. Certainly so long as defendant does not claim under McLeod, or need any grant McLeod may have had to justify damming the river, his obligations cannot be said presumptively to have been assumed by it.

But it is said that defendant must claim under McLeod, who built his dam before the present Constitution was adopted, because since that time no dam can be constructed across a navigable stream except with the consent of the board of supervisors of the county, which defendant has never obtained. The conclusive reply to this suggestion is that no question of the consent of the board of supervisors appears to have been made in the court below, and we neither know what the fact was, nor could we act upon it if we did. We sit here to review only the rulings of the circuit judge.

The circuit judge gave instructions to the jury corresponding to the views above expressed, and verdict and judgment were rendered for defendant.

This judgment must be affirmed with costs.

The other Justices concurred.

FREDERICK S. AYRES, JAMES S. AYRES AND EBENEZER R. AYRES v. CALEB H. GALLUP.

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Evidence of land sale—Contract relations—Plea of set-off.

A sale of land is not made out by an entry on the books of the vendors and by their receipts for purchase money, where the land was not fully described and did not belong to them, and the actual owners only assented to the sale verbally.

A purchase of partnership assets and assumption of responsibility to outgoing partners does not bring the purchasers into contract relations with the firm's creditors so as to enable them to take advantage of a contract partly performed by it.

A claim of set-off made in a plea cannot establish a contract.

Error to Huron. Submitted April 28. Decided June 11.

ASSUMPSIT. Plaintiffs bring error. Reversed in part.

James H. Hall and *Atkinson & Atkinson* for plaintiffs in error.

C. H. Gallup in person for defendant in error. A memorandum of a land contract must state its substantial terms, except the consideration. *Palmer v. M. P. R. M. Co.* 32 Mich. 274; *Bailey v. Ogden* 3 Johns. 399; *Merritt v. Clason* 12 Johns. 102; *First Baptist Church of Ithaca v. Bigelow* 16 Wend. 28; *Clason v. Bailey* 14 Johns. 486.

CAMPBELL, J. Plaintiffs sued defendant for an alleged balance due for purchase money of land sold him by a firm of Ayres, Learned & Ayres, to whose rights plaintiffs claim to have succeeded. On the trial below it was found that no legal contract of sale had been made, and the court rendered judgment in favor of defendant for the payments he had made, as paid without consideration. The case comes up on error.

The only evidence of any contract consisted of an entry in the books of Ayres, Learned & Co. and of two receipts for purchase money, signed by that firm. The land was not

fully described in either of these, and the firm did not own it. The owners verbally assented but no more. Under these circumstances it cannot be claimed any sale was made out: *Scott v. Bush* 26 Mich. 418. Plaintiffs do not now insist that any sale was made which was binding.

But the present plaintiffs are not the persons to whom Gallup paid his money, and the fact that they purchased the partnership assets and became responsible to the outgoing partners, does not bring them into contract relations with the creditors of that firm, and no dealings were ever had whereby Gallup accepted the new firm as his debtor in lieu of the old. A claim of set-off in a plea cannot constitute a contract. There was no foundation for a money judgment in his favor: *Pipp v. Reynolds* 20 Mich. 88; *Turner v. McCarty* 22 Mich. 265; *Hicks v. McGarry* 38 Mich. 667; *Hayes v. Knox* 41 Mich. 529; *Booth v. Connecticut Life Ins. Co.* 43 Mich. 299.

So much of the judgment as gives damages to Gallup must be reversed with costs. The remainder is affirmed. As the case will not go back, the costs of the court below in Gallup's favor may be set off against those granted to plaintiffs in this court.

The other Justices concurred.

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JOHN G. SEAGER v. JAMES E. COOLEY.

Contract right to land—Notice.

Where parties claim conflicting descriptions of land under a common source of title, and one had a contract right and had entered into possession before the other purchased, but received his deed afterwards, he can maintain a bill to enjoin an action of ejectment brought by the other claimant.

Immediate possession and constant occupancy by one who holds under a land contract, operate as full notice of his rights under the contract, so far, at least, as concerns enclosed premises.

Rights conferred by a land contract cannot, as against one in full possession under it, be affected by errors of description whereby deeds from the same grantor to subsequent purchasers are made to cover portions of the same land.

Where a deed is given in pursuance of a land contract, it is presumed to secure and perpetuate all rights conferred by the contract, and an intermediate conflicting deed given by the same grantor has no priority.

Appeal from Saginaw. Submitted April 28. Decided June 11.

INJUNCTION to restrain an action of ejectment. Defendant appeals. Affirmed.

Wm. H. Sweet for complainant. The right to a disputed tract of land may be determined by the contract held by one of the parties at the time the other took his deed. *Morris v. Showerman* 2 Doug. (Mich.) 16; *Disbrow v. Jones*, Har. Ch. 48.

H. H. Hoyt for defendant. The right given by a contract is merged in that conveyed by the deed: *Young v. Camp* 1 Cow. 605; *Houghtaling v. Lewis* 10 Johns. 297; *Howes v. Barker* 3 Johns. 506; a description by metes and bounds controls though the quantity of land be incorrectly given: *Arden v. Thompson* 5 Cow. 371; *Butler v. Widger* 7 Cow. 723; *Mann v. Pearson* 2 Johns. 36; *Livingston v. Barringer* 15 Johns. 470; *Jackson v. Dieffendorf* 1 Cai. 473. Equity courts are not proper tribunals for trying conflicting titles: *Blackwood v. Van Vliet* 11 Mich. 252: unless the adverse claimant cannot be brought into a court of law: *Moran v. Palmer* 13 Mich. 367.

GRAVES, J. Cooley instituted an action of ejectment for a strip of land in Seager's possession, and the latter brought this bill for a decree declaratory of his rights and perpetually enjoining their infringement. The case was heard on pleadings and evidence, and the court granted relief. The defendant appealed.

November 29, 1858, John Gallagher conveyed to Casper

Loeher all the *south half* of out-lot forty-four of Glasby & Gallagher's addition to the village of East Saginaw, *except the east acre and a half*. This excepted parcel on the east side seems to have been previously bargained to one Franz or Frank Beier, to whom, as appears, it was conveyed by deed in 1860. February 5, 1859, and only a few months after he received his deed from Gallagher, Casper Loeher agreed in writing to sell and convey to complainant for a specified money consideration "one acre of land commencing on the corner between land owned by Frank Beier and Casper Loeher, in south half of out-lot forty-four and of sufficient width to make one acre, and being on the east part of land sold by John Gallagher to Casper Loeher." Loeher proceeded to stake out the west line of this parcel for the purpose of showing complainant where to make fence and what to occupy, and the latter at once entered into actual possession of the piece designated and put up a fence along the line marked by the stakes. On the east side a fence was already up on what was supposed to be the west line of the excepted parcel. These fences have been continued on the same sites ever since, and complainant has remained in the uninterrupted occupancy and possession of the middle enclosed parcel. Complainant entered under the contract and held under it exclusively until he received a deed. His possession and occupation for the whole period have been actual, open and notorious.

February 23d, 1860, Loeher executed to Charles T. Disbrow a warranty deed for the west acre and a half of the south half of out-lot forty-four, and the deed was recorded in August following; and on the *first* of January, 1861, Disbrow executed a deed to Shepherd Knapp for the same description, which was recorded. At the time when these deeds were given, complainant was still holding under his written agreement from Loeher, but on the 6th of March, 1861, and about two months after the deed from Disbrow to Knapp and about a year subsequent to Loeher's deed to Disbrow, the complainant received a deed from Loeher, which was intended to carry out and comply with Loeher's obliga-

tion under the written contract. The terms of description, however, as will be seen, were made less accurate than the written agreement, and were not sufficiently precise by themselves to absolutely foreclose controversy. The description is as follows: "One acre of land in the south half of out-lot forty-four in Glasby and Gallagher's addition, lying between land owned by Franz Beier and *Charles J. Disbrow*, having a front of five rods on Lapeer street and running back to the division line east and west enough to make one acre of land more or less."

Subsequent to this deed from Loeher to complainant the defendant Cooley received a deed from Shepherd Knapp containing the same description as the deed to Disbrow, and calling for the west acre and a half.

In June, 1875, a survey was made, and it was then ascertained that neither of the three parcels as actually enclosed and occupied contained as much land as the terms of the papers called for, and that the center parcel in complainant's possession, instead of being an acre, was only 79-100 of an acre. Immediately the defendant claimed in substance that as the deed to Disbrow, his predecessor in title, called for a full acre and a half, and was the prior deed from Loeher, the common source of the title of complainant and defendant, he was absolutely entitled as against complainant to that quantity and as a consequence had lawful right to a sufficient strip from the west side of complainant's enclosure to make up the full west acre and a half. He accordingly brought his ejectment, as before mentioned, for the strip referred to.

The point is made that the bill is wanting in equity on the ground that complainant's case might have been used as defense in the ejectment.

The position is not tenable. The decision there must have been in favor of the superior legal title, and that seems to have been in Cooley. His claim is under Loeher, the common source of title, and through a deed from him prior to that held by complainant, and such priority implies a legal preference in the competition between the parties for quantity.

That being the case, the only chance left to complainant was to establish that this apparent legal advantage was actually subject to a controlling equity in his favor, and this is the ground he takes. He shows that the making use of the earlier date of the grant to Disbrow from Loeher, the source of all the titles, in order to divest him of a part of what Loeher sold him and a part of his actual holding, is inequitable and ought not to be allowed. His contract entitled him to a full acre next to the excepted parcel. It was the first sale made by Loeher, and preceded by a considerable time the sale to Disbrow. In virtue of it complainant became equitable owner. His immediate and constant occupancy and possession operated as full notice of his rights so far, at all events, as the premises within the enclosure are concerned: *Rood v. Chapin*, Walk. Ch. 79; *Godfroy v. Disbrow*, id. 260; *Russell v. Sweezey* 22 Mich. 235. His holding was under the contract, not only when Loeher deeded to Disbrow but also when Disbrow deeded to Knapp. The right under that chain of conveyance was therefore fixed during such holding, and it could not be more extensive than complainant's contract rights permitted. The latter necessarily gave bounds to the former, and there is no room for argument that, as against complainant, the right under the Disbrow deed has grown larger. On the whole, it appears to me that the case is within the principle of *Boyce v. Danz* 29 Mich. 146, and the cases there cited.

It is next contended that the grant by deed to complainant executed the contract and put an end to its operation, and that the deed itself, by force of its terms, confines complainant to whatever space there happens to be between the excepted parcel on the east and an acre and a half on the west. Only a few words will be given to this objection. The deed was given to carry out the contract, and not to abridge any of the rights it was made to secure. Such, at least, is the fair inference, inasmuch as all the evidence tends that way and there is nothing to the contrary.

The defendant holds with notice that his title was created in subordination to complainant's right to the strip sued for

and within his enclosure, and the deed is certainly open to an interpretation which will cover it. *White v. Luning* 93 U. S. 514.

The case contains references to tax titles, but defendant has wisely discarded them. They appear invalid and are certainly of no consequence whatever in this contention. It may be that the form of relief which the court decreed is not the most appropriate, but if so it is because something more salutary might have been allowed. But the defendant has no cause to complain and the complainant has not appealed.

I think the decree should be affirmed with costs.

The other Justices concurred.

PHILIP W. DEDERICK v. HENRY BARBER.

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Foreclosure for joint and several liability.

A bill to foreclose a mortgage given to secure a joint and several note is defective for want of parties if filed against only one of the makers of the note, though the mortgage was given by him only. This is especially so where the mortgage has been assigned and if the defense to the note could only have been enforced by a joint cross-action for damages.

Where a debt is made payable after several years, but the interest is payable annually, a bill to foreclose the mortgage which secures it may be properly filed after the expiration of the year, if interest is in arrears.

A promissory note beginning "I promise" but signed by several persons is a joint and several note, and in law may be sued against one or more of the makers.

Appeal from Genesee. Submitted April 28. Decided June 11.

FORECLOSURE. Complainant appeals. Affirmed.

Le Roy Parker for complainant. A note beginning "I promise" and signed by more than one is several as well as

joint, 1 Dan. Neg. Inst. 74; *Wallace v. Jewell* 8 Amer. 48; Story on Prom. Notes § 466; *Supervisors v. Coffinbury* 1 Mich. 355; a bill filed against one of the joint and several makers is not bad for non-joinder, Comp. L. § 5150; 2 Barb. Ch. Pr. 174, n. 573; 2 Hill. Mortgages 121.

Newton & Howard for defendant.

CAMPBELL, J. Complainant filed his bill to foreclose a mortgage dated June 13, 1876, and given by Henry Barber to secure notes for $2500 in the aggregate, made by Barber and George A. Boughton and William C. Drudge, payable with interest annually in two, three, four and five years, three notes being for $500 each and one for $1000. The bill does not describe them except as promissory notes payable to Peter K. Dederick but in fact they were payable to him or bearer. The bill avers an assignment in June, 1877, to complainant. It was filed September 14, 1877, for interest in arrears.

Barber answered and claimed a defect of parties. He also set up that when the mortgage was given the land was owned by Robert Barber, and that the mortgagee had knowledge of his title. The chief defense was that the notes were given for a transfer of the exclusive right to use a certain hay-press patent in Genesee county, and an agreement by the patentee to take up two outstanding licenses which he had previously granted, held by persons named Walker and Beahan, and that defendants have been greatly damaged by the failure to get rid of these rights.

As the notes all called for interest payable annually, the bill was not prematurely filed. But the question of who should be parties to such a bill is more important.

Although Barber is the only mortgagor in this case, nevertheless the only debt or security purporting to be covered by the mortgage is the notes of the three makers before named. The bill asks for a personal decree against Barber for any deficiency. It sets out the notes as joint, and not joint and several. As a matter of law, being in the singular number, and declaring in each instance that "I" and not "we" promise

to pay, they are joint and several, and if sued at law might be sued against Barber alone. But they could also be sued on jointly, and it is questionable whether, even at law, such an allegation as that in this bill, with no further explanation, would be consistent with a several liability.

But this is not important, because in this class of cases it is not true that equity follows the law; and although there are some instances where the legal analogies have been adhered to, such is not the universal rule. Where an attempt is made to enforce an obligation which is joint and several, all the debtors who are liable as principals and not sureties, should, unless there are satisfactory reasons to the contrary, be brought in as defendants. It is held to be important that any judgment that is rendered should, so far as it goes, settle their rights, so as to need no further litigation to determine their respective obligations. Where all are principals each is bound to make up his share directly or by contribution, and each is interested in having every judgment accurate. In case Barber's land should be applied to satisfy this mortgage, he has a very strong interest in having Boughton and Drudge bound by the litigation. And the authorities are direct on this point: *Bland v. Winter* 1 Sim. & St. 248; *Cockburn v. Thompson* 16 Ves. 321, and note in 2 Hovenden's Supp. 444, on this case; also *Madox v. Jackson* 3 Atk. 406; Story's Eq. Pl. § 169.

In the case before us the notes were given in payment for a patent-right interest purchased by the three makers jointly. The defense set up is one which belongs to all three, and which under the old rules of practice at law could only have been enforced by a cross action for damages. It would be very inconvenient to attempt any settlement of these damages in a controversy between a single purchaser and the assignee of a vendor. If he is not a *bona fide* purchaser, there is certainly an equity against his recovering the full amount of the notes, if there is any defense to them. It would be inequitable, if he should recover the full amount from Barber, that Barber should still be left to the uncertainties of a new litigation for contribution where the same

result might not be reached. If a cross-bill or any other affirmative proceeding should be found necessary to enforce the defendant's equities, Boughton and Drudge would beyond question be necessary parties, and no complete relief could be had without them. Barber could not sue alone either to rescind the purchase, or to get other redress. We cannot find any material question relating to the general merits of this case, that does not concern the parties jointly.

This objection was pointed out by the answer. If the testimony had shown that these persons were not necessary parties, the court might possibly have made a decree which would not prejudice them. But the testimony shows that the whole contest touches their joint interests, and in no way excuses the omission.

For these reasons we make no allusion to the merits. We think that in dismissing the bill without prejudice the court below decided correctly, and the decree must be affirmed with costs.

The other Justices concurred.

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CATHERINE UNGER v. JOSEPH SMITH.

Agreement of grantor to pay mortgage.

A deed expressly stipulated that the grantor should pay off a certain mortgage on the premises. *Held*, that a verbal agreement between the parties that the grantor should advance the moneys to pay it, would be inconsistent with the terms of the deed, and that the grantee could not recover upon it against the grantor.

Where the grantee of land accepts a deed binding him to pay a mortgage thereon he becomes personally liable for the debt secured thereby, and the liability may be enforced in chancery, and a personal decree obtained against him for any deficiency that may exist after the sale of the premises on foreclosure. And the grantor can compel him to pay the mortgage.

Error to Allegan. Submitted April 29. Decided June 11.

ASSUMPSIT. Defendant brings error. Reversed.

Padgham & Padgham for plaintiff in error.

Fenn & Donaldson and *F. J. Littlejohn* for defendant in error. Where part of the consideration for a deed is an additional undertaking not necessary to insert therein, it may be shown by parol, and the evidence does not tend to contradict the deed: 2 Pars. Cont. 184; *Trevidick v. Mumford* 31 Mich. 457; *Seaman v. O'Hara* 29 Mich. 66.

MARSTON, C. J. The main features of this case may very briefly be stated. In December, 1875, plaintiff and defendant made an exchange of certain real estate, and in the deed from Smith to Unger a clause was inserted that "this conveyance subject to a mortgage executed by Joseph Smith and wife to Henry W. Bly for the amount of four hundred dollars and interest, dated sometime in the month of September, October or November, 1875, due two years from date, which said mortgage the party of the second part hereby agrees to pay." The party of the second part, Mrs. Unger, did pay this mortgage, and the present action is brought by her to recover from her grantor, Smith, the amount so paid, in accordance with the contract under which the exchange was made, by which, she claims, Smith agreed to furnish the money to pay this mortgage. The court ruled that under the pleadings plaintiff could not recover on the Bly note which she had paid. The plaintiff then offered in evidence a note given by Smith to her in July, 1875, for $900, and secured by mortgage, the conditions of which had been fully performed. She then gave evidence tending to show that after this $900 became due and was satisfied, and after the exchange of the lands in December, 1875, this $900 was turned out to her as security that Smith would furnish her $400 to take up the Bly mortgage as he had agreed. This evidence was contradicted by Smith.

The court charged the jury that if they found the agreement to be that defendant was to pay the Bly mortgage, then plaintiff could not recover, as such an agreement would be in

conflict with the terms of the conveyance from defendant to plaintiff; but that she might show that defendant was to pay her $400 in time to enable her to pay the Bly mortgage, and the $900 having been turned out as security for the performance of such agreement, she might recover thereon the amount paid by her to Bly. And upon this theory she recovered a verdict and judgment.

Mrs. Unger, by accepting a deed of certain premises subject to a mortgage thereon which she therein agreed to pay, became personally responsible for the debt. The mortgagee could in chancery enforce this liability and obtain a personal decree for any deficiency that might exist after a sale of the mortgaged premises, and under the authorities the vendor also might have compelled Mrs. Unger to pay off the mortgage: *Crawford v. Edwards* 33 Mich. 360; *Miller v. Thompson* 34 Mich. 10; *Carley v. Fox* 38 Mich. 388; *Higman v. Stewart*, id. 523; *Winans v. Wilkie* 41 Mich. 265.

Such being the nature and character of the obligation which Mrs. Unger assumed both to the mortgagee and her vendor, an oral agreement previously entered into with her vendor that he would furnish the money to enable her to pay this mortgage, would in my opinion be clearly inconsistent with the clause in the deed.

Under such an agreement, in no just or legal sense could it be said that Mrs. Unger paid the mortgage, and if the oral agreement is binding, then Smith, her vendor, cannot have the full force and benefit of the clause inserted in the deed. In no fair sense can the agreement for exchange be construed as one under which a certain amount of money was to be paid Mrs. Unger, as the difference in values between the property, such payment, in whole or in part, to be made in time to enable her to meet the mortgage indebtedness which she had assumed. The agreement, as testified to by the plaintiff, is one under which, as between these parties, it was the duty of Smith, the vendor, to pay the mortgage debt, by furnishing her with the money for that purpose. If such was the agreement, then plaintiff could not recover.

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

The other Justices concurred.

MICHIGAN & OHIO PLASTER COMPANY v. GEORGE H. WHITE AND ADOLPH LEITELT, ASSIGNEE, ETC.

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Record—Bill of interpleader—Practice—Intervening strangers—Collusion—Costs—Interest.

An appellate court is bound by the record, and cannot take notice of allegations made by counsel on the hearing and not appearing of record.

A bill of interpleader lies only where complainant is, in good faith and without collusion or fault, so placed that he cannot safely decide between adverse claimants of a fund or right under his control. It is only upheld upon full merits.

Where it is determined on a bill of interpleader that one of only two conflicting claimants has no claim, or where the bill is taken as confessed by one, it follows that the fund indisputably belongs to the other.

A bill of interpleader was filed against two persons, one of whom disclaimed any right to the fund in dispute. A stranger was afterward admitted, on petition, to contest the interest of the remaining defendant, in which he claimed a partnership right. *Held*, that there was no practice which would allow him to get into the cause by petition; that bringing him in without an amendment to the bill put nothing in issue; that his claim was not one against which the bill was filed, and that the bill could not be amended so as to reach him, because it was filed to guard against known, and not unknown, claims.

Any improper delay after answer to a bill of interpleader, in preparing the cause for hearing, will authorize the party who has answered to apply for the money, if there is any fraudulent purpose or collusion.

A complainant in a bill of interpleader may be allowed a lien on the fund if he has acted honestly and promptly; and the prevailing defendant will generally have to look to the other defendant for his costs. But if complainant has improperly delayed the case by collusive conduct, costs may be granted against him in defendant's favor.

It is a suspicious circumstance if after one of only two defendants to a bill of interpleader has disclaimed, complainant seeks for delay and complainant's agent petitions in behalf of a stranger for leave to

contest the interest of the other defendant; and an order of court that the fund remain in the register's hands, and that defendant and petitioner interplead, is irregular.

Interest is not stopped by a bill of interpleader improperly filed.

Appeal from Kent. Submitted April 29. Decided June 11.

BILL OF INTERPLEADER. Complainant appeals. Dismissed.

Norris & Uhl for complainant.

Blair, Kingsley & Kleinhans for defendant White. Where intervention on petition is allowed, the intervenor must come in before the trial: *Van Bibber v. Geer* 12 Tex. 15; *Gaines v. Page* 15 La. Ann. 109; *Hocker v. Kelley* 14 Cal. 165; interpleader will not lie where one defendant makes no claim, and the other could recover in an action: *Crawshay v. Thornton* 2 Myl. & C. 1.

Lyman D. Follett for petitioner Rathbone.

CAMPBELL, J. Complainant, on the 5th of September, 1876, filed a bill of interpleader against defendants, averring that Leitelt, as assignee in bankruptcy of the Grand River Valley Plaster Company, and White set up conflicting claims to $1540 in money in complainant's hands, being the proceeds of the sale of certain plaster manufactured at the mill of the bankrupt company and delivered to complainant. The bill avers that White claimed it as plaster ground for him, and that Leitelt claimed White bought the rough plaster on an execution against the bankrupt, which was invalid as against the assignee.

Complainant was a corporation organized by the union of several plaster manufacturers for the purpose of keeping control of the market by selling all their product so far as it was to be marketed—each member furnishing a certain percentage of the plaster, and agreeing to sell no more, except among themselves. Complainant was to pay a certain price in the first instance, and divide the profits ratably according to the proportions fixed.

The bill avers that after the bankruptcy of the Grand River

Valley Plaster Company Leitelt ran its mill and assumed its place in the arrangement with complainant, and up to June 13, 1876, had delivered the quota, amounting to 1727 tons; that complainant had paid over a considerable sum named to him, but that White claimed 450 tons of this to be his property, and to have been ground for him by Leitelt under a special bargain; while Leitelt claimed it as his under assertion that the execution sale before mentioned was in fraud of the bankrupt law.

On these statements the complainant offered to pay the $1540 into court, and sought to compel the defendants to interplead. The money was paid in, and both parties were enjoined from legal proceedings.

White appeared and answered October 23, 1876, and complainant filed a general replication. The answer in substance denied that Leitelt delivered White's plaster, or that White ever claimed any plaster delivered by Leitelt, and denied that Leitelt set up any adverse claim to White's property. It avers that Leitelt ground the plaster for White and White delivered it to complainant and was credited with it himself, and his rights recognized by complainant. There is a full denial of any conflict, and an averment of suit brought and pending in favor of White against complainant for the money. He admits a refusal to indemnify complainant, for the reason that there was no adverse claim set up, and offers to accept the money and discontinue.

Leitelt appeared on the 9th of October, 1876, and the time for answering was extended until November 18. On the 7th of December, 1876, an order *pro confesso* was entered against Leitelt, embodying an order of reference to take proof of the material facts and circumstances charged in the bill.

As we are bound by the record, we can take no notice of various allegations and counter allegations made by counsel on the hearing, and not appearing of record.

Nothing further appears to have been done until January 29, 1878, when complainant's and Leitelt's solicitors stipulated to set aside Leitelt's default, without costs to either party, and to let him file a disclaimer. On the next day Leitelt

filed his disclaimer under oath, denying that he had ever owned or claimed any interest in the matters in dispute.

No testimony having been taken the cause was for argument at the May term, 1878, but during that term, in August, 1878, complainant's solicitors, on the claim that the disclaimer was broader than they had supposed, asked to have it restricted to the date of filing, or else to have leave to reply. Leave to reply was given, and replication was filed August 31, 1878. On the 10th of October, 1878, an *ex parte* order was made to take testimony within sixty days.

On the 29th of November, 1878, which was the last day on which notice to take testimony could be given, notice was given to take it on December 9, which was the last of the sixty days. On that day no witness had been examined, and on a showing that one witness out of three had informed complainant's counsel it would be a damage to him to be compelled to attend, and that he had thereupon been assured another day would be fixed, the time was extended by an *ex parte* order sixty days longer. A petition was then filed on White's behalf remonstrating against the delay, and asking a reduction of time, and a stipulation was made to put the case on the docket for the then December term, and close the proofs by February 5, 1879.

On the 28th of December, 1878, one Amos Rathbone filed a petition for leave to intervene and contest White's interest, in which he claimed a right as partner. This petition was sworn to December 10th, and the solicitor who presented it had on the previous day made application, as complainant's agent, for the extension of time for proofs. There is nothing to show that this petition of Amos Rathbone was ever brought to White's attention until the final hearing. Leave to file it was given *ex parte* December 12; but the service was not required to be made until nine days before the petition itself should be brought on for hearing, which was not required to be until the final hearing of the cause.

The case was not heard until November, 1879, and on the 26th day of November a decree was made to the following effect: *first*, that the bill was properly filed; *second*, that

Leitelt had no claim on the money, but that it should remain in the register's hands free from any such claim, and that no costs should be awarded against him; *third*, that Rathbone was thereby made a party defendant and allowed to interplead for one-half of the money; *fourth*, that White and Rathbone interplead, and that pleadings be filed accordingly; *fifth*, that complainant recover costs out of the fund; *sixth*, that a copy of the decree be served on White or his solicitors.

White appeals from this decree.

It is impossible to sustain such a decree on a bill of interpleader. Such a bill can only be filed when a complainant is in good faith and without collusion or fault, placed in a condition where it is impossible to decide safely between adverse claimants of the same fund or right. In order to prevent collusion the rules are applied strictly, and such a bill is not upheld unless upon full merits: *Bedell v. Hoffman* 2 Paige 199; *Badeau v. Rogers* id. 209. Laying aside for the present all reference to the actual merits of the controversy, it is manifest that when one of the only two conflicting claimants referred to in the bill is finally determined to have no claim, it must follow as a matter of course that the fund belongs to the other. The claim, whatever it may be, of Rathbone, is not a claim against which the bill was filed, or which in any way appears to have stood in the way of complainant paying over the money to any one. Bringing him into the case without an amendment of the bill puts nothing in issue, and it is difficult to conceive how a bill of interpleader could be so amended as to reach him, because the only excuse for filing it is to guard against known and not unknown claims. There is no practice which allows a stranger to get himself into a cause by petition. Apart, therefore, from all other considerations, the retention of the fund or any part of it after it was found there was no contest among the original defendants, could not be justified under a bill of interpleader properly brought.

But, inasmuch as Rathbone is represented by the same solicitor who appeared for complainant in obtaining some delays in the presentation of the cause, this provision in the

decree must be regarded as irregular and censurable. It resembles in this respect the case of *Dungey v. Angove* 2 Ves. Jr. 304, where an application to have the money, under similar circumstances, retained to answer some purpose connected with another litigation, induced Lord Rosslyn to direct an inquiry into the collusion, which resulted in serious consequences to the parties concerned. It is impossible to read this record without becoming satisfied that Mr. Rathbone was not introduced into it for any legitimate purpose.

It becomes necessary, however, to look into the entire record to determine how far the suit was properly begun, and what equities appear bearing on the right of the various parties to interest and costs.

The bill on its face is regular. White, while denying the fact of any conflict of claims, offered by his answer to take the money. At that time there had been no considerable expense incurred.

When the bill was taken as confessed as against Leitelt, it amounted to an admission that he had no claim on the fund, and White became thereby at once entitled to it: *Badeau v. Rogers* 2 Paige 209; *Aymer v. Gault* id. 284; *Stevenson v. Anderson* 2 Ves. & B. 412; *Martinius v. Helmuth* id. 412 (n). Any improper delay after an answer in preparing the cause for hearing will authorize an application for the money by the party who has answered, if there is any fraudulent purpose or collusion: *Hyde v. Warren* 19 Ves. 322; 2 Supp. to Vesey Jr. 316, 458. The only question open after Leitelt's default which concerned White or complainant was as to costs, and as to their lien on the fund. A complainant who has acted honestly and promptly may be allowed a lien on the fund, and the prevailing defendant will generally have to look to the other defendant for his costs. But this must depend on the facts, and if complainant has filed his bill improperly, or has conducted the case unfairly, the result will be different. See previous cases and *Dunlop v. Hubbard* 19 Ves. 205 and note; 2 Supplement to Ves. Jr. 447.

Neither Leitelt nor White can be properly regarded as responsible for any delays. And upon the issues made by

the answer of White, and the disclaimer of Leitelt, we think the testimony preponderates in favor of Leitelt having done nothing at any time before or after suit to authorize the complainant to refuse payment to White and file the bill. We think further that the course of dealing shown by the books of complainant, whereby White was credited with the plaster in controversy, would have justified White in claiming that there was no ground for an interpleader, even if Leitelt had made adverse claims. But no such claim was set up.

The record shows that White desired the case to be speeded, and that Leitelt regarded himself as having no interest in it. The great and unreasonable delays, coupled with the peculiar way in which Rathbone's name became involved, would have made it unjust to give complainant costs out of the fund, even had there been any foundation for the bill originally.

But on the testimony there was no proper excuse or reason for filing it. The decree must therefore be reversed with costs of both courts in favor of White against complainant. White is at liberty to prosecute his suit at law on the claim against complainant, and to withdraw the fund from court crediting as of the date of this decree, so much as remains of it over and above his costs aforesaid, as a payment on the claim. The bill having been improperly filed will not stop interest, and must stand dismissed.

The other Justices concurred.

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DANIEL J. CAMPAU ET AL. v. ALEXANDER M. CAMPAU ET AL.

Tenancy, in common—Presumption as to equality of interests—Adverse possession.

Tenancy in common extends to the entire premises, but sole possession by any one tenant is not presumed adverse as against the rest and does not affect their rights, unless held under a claim of exclusive right whereof they have express or implied notice.

Title by adverse possession, whatever the extent of the claim, must be clear and distinct especially as against co-tenants in common.

Constructive possession is co-extensive with the title which creates it, and actual possession is limited by the occupant's title.

There is no presumption that the interests of tenants in common are equal.

Where a conveyance or deed to two or more persons does not state the interest of each, their interests are presumed equal.

Error to Wayne. Submitted April 29 and 30. Decided June 11.

EJECTMENT. Defendants bring error. Reversed.

F. A. Baker and *Ashley Pond* for plaintiffs in error.

H. L. Baker and *G. V. N. Lothrop* for defendants in error.

MARSTON, C. J. Plaintiffs below claimed title through Nicholas Campau who died intestate in 1811. Nicholas had six brothers and two sisters, two of whom died, one in 1809 and one in 1811, intestate and without issue. Catherine, one of the sisters, moved upon the premises in 1818 or 1819 and commenced the cultivation of a part, and she continued to reside thereon until the time of her death in 1854. In 1845 she quitclaimed her interest in the premises to two of her brothers, Joseph and Barnabas. The construction of this instrument was passed upon when this case was here before, and we see no reason to change or modify what was then said: *Campau v. Campau* 37 Mich. 246; *Sparrow v. Kingman* 1 Comst. 242. Contemporaneous with this conveyance the grantees gave Catherine back a life lease of the entire estate, covenanting that she should have quiet possession, and agreeing to build or repair a house for her on the premises, she agreeing to pay one dollar per year rent and taxes.

In 1863 Joseph died, and his administrator compelled those in possession, and who had entered under Catherine, to pay rent or recognize his rights as administrator in the premises. In 1866 Joseph's estate was partitioned, and his interest in these premises set apart to Elizabeth Brown who con-

veyed in 1868 to Daniel J. Campau, one of the defendants.

In 1875 the heirs of Barnabas sought to exercise their rights, but not being recognized brought ejectment for an undivided one-half of the premises.

It seems quite clear that the title which Joseph and Barnabas had upon delivery to them of the deed from Catherine could be and was no more than they previously held, with the interest of Catherine as one of the heirs added, less any previous valid conveyance made by her. There is nothing in the record fairly tending to show that Catherine had acquired any other or greater interest, or that she intended to convey, or her grantees supposed they were acquiring, any more than this. *Sands v. Davis* 40 Mich. 20.

As tenant in common she was entitled to the possession of the entire premises, with the others if they entered—if not, alone; but such possession would not be presumed adverse as against her co-tenants. The conveyance by Catherine to Joseph and Barnabas did not give them the entire title or cut off the rights of their co-tenants, and the lease back of the entire estate and her possession thereunder could not enlarge the title of Joseph and Barnabas as against their co-tenants.

Where a person is in and has held possession of land rightfully under a claim of title which, when traced back, does not purport to convey the entire estate, the mist and ambiguity which shroud and surround the character of the possession, and claim made thereunder, cannot enlarge the actual title or rights acquired by possession thereunder. On the contrary, clearness and distinctness are requisite to acquire title by adverse possession, either in whole or in part, and especially is this so as against tenants in common. *Davis v. Filer* 40 Mich. 316; *Gower v. Quinlan*, id. 575; *Everts v. Beach* 31 Mich. 136.

It is also well settled that the possession of an occupant is co-extensive with his claim and color of title. If in possession of a part under color of title to the whole tract, his constructive possession extends to the whole; if

under color of title to an undivided interest, his constructive possession covers the whole to the extent of such interest; if without color of title, the possession is not extended by construction, beyond the boundaries of the occupied portion. The constructive possession of premises will be co-extensive in interest with the title which gave rise to and created it, and in like manner the actual possession may be limited by the title of the occupant. The actual possession of a tenant in common will not be presumed adverse to that of his co-tenants, and his constructive possession in like manner will be limited to his interest as tenant in common. The possession of one tenant in common, unless under a claim of exclusive right, will not affect the rights of the co-tenants. Such exclusive claim and denial of their right, should be clear and unambiguous and brought home to the knowledge of the co-tenants either by express notice, or by implication. And if the latter, all doubt growing out of the nature and character thereof, should be against an ouster. The presumption should be that the tenant in possession respects and recognizes the rights of his co-tenants, until the contrary clearly appears; that the possession is rightful, and not to the exclusion of others having equal rights.

The court charged the jury in substance, that Joseph and Barnabas each owned an equal undivided interest in the property. As heirs of Nicholas Campau this would be true, and it would be equally so as to the title they took under the deed from Catherine, or that they acquired by adverse possession, if any. As a general proposition there is, however, no such presumption. Where lands are conveyed or devised to two or more persons, and the instrument is silent as to the interest which each is to take, then the presumption will be that their interests are equal. Such would be the legal effect and construction of the instrument. Where however the interest of each is not thus made apparent, there can be no such presumption. The quantities of the estate of tenants in common, and their proportional shares therein, may be so different and unequal that no such presumption could, with safety, be indulged in.

The views herein expressed are somewhat different from those which prevailed upon the trial. Several other questions were raised which may not arise upon a new trial, and we therefore pass them for the present, but not thereby giving thereto our approval. It follows that the judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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LEWIS H. WILCOX v. THE LAFLIN & RAND POWDER CO. AND WORDEN R. CHAPELL.

Discretionary costs—Judgment of justice.

The statute permitting a judge to give or withhold costs in his discretion on the partial reversal of a judgment, does not apply where the full amount due had been tendered before suit. In such cases costs accruing after the tender must go to the defendant under Comp. L. §§ 6180–1.

It cannot be assumed on error that the jury disregarded the proofs and acted on something else.

Comp L. § 5479, forbidding reversal of a justice's judgment for an improper allowance of fees, does not cover a case expressly governed by a statute regulating costs generally, and where the question is not as to particular allowances which the justice has failed to consider.

Error to Shiawassee. Submitted June 8. Decided June 11.

ASSUMPSIT. Defendants bring error. Reversed.

L. J. Hamilton and *Hugh McCurdy* for plaintiffs in error. Tender at any time after a claim becomes due stops accruing interest and in a suit for the debt entitles defendants to a judgment for costs: *Berthold v. Reyburn* 37 Mo. 586; *Tracy v. Strong* 2 Conn. 659; *Reymond v. Bearnard* 12 Johns. 274; *Manny v. Harris* 2 Johns. 24; *Jackson v. Law* 5 Cow. 248; *Moynahan v. Moore* 9 Mich. 10; Chitty Cont. ch. 5, § 8.

Lyon & Kilpatrick for defendant in error.

CAMPBELL, J. Plaintiffs in error were sued by defendant in error before a justice, and pleaded a tender, and paid the money tendered into court. The case was tried by jury who found a verdict for the precise amount of the tender, for which the justice entered judgment, and gave costs against defendants below. They sued out a certiorari claiming that they should have been allowed costs in their favor. The justice made a return showing conclusively that the only basis of the judgment was the amount tendered, and there was no conflict of testimony on the fact of tender, and the precise amount due, had no tender been made, would have been slightly greater. The circuit court affirmed the judgment and error is brought.

It is impossible to read the return and account for the judgment except on the theory of a tender proved. It is suggested that the jury may not have found that this was before suit brought, but we cannot assume they disregarded the proofs made and acted on something different.

The statute, §§ 6180, 6181, expressly provides that in such a case the defendant shall pay no costs accrued after tender, but shall recover them. This is inconsistent with any discretion in the matter, and the statute allowing the circuit court when affirming a judgment in part and reversing it in part to give costs in its discretion cannot apply where the judgment, although in form given against defendants for damages was in fact in their favor as maintaining their plea. And the statute preventing a reversal for improper allowance of fees by a justice (§ 5479) does not cover a case expressly governed by another statute, for costs generally, where the question does not come up on particular allowances which the justice had power to consider.

The judgment of the circuit and justice's courts must be reversed as to the allowance of costs and plaintiffs in error must be allowed costs of all the courts.

The other Justices concurred.

HARVEY W. RICE, HENRY EPLEY AND GEORGE HARRIMAN v. THE TOWNSHIP OF SIDNEY.

Town treasurer's liability for funds in his control.

An entry by a town clerk carrying an apparent balance over from the account of one town treasurer to his successor, is no evidence of the actual receipt of the money by the latter even though his deputy had without his knowledge settled the account of the office accordingly.

A township treasurer's sureties cannot be bound by a false settlement of his accounts.

If a township treasurer's liability for funds in his hands, can be discharged by anything but payment, there must at least be an intentional acceptance of another's responsibility instead.

Error to Montcalm. Submitted June 8. Decided June 11.

ACTION on bond. Defendants bring error. Affirmed.

Lemuel Glute for plaintiffs in error.

M. Clement Palmer and *Ellsworth & Sapp* for defendant in error.

CAMPBELL, J. Plaintiffs in error were sued on the official bond of Epley as town treasurer of defendant in error for moneys due from him to the township at the close of his official term in 1875. The finding of the court is that at the end of that year he was found to have a balance in his hands of $1215.80, which he did not pay over to his successor, Joseph E. Morrison, but a portion was afterwards paid to M. A. Reynolds, Morrison's successor. The case was tried without a jury, and judgment was rendered for the balance.

The only points argued before us were that neither testimony nor finding can warrant the judgment.

We do not see any defect in the finding. It is express to the effect that the balance was in Epley's hands, and not paid over. But it is claimed there were other facts found which preclude such an inference. The only other fact so relied on

is that in the account kept against Morrison by the town clerk, Morrison was charged with the amount as money in the treasury, and that Rice, who was Morrison's deputy, if there is any propriety in using such a name, settled Morrison's accounts with the town at the close of his term on that basis. But it appears Morrison had no knowledge of these charges personally, or to speak more precisely, that he was not present at the settlement, and is not shown to have had any knowledge that the clerk had so charged him.

The money in the hands of Epley at the close of his term was not money in the treasury in the sense that the township had it in its own custody, but was merely so much due to the township from Epley, which he was bound to pay over to his successor. Unless so paid over Epley and his bondsmen were liable.

If Morrison himself had given credit to Epley for this money, it might raise a presumption, perhaps, that it was paid over. But an entry by the town clerk, carrying over an apparent balance from one treasurer to another, could not be evidence of the receipt of the money by Morrison. Neither could the settlement with Rice of which Morrison was ignorant, be regarded as any such evidence. And we think it cannot be maintained that a false statement made by Morrison himself could prevent the township from recovering moneys belonging to the corporation, from a previous defaulter. Nothing but an intentional acceptance of Morrison's responsibility in lieu of Epley's could discharge Epley. We are not prepared without further light to say that anything but payment would discharge him. Morrison's sureties could not be bound by a false settlement.

Some evidence was necessary to show the payment of the money to Morrison. The testimony introduced could in no sense be regarded as even amounting to an admission by Morrison that he had received the money. We think therefore the judgment was right, and it must be affirmed with costs.

The other Justices concurred.

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ROBERT CUMMINGS ET AL. v. THOMAS FEAREY ET AL., GARNISHEES.

Garnishee's exemption—Fraud against creditors of principal defendant.

The garnishee's exemption of any demand to which he may be entitled as against the principal defendant (Comp. Laws. § 6504) does not apply where the property in his hands was wrongfully obtained, as under a chattel mortgage, which, by reason of being kept from record, was fraudulent as against other creditors.

The entire antecedents of the dealings between a principal defendant and a garnishee and their agents, and all transactions regarding the property and its disposal, are admissible in evidence where fraudulent dealings of the garnishee as against the principal defendant's creditors are in question.

Parties dealing so as to defraud creditors of a principal defendant, and having no preference by legal proceedings, cannot go behind judgments recovered against the principal defendant to inquire into the dates at which debts matured.

Where a mortgagee of chattels has replevied the mortgaged goods, he cannot repudiate the ownership thus asserted, in proceedings against him as garnishee.

Error to Bay. Submitted April 14 and 15. Decided June 16.

GARNISHMENT. The garnishees bring error. Reversed.

Camp & Brooks and *S. T. Holmes* for plaintiffs in error.

McDonell & Mann and *Hatch & Cooley* for defendants in error.

CAMPBELL, J. This controversy has already been before us, as reported in 41 Mich. 376, in which the present defendants were plaintiffs. There is very little in the present record which was not in the former one, and most of the questions now presented are of minor importance. One legal question, however, stands at the threshold of the case, on which some doubts have arisen.

By § 6504 of the Compiled Laws of 1871 it is declared

that "every garnishee shall be allowed to deduct from the property in his hands all his demand against the principal defendant, of which he could have availed himself if he had not been garnished, whether by set-off at the trial or upon execution, and shall be liable for the balance only after adjustment of mutual demands." This, it is insisted, exempts the garnishees in the present case from responsibility, because it is conceded they got no more property than would have paid their debt.

It has been found in the present case, as a necessary result of the verdict, that plaintiffs in error got possession of the fund in controversy under a chattel mortgage which, though good as between the parties, was a fraud upon the defendants in error. Upon its illegal character there is no room for dispute. It and its predecessors had been kept from record intentionally, and the mortgagor had been enabled to keep up his credit and obtain goods from other creditors, who were deceived as to his standing, under a continued course of concealment.

By § 6498, as mentioned in our former decision, it is provided that a garnishee may be held for property conveyed to him in fraud of creditors, even though the conveyance is valid against the principal debtor himself.

We think this provision must be construed with the other, and that § 6504, which allows a garnishee to retain property enough to satisfy his demand, only refers to property which he has received rightfully, and which his debtor would own and could recover from him if there had been no garnishment. As against the garnishing creditor, the garnishee holding under fraud is a wrong-doer, and his possession is not a rightful possession. By any other construction, a mortgagee holding by fraud is in as good a condition as an honest mortgagee. The law does not vitiate his mortgage merely when there is no consideration. The defect is that, although there may be a full consideration, yet it has been used to injure and deceive other creditors. We do not think the entire garnishee statute, especially when coupled with the statute

against frauds, will allow the construction claimed by plaintiffs in error for § 6504.

Upon the several questions of evidence on which errors are alleged, we think the court was justified in admitting testimony concerning the antecedents of the dealings between Nellis and plaintiffs in error, and their agents, as well as concerning the transactions from first to last regarding the property and its disposal. We have found nothing that can be deemed impertinent.

We also think that parties dealing in such a manner as to defraud creditors, and having no preference by legal proceedings, cannot go behind the judgments recovered against Nellis to inquire into the dates on which debts matured. If they had been creditors having liens under legal process, on which they sought priority, a question would be presented which is not presented here. We think that on the testimony as submitted to the jury the instructions concerning the nature and validity of their holding and disposal of the property were presented fairly and justly, and that there are no errors in any of those instructions. If there was any testimony authorizing a claim that they did not act in pursuance of their mortgage interests, it was left to the jury. We do not feel sure that there was much room for such an assertion.

It is not material, in our opinion, whether defendants in error could have replevied the last shipments of goods. They have not done so, and if they choose to look to these garnishees for these as goods of Nellis, they may lose other rights by doing so, but the garnishees cannot repudiate the ownership which they have asserted by seizing them.

The judgment must be affirmed with costs.

MARSTON, C. J. and COOLEY, J. concurred.

GRAVES, J., dissenting. This case was before us a year ago on a judgment against the Feareys, and we remanded it for a new trial. 41 Mich. 376. It is now brought up again after judgment on such trial in their favor. As I am not able to concur with my brethren, I proceed to explain the impressions I entertain.

The action is of very unusual occurrence. It is a controversy under the garnishee law between mutual creditors of the same debtor, and not a proceeding on the part of a creditor against one who, as a debtor of the principal debtor or holder or controller of such debtor's property, is in legal contemplation indifferent whether he pays and delivers to the latter or to the garnishee plaintiff. The nature of the contention, as well as its scope, are different in the two cases, and the distinction and its proper implications ought not to be overlooked.

The remedy by garnishment is statutory and special, and not well fitted for any complicated disputes of this nature. In applying it the court is bound to adhere to all the provisions intended to restrict it or to protect the garnishee. Such extraordinary methods accommodate themselves much better and with greater safety to jurisdictions where the procedure follows or resembles that of equity, than to those where the course is according to the common law.

On the former occasion we acknowledged the difficulty felt in attempting to decide questions under this law unless very distinctly presented.

Some matters are now brought under discussion which were not considered on the former hearing. Such of them as seem to require notice upon my construction I shall refer to with as much brevity as the case will justify. It is first proper to notice three several provisions in the act giving the remedy and which belong to the remedy. Two of these show in a way very marked the design of the Legislature to avoid any such interference with the garnishee as might overrule or impair any just interest or advantage he might have acquired. Drake on Attachment, § 462.

Section 6498 of the Compiled Laws provides that "if any person garnished shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of the defendant, he may be adjudged liable as garnishee on *amount* (*quære*, account?) of such property, although the principal

defendant could not have maintained an action therefor against him."

Section 6472 refers to cases where personal property of the principal defendant, in possession of the garnishee, is under some lien, pledge or mortgage, and makes provision for protecting the rights of the garnishee under such incumbrance. Section 6504 is as follows: "Every garnishee shall be allowed to deduct from the property in his hands all his demand against the principal defendant, of which he could have availed himself if he had not been garnished, whether by set-off at the trial or upon execution, and shall be liable for the balance only after adjustment of mutual demands: *Provided*, that in the adjustment, no claims for unliquidated damages for wrongs or injuries shall be considered."

The effect of these provisions is:

First. To enable a creditor proceeding as garnishee plaintiff against property in possession of the garnishee defendant, to defeat the title or conveyance the latter holds thereto, which is void as against the principal defendant's creditors, but without infringing other claims.

Second. To guard whatever right the garnishee defendant may have as the holder of any valid lien, pledge or mortgage; and

Third. To secure to him, in the cases covered by § 6504, the right to have his demand first compensated out of the property, and to limit his liability over to such amount as remains after the deduction of his demand from the true value of the property. Recurring to the litigation, several matters of importance appear to be settled by admissions, actual or tacit, and a few short propositions will explain the case and relieve it of some incidents which appear confusing: (1) Each set of contestants are creditors of Nellis, the principal debtor; (2) the garnishee defendants, Cummings, were in possession of Nellis' assets at the time of service of garnishee process on them; (3) the chattel mortgage from Nellis to them was void as against the garnishee plaintiffs, the Feareys. *Cooper v. Brock* 41 Mich. 488; *Fearey v. Cummings*, supra.

Fourth. The garnishee defendants were entitled to deduct

under § 6504 the true amount of their demand against Nellis from the fair value of the assets, and could not be held for anything beyond the remainder; but would be liable for that, or so much of that as would be equal to the recovery against the principal defendant. Such, I think, must be the effect of the statute. Had Nellis sued Cummings for goods sold and delivered, and for money had and received, their demands against him would have been the subject of set-off, and the Feareys can be in no better situation. *Gage v. Chesebro*, 49 Wis., 486. The question whether Nellis did or did not yield on account of pressure, when the garnishee defendants got possession, is herein unimportant. There is no ground for claiming that the transaction was merely a sale by Nellis to the garnishee defendants in payment of his debts. And in any event the material inquiry is, what was the true amount of his indebtedness to the garnishee defendants, and what was the fair value of the assets they obtained?

Fifth. The contention by the garnishee plaintiffs that the package of goods which arrived from Fearey's on the 28th of May was obtained by Nellis fraudulently, and with a preconceived design not to pay for it, was not pertinent to the case. The proceeding by the garnishee plaintiffs was not on account of property of which the title was still in themselves, but on account of property of which the ownership was or had been in the principal defendant Nellis.

Sixth. The judgment in Fearey's favor against Nellis in the action with which the garnishee proceeding was connected, has been allowed to remain as rendered. Nellis has not questioned it, and the garnishee defendants cannot be legally prejudiced by any inaccuracy, if there be one, in the amount for which it was entered up. They can be held liable only for whatever of assets they may have received over and above their demand, and in regard to that they are no more than stakeholders or trustees for Nellis, and in the same plight as any other garnishee defendant, who holds indifferently, and subject to the determination of the law as to whom he is to account. They are not in a situation to claim the right, if in any case it could be claimed, to assail the judg-

ment as having been given for debts not due. The point is not germane to their relation to the controversy, in the view I take of it. So far as their legal responsibility and legal rights are concerned, it is entirely immaterial. See *Hanna's Syndics v. Lauring* 10 Martin 568: 13 Am. Dec. 339 and note.

I think the judgment should be reversed.

THE COUNTY OF BAY FOR THE USE, ETC. OF DAVID H. HOUGHTALING AND HIRAM ROMEYN v. MARTIN W. BROCK ET AL.

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Sheriff's bond—Surety's liability when informal.

The sheriff elect entered into a bond, with sureties, which was intended for his official bond as sheriff, and was in all respects correct except that the county was named as obligee therein when the statute required the bond to be given to the people. The board of supervisors approved of the bond as sufficient. *Held*, that as the statute empowered and required the supervisors to examine and approve the bond and the sureties therein, this approval was final and the bond a valid official bond.

As the obligee named in such a bond has no active duty to perform, and no voice in taking or approving of the bond, or in bringing suit upon it, and there is no importance in the people being named as obligee rather than the county, it being important only that some party shall be named as promisee in whose name suits may be brought, the provision for naming the people may be treated as directory merely, and a bond sufficient in substance, which parties have given for the statutory purpose, which has had the statutory approval, and on which the public have relied, will be held sufficient to give the intended security.

Error to Bay. Submitted April 16. Decided June 16.

ASSUMPSIT. Plaintiff brings error. Reversed.

McDonell & Mann for plaintiff in error. Official bonds are not necessarily invalidated by informalities in naming the obligee, if the variance is not material: *Supervisors v. Cof-*

finbury 1 Mich. 355; *La Grange v. Chapman* 11 Mich. 500; *Sweetser v. Hay* 2 Gray 52; *Horn v. Whittier*, 6 N. H. 88; *Governor v. Allen* 8 Humph. 176; *Vanhook v. Barnett* 4 Dev. 268; *Justices v. Smith* 2 J. J. Marsh. 472; *Thomas v. White* 12 Mass. 369; *People v. Love* 19 Cal. 681.

McMath & Cobb for defendants in error. An official bond will not sustain a recovery for the use, etc. of a third party where suit is brought in the name of some other than the statutory obligee: *Albertson v. State*, 9 Neb. 429.

COOLEY, J. This is an action upon the official bond of Martin W. Brock, late sheriff of Bay county, brought by Houghtaling and Romeyn, who allege as their injury, the neglect to levy an execution issued to him upon a judgment in their favor, and a false return thereon.

The case in the court below turned upon the validity of the bond, which unfortunately had not been framed in conformity to the statute. The statute requires the bond to be given to the people of the State in the penal sum of ten thousand dollars, with condition that if the principal obligor shall well and faithfully in all things perform and execute his office of sheriff during his continuance in office by virtue of his election, without fraud, deceit or oppression, and pay over all moneys that may come into his hands as sheriff, then the obligation to be void, otherwise of force. Comp. L. § 551. The purpose of the bond is sufficiently indicated by the condition: it is to protect and give indemnity to all persons in whose favor a duty may arise, to be performed by the sheriff, and who may be damnified by neglect or failure in performance. The State, or what is equivalent, the people of the State (*People v. Love* 19 Cal. 676), is made the obligee, as mere naked trustee for those who might become entitled to the protection of the bond, and who of course can never be known at the time the bond is taken, but will be pointed out by such subsequent events as charge the sheriff with a duty in their favor.

The statute of 1846 required this bond to have the approval

of the circuit or county judge; but this was so changed in 1873 as to impose the duty of approval upon the board of supervisors. General Laws, 1873, p. 26; amended, Public Acts 1877, p. 86. The approval is of the bond, and the sufficiency of the sureties thereto (ibid.); and when approved the bond becomes a part of the county records, and is relied upon for their protection by all persons having occasion to employ the sheriff's services.

The defect in the bond now under consideration is that it names the county of Bay as the nominal trustee, instead of the State. For this reason it is said to be absolutely void, and the parties who have relied upon it as security, who themselves had and could have no voice or influence in shaping or taking it, but who had a right to suppose that the public authorities charged with a duty in the premises would correctly perform that duty, are now, in consequence of this error, left to suffer the loss of important rights without redress. It seems at first blush a very small error to have such important consequences; for the obligee named in the bond has no active duty whatever to perform, being neither consulted when the bond is taken, nor afterwards when it is sued, and having in fact no control whatever over it, except as a public officer holds it for safe-keeping.

If the several duties which the sheriff is called upon to perform could only arise because of the statute requiring the giving of the bond, there would be abundant reason for saying that until a bond in conformity with the statute was produced, no recovery could be had. But this statute does not impose the duties; they would be the same if no official bond were required, and a sheriff *de facto* is charged with them under the same circumstances as is a sheriff *de jure*. It needs no statute to enable the officer to give a valid bond to perform any such duty; and had Brock executed to Houghtaling and Romeyn a common law bond conditioned that he would duly levy and return the execution they placed in his hands, there could have been no doubt of its validity. *United States v. Tingey* 5 Pet. 115; *Thompson v. Buckhannon* 2 J. J. Marsh. 416; *Governor v. Allen* 8 Humph.

176; *Montville v. Haughton* 7 Conn. 543; *Commonwealth v. Wolbert* 6 Binney 292. And any bond that may voluntarily be given to a party for his benefit will be equally valid if given to another for him. *Vanhook v. Barnett* 4 Dev. 268. And in the case last cited this principle was applied to the bond of office of an administrator, which, though given to the county justices when the statute required it to be given to the governor, was held to be a valid common law bond, and available as such to any person in whose favor a cause of action against the administrator might arise. I can see no difficulty in the application of this doctrine to the bond now in suit, except that the damages to which a sheriff may become liable to different persons may indefinitely exceed the penalty of the bond; but it might well be held that recoveries could be had not exceeding the penalty in all. *Commonwealth v. Wolbert*, supra.

But it seems to me that this bond may be supported on another ground. The taking of the bond is by the board of supervisors, and the approval of the form and security is confided wholly to that body. If they decide to take one the form of which is not what it should be, and it is invalid in consequence, there is and can be no redress whatever for those who may be injured. The duties of the board are *quasi* judicial, and no action can be predicated upon an erroneous performance. *Van Deusen v. Newcomer* 40 Mich. 90, 135; *Raynsford v. Phelps* 43 Mich. 342. But the very fact that they are protected in acting upon their judgment, is a reason why the public also should be protected by their judgment. If a mere ministerial officer through his negligence or failure to obey the statute causes damage, he is held responsible for it, and if parties must perforce accept the judgment of a judicial officer or board, they ought to be safe in relying upon it, especially when they can have no opportunity to object or complain.

Now this *quasi* judicial board, in taking and approving the official bond of a county officer have decided that it is proper to name the county therein as obligee. In doing so they have not complied with the strict letter of the law,

which required a bond to the people of the State. No one questions that the bond taken is equally proper, equally convenient and equally effectual provided the law will admit of its being taken, and I doubt if any good reason can be assigned for requiring the bond to be taken to the people rather than to the county, as the supervisors decided to take it. And my opinion is that while the statute ought to have been obeyed literally, yet that in so far as it names the nominal obligee in the bond, it is to be regarded as a directory provision merely. The obligee is not named because of any interest in the condition, but merely that there may be a promisee and a party in whose name to bring suit; nothing of importance depends upon its being the State rather than the county; the condition is the important requirement, and the naming of an obligee is the merest formality possible, so that if the instrument omitted to name one, as the statute evidently contemplates shall be done in the case of a constable (Comp. L. § 723), the substance of the undertaking would still remain. The approval of the supervisors in the case of a sheriff's bond, in which all the substantial requirements appear, seems to me conclusive, and I do not think we are at liberty to treat it as void to the prejudice of those who have relied upon it. The sheriff and his sureties have endeavored to give the proper statutory bond; the supervisors, to whom the law has confided the duty, have given it the statutory approval as proper and sufficient; the public have relied and indeed were compelled to rely upon it; and we are not disposed now to hold that a mere error in matter of form shall disappoint the reliance and nullify as well the attempt of the parties to bind themselves as that of the proper official board to approve it.

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

MARSTON, C. J. and CAMPBELL, J. concurred.

GRAVES, J. dissenting. I agree with the circuit judge that the declaration shows no cause of action. The law

cannot be changed by the mode of entitling the cause, or by the fashioning of the declaration. The defendant Brock was elected sheriff and gave a bond, with the other defendants as sureties, for the discharge of his duties in a proper manner. It was framed in accordance with the statute (Comp. L. §§ 550–1) in all respects, except that in place of being made to "the people of this State," it was drawn and executed as running to "the county of Bay." It was approved in the same manner by the board of supervisors as required where the bond, conformably to the statute, is made in terms to "the people of this State." Laws 1873, Act 27, p. 26, as amended in 1877 by Act 112 Pub. Acts 1877 p. 86. The action is brought on this instrument in the name of Bay county. In entitling the cause the names of Houghtaling and Romeyn are introduced as persons for whose use and benefit the suit is prosecuted, and the cause of action set up is confined to injuries to them by the defendant Brock in his character of sheriff, in neglecting to levy and in falsely returning as unsatisfied an execution in their favor. No breach of duty or default towards the county is suggested The county's title to sue is based exclusively on the alleged grievances of Romeyn and Houghtaling.

The general principle is indisputable that no one but the party having the strict legal title to the cause of action can be plaintiff, and that suing in the name of one and alleging the cause of action as in another is a fatal contradiction (1 Chitty's Pl. 2, 3; *Forrest v. O'Donnell* 42 Mich. 556); and this principle is always applicable unless the case is taken out of it by some special regulations, and there are no such provisions for a suit in the name of a county, based on a bond for the official good behavior of a sheriff.

Where the people of the State are the real obligees, a suit in their name may be maintained on the bond for the use and benefit of any one injured by the default or misconduct of the sheriff in his office, and in that case "such party shall be deemed the plaintiff in such action." Comp. L. ch. 209 § 1 et seq.; *Jackson v. The People* 6 Mich. 154. The power in that instance is given by statute, and would not

exist otherwise. The enactment would not have been required if the same course might have been pursued without it. The Legislature saw fit to connect the remedial exceptions with a proceeding in the name of the people on the sheriff's official bond, and not with one in the name of a county, and it is not competent for the court to extend the regulation to an action in the name of a county. *Davis v. Kruger* 4 E. D. Smith 350; *Jackson v. Simonton* 4 Cranch C. C. 255; *Town of La Grange v. Chapman* 11 Mich. 499; *Stevens v. Hay* 6 Cush. 229; *Marshall v. The State* 8 Blackf. 162.

In case the beneficiary sues in the name of the obligee for a cause of action with which, as the same is set forth, the obligee has no connection, the aid of the statute is indispensable; and where, as here, it does not apply, the nominal plaintiff must be considered as the real plaintiff in judging of his right to sue on the cause of action set up, and the suggestion that the suit is for the benefit of others cannot avoid the want of legal title in him apparent on the face of the declaration. *Farwell v. Dewey* 12 Mich. 436; *Clay Fire & M. Ins. Co. v. Huron Salt etc. Co.* 31 Mich. 346; *Kelly v. The State* 25 Ohio St. 567; *The State for the use of the Justices of the Levy Court of Baltimore County v. Dorsey et al.* 3 Gill & J. 75; *Inhabitants of Northampton v. Elwell* 4 Gray 81.

The books contain instances where actions have been sustained, notwithstanding a variation between the denomination of the obligee in the statute and in the bond. But this has been on the ground of there being no difference in effect, the essence of the ruling being that either name denoted the same governmental agency or sovereignty: *Treasurers v. Stevens* 2 McCord 107; *Tevis v. Randall* 6 Cal. 632. So too it has been held that the same corporation might under some circumstances be made a party in legal proceedings, under either of two names, each having the requisite legal property to identify it. *Lyell v. Supervisors of Lapeer County*, 6 McLean 446; *Johr v. Board of Supervisors of St. Clair County*, 38 Mich. 532. These decisions are not applicable here.

The expressions "The county of Bay" and "The people of this State" do not represent the same thing. The latter denotes the political or sovereign body of the State, and the former one of its political subdivisions or municipal corporations. The county had only the common interest of natural and artificial persons in general, and no greater competency to become a party as obligee; and it had no authority whatever to assume the position of trustee. No exception in favor of authority by the county can therefore be found in any peculiar interest of its own, or in any particular duty imposed upon it to stand as a trustee.

But it must not be implied from these considerations, which are urged to show that the bond is not suable in the name of the county, that it is decided to be invalid. That point is not involved. The transaction stands on grounds peculiar to itself. The requirement of the proper obligation is an expedient of government to afford protection to suitors, and is of a public nature. The obligation prescribed does not spring from the mere business concerns of individuals, or from any of those arrangements of personal or private interest which are the sources of other classes of obligations. It is something which forms a part of the machinery of administration. It is expressly required of the sheriff, and its character and scope are previously ascertained by law. No room is left for any negotiation or speculation about the terms. They are given by the statute, and as stated heretofore, the instrument is directed to be made to the people of this State, and except in Wayne county, the business of approval is devolved on the board of supervisors. In performing this function it is incumbent on them to see, not only that the sureties are sufficient, but that the essential matters as to the contents agree with the statute; and in this they are called to act as agents of the public and guardians of its interests. The named obligees are contemplated as having nothing more than the legal title, the beneficiary being regarded, in case of a suit, as the plaintiff in interest and controller of the action, and the suit and judgment as his suit and judgment.

Now, in regard to the instrument in question here, there seems to be but one inference, and that is that it was drawn, executed and received as the security the statute called for from the sheriff, and that the only agency for the public in taking it was the board of supervisors, and that the board, standing in that situation, instead of taking it in the name of the true and lawful principal, the people of the State, took it in point of fact in its own name, or rather in the name of its other self. And it seems to me that, without violating any principle or going counter to any sound reason, a suit in the name of the principal, the people of this State, with proper averments of their legal title and in explanation of the case, might be maintained. *United States v. Boice*, 2 McLean 352; *Dugan v. United States* 3 Wheat. 172; *President and Trustees of the Town of Fort Wayne v. Jackson* 7 Blackf. 36.

I perceive no obstacles that are not rather formal and technical than substantial. It would be different with a case originating in another way and not subject to the group of considerations which depend on the nature of the obligation and the statutory provisions with which it is inseparably connected. There was nothing for the judgment or discretion of the obligors. There were no terms to be the subject of discussion. The required security was precisely liquidated by law, and nothing more was necessary than to fill the mould, and this the parties were bound to know. They were acting on the call of the law, and it must be intended that it was their purpose to comply with it and not evade it. The case not being one in which the parties might shape their undertaking to suit themselves, the door is closed against all claims based on the assumption that their position entitled them to exercise option. Whether they succeeded or not, their design in executing this bond was to satisfy the statute.

The main stumbling-block seems to be the seal. But the fact that the instrument is under seal, though once a weighty circumstance, is not a matter of much importance now. The ancient significance of private sealing has almost wholly disappeared, and so far has respect for it declined that the Leg-

islature has first permitted the use of "any device" "by way of seal" (Comp. L. § 5937), and then enacted that "no bond, deed of conveyance, or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party." § 6194. When the matter is considered independently of the deference usually felt for technical rules belonging to a state of things where many of our legal doctrines originated, although the circumstances in which they had their birth are entirely altered, the sealing seems a very insufficient reason for excluding the name of the people of the State as formal plaintiffs on the bond.

The theory suggested of regarding the county, for the purpose of the question, as the agent of the people of the State in taking the bond, and then implying a right to sue on it in the name of the people as the principals or substantial obligees, was not presented in *La Grange v. Chapman*, supra, and I see no other theory on which the bond can be sustained.

Under this view there may be a question upon the effect of the judgment. It may be claimed that Houghtaling and Romeyn are concluded. That does not appear to me the necessary legal result. The present action, on the view I take, is determined. But as the case was brought to an end by the refusal to admit any evidence, and the ruling was authorized, not because the bond was invalid and could not be sued on for the benefit of Romeyn and Houghtaling in the name of the people, but because it could not be so sued on in the name of Bay county, the effect is not final, and the judgment cannot be regarded as a bar to a new suit in the name of the people.

In my opinion the judgment should be affirmed, with costs.

ÆTNA INSURANCE COMPANY v. CHARLES RESH.

Insurance—Divisibility of contract for insurance.

An insurance policy, covering both real and personal estate is not to be held a divisible contract, part of which may remain in force though the rest be invalid, where it is not perfectly clear that the insurer would have assumed both risks separately.

Error to Kent. Submitted June 8. Decided June 16.

ASSUMPSIT on insurance policy. Defendant brings error. Reversed.

Norris & Uhl for plaintiffs in error. The weight of authority is against the divisibility of insurance contracts: *Gottsman v. Ins. Co.* 56 Penn. St. 210; *Fire Association v. Williamson* 26 Penn. St. 196; *Firemen's Ins. Co. v. Assum* 5 Md. 165; *Bowman v. Ins. Co.* 40 Md. 620; *Moore v. Virginia F. & M. Ins. Co.* 28 Grat. 508; *Friesmuth v. Ins. Co.* 10 Cush. 587; *Brown v. Ins. Co.* 11 Cush. 280; *Treadway v. Ins. Co.* 29 Conn. 68; *Hinman v. Ins. Co.* 36 Wis. 159; *Barnes v. Ins. Co.* 51 Me. 110; *Patten v. Ins. Co.* 38 N. H. 338; *Plath v. Minnesota Farmers' Mut. F. Ins. Ass'n* 23 Minn. 479; *Wilson v. Herkimer County Mut. Ins. Co.* 6 N. Y. 53: contra, *Merrill v. Ag. Ins. Co.* 73 N. Y. 452; *Hartford Ins. Co. v. Walsh* 54 Ill. 164; *Phœnix. Ins. Co. v. Lawrence* 4 Ky. 9; *Koontz v. Ins. Co.* 42 Mo. 125.

Simonds & Fletcher for defendant in error, as to the divisibility of the insurance contract, cited: *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247: 19 Mo. 628; *Clark v. New England Ins. Co.* 6 Cush. 342; *Date v. Ins. Co.* 14 U. S. 548; the divisibility of a contract depends partly upon whether the parties would have entered into it if it were so construed: *Young Mnfg Co. v. Wakefield* 121 Mass. 91; *Clark v. Baker* 5 Met. 452; *Morse v. Brackett* 98 Mass. 205; *Mansfield v. Trigg* 113 Mass. 350; *Coburn v. Hartford* 38 Conn. 290; *Shinn v. Bodine* 60 Penn. St. 182; a contract is

severable if its consideration can be distributed: *Johnson v. Johnson* 3 Bos. & P. 162; *Miner v. Bradley* 22 Pick. 457; *Lucesco Oil Co. v. Brewer* 66 Penn. St. 351; *Robinson v. Green* 3 Met. 159; *Pelton v. Minot* 7 Allen 412; *Perkins v. Hart* 11 Wheat. 237; *Dibol v. Minott* 9 Ia. 403; May on Ins. § 278.

MARSTON, C. J. This case now comes before the court upon the same showing as when here before, with the addition that evidence was introduced tending to show the rate per cent. at which the property was insured, and the ruling of the court that under such evidence the policy was divisible, and that a recovery might be had for the personal property lost. The prior decision will be found in 40 Mich. 241. As was said when the case was here before, reference was made in the policy to a written application which was declared to be a warranty, and the policy was to be avoided for any omission to make known a material fact. The false representations related to the title of the insured to the real estate and encumbrances thereon.

There is a conflict in the authorities as to the right to recover in cases like the present. That there may be cases where the contract would be divisible, and where the fact that the policy might be rendered void as to a part would not affect the whole, we do not question, and what may here be said must not be understood as going beyond the facts of this case as presented us.

Here the false statements which avoided the policy as to the buildings were made before the policy was issued. The personal property was in the same building. If it was for the interest of the insured to cause or suffer a loss of the building, because he had not the interest therein he had represented, it would we think be idle to say that such fact would not increase the risk upon the personal property in such building. It would be very unsafe therefore to assume that the company would have taken a risk upon the personal property, separate from the building, and therefore, because the rate and the amount insured upon the personal can be

separated from that on the building, to hold that the contract is divisible. That the company would have taken a risk upon the personal property alone, to a like amount and at the same rate, we may assume, even with full knowledge that the insured had no title to the building; but it would be hazardous to assume that with such knowledge the company would have written upon both the personal property and the building, so that upon the whole policy the insured would be more interested in a loss of both than in their protection. It was declared in this policy that the omission to make known a material fact should render it void, and we cannot say that the false representation was not material as to both the real and personal property. The case should be clear and free from all reasonable doubt to warrant a court in carving out separate and distinct contracts from one common whole. The authorities upon this question are collected and cited in the briefs of counsel.

Upon the facts presented there can be no recovery, yet we can but reverse the judgment with costs and order a new trial.

The other Justices concurred.

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IN RE ESTATE OF ALFRED D. RATHBONE, DECEASED.

Executors—Settlement of accounts.

The probate court may require executors whose accounts are under investigation, to submit to oral examination under oath by counsel for heirs and legatees of the estate.

Certiorari to Kent. Submitted June 8. Decided June 16.

Blair, Kingsley & Kleinhans for plaintiff in *certiorari*. The examination of an executor upon rendering his account should be by the probate court, and ought not to be con-

trolled by heirs, legatees or creditors: *Buchan v. Rintoul* 70 N. Y. 1; *Westervelt v. Gregg* 1 Barb. Ch. 469; *Hall v. Grovier* 25 Mich. 436.

Norris & Uhl for defendants in *certiorari*. The Massachusetts statute permitting an executor to be examined on oath by the judge of probate was adopted in the Michigan Revised Statutes of 1837. See Smith's Probate Law, 3d ed. 217; *Stearns v. Brown* 1 Pick. 535; *Saxton v. Chamberlain* 6 Pick. 425; *Higbee v. Bacon* 7 Pick. 14: 8 Pick. 489; *Pope v. Jackson* 11 Pick. 118; *Bailey exr. v. Blanchard* 12 Pick. 166; *Bard v. Wood* 3 Met. 76; *Sigourney v. Wetherell* 6 Met. 558; *Wade v. Lobdell* 4 Cush. 510.

GRAVES, J. The probate court of Kent county, having under its cognizance the investigation of the accounts of Mr. George H. White as executor of the will of said Alfred D. Rathbone, deceased, made an order to the effect "that the said executor, George H. White, do submit to an oral examination under oath by counsel for the heirs and legatees of said estate." Mr. White expressed his willingness to be examined on oath by the court upon any matter relating to said account, but objected to such examination by counsel for the heirs and legatees, and upon the ground that the statute gave no such power: Comp. L., § 4489. The judge of probate overruled the objection and Mr. White appealed to the circuit court, and the order was affirmed.

We are now asked to revise the ruling on *certiorari*. The court is unable to find any merit in the objection. The right of examination in such cases is one of great importance, and it is not easy to see how it can be made oppressive to any honest trustee. In a great number of cases the ability to trace out transactions and ascertain the truth in fiduciary matters must depend very much at least upon such disclosure or discovery as is freely made on the one hand or coerced on the other, and the reason is very strong against anything likely to fetter the power, where necessary explanation is not spontaneous but requires pressure.

It seems extremely probable that those actually interested would possess great advantage over the judge in the knowledge of facts and incidents essential to a fruitful examination, and that a rule confining it to him would be an embargo upon the object. This could not have been intended, and the right to have the assistance of counsel is justified by the same principles. Whether the questions proceed from the judge or from counsel, the examination, so far as any is allowed, must have the sanction of the court, and no one will contend for the empty form of having the questions suggested to the judge in order that he may literally put them. The statute contemplates nothing of the kind. It virtually assumes that the examination will be conducted in the way usually practiced in the probate court. The common course in some jurisdictions is to proceed on written interrogatories, but no one has ever supposed that they must be actually framed and drawn up by the judge. Yet the objection we are considering would require it. Extended discussion is unnecessary.

The order is affirmed with costs against the plaintiff in *certiorari*.

The other Justices concurred.

J. W. BRIGHAM ET AL. v. JOHN W. BROWN, LESTER J. RINDGE ET AL.

Mortgage—Consideration—Good faith—Record.

A man may give a voluntary mortgage if he chooses, and it will be good except as to those who are or might be defrauded by it. But the fact that a mortgage is given without consideration may have an important bearing on any disputed question concerning its delivery or recording.

A debtor gave a mortgage for the debt, the *bona fides* of which was not disputed, and it was at once placed on record. Subsequently it was found that another party had a mortgage from the same mortgagor on the same land, purporting to be given and recorded first. This

mortgage had no debt to support it, unless it was one owing to a firm of which the mortgagee was a member, and for which other mortgages for more than its amount, were in existence. The register of deeds testified that it was left with him by the mortgagor, with directions not to place it upon record until further directions were given, and that he never received any such directions, but his clerk recorded it without orders. *Held*, that the spreading it upon the record book, under such circumstances, was not a recording which entitled it to priority.

When a paper is left with the register with the understanding that it is not to go upon record until further directions, the register, when he receives such directions, must record it as of that time, and not as of the time when it was left with him.

Where a mortgage is given, manifestly as a cover for the benefit of the mortgagor, and the latter is sent with it to the registry, where he gives directions for leaving it off the record, the mortgagee will be bound by these directions, and will not be at liberty to rely, as against them, upon a false certificate of recording which he obtains.

Appeal from Newaygo. Submitted June 9. Decided June 16.

FORECLOSURE. Complainant appeals. Decree modified.

E. L. Gray for complainants. Parol evidence is admissible under a bill to set aside a discharge of a mortgage, to show that it was entered by mistake: *Bruce v. Bonney* 12 Gray 107; *Davis v. Stern* 15 La. Ann. 177; *Watson v. James* id. 388; *McKelway v. Armour* 2 Stockt. 510; *Tatum v. Goforth* 9 Ia. 247; *Hunt v. Rousmanier* 8 Wheat. 174; *Brainerd v. Brainerd* 15 Conn. 575; *Geddy v. Stainback* 1 Dev. & Bat. Ch. 66.

Blair, Kingsley & Kleinhans for defendant Rindge. The conclusiveness of official certificates of the record of papers is generally sustained: *Tracy v. Jenks* 15 Pick. 465; *Ames v. Phelps* 18 Pick. 314; *Fuller v. Cunningham* 105 Mass. 442; *Adams v. Pratt* 109 Mass. 59. The register is bound to perfect the record, regardless of the orders of the parties to a mortgage, after it has been received for record: *McDonald v. Leach* Kirby 72; *Hartmeyer v. Gates* 1 Root 61; *Woods' and Brown's Appeal* 82 Penn. St. 116; *Judd v. Woodruff* 2 Root 298.

COOLEY, J. The bill in this case was filed to foreclose a mortgage given February 15, 1878, by defendant Brown to complainants, and recorded on the day of its date. No question is made of the *bona fides* of this mortgage, and the case turns upon a question of priority between the mortgage of complainants and one given by Brown to defendant Rindge, of the same land, for $1500. The Rindge mortgage bears date December 11, 1877, and purports to have been recorded January 1, 1878. It was shown by complainants, however, that at the time of the taking of their mortgage they applied to the register of deeds for an examination of the title to the land, and he reported to them it was unencumbered. On the other hand, Rindge testified that Brown made the mortgage and brought it to him fully executed in December, and that he took it, but then handed it back to Brown with instructions to put it on record; that on January 19, 1878, he called at the register's office for it, and was told it was not yet recorded; that he called again in March following, when he found that the register had erased an entry he had made of its receipt for record, but the mortgage was actually recorded, and he, Rindge, insisted upon having it, with the usual certificate of record, and succeeded in so obtaining it. There can be no question that the register marked the mortgage as received for record January 1, 1878, and made an entry to that effect on a book kept for the purpose, which was seen by two witnesses before complainants' mortgage was recorded; but the register testified that Brown handed him the mortgage with express directions to hold and not record it unless subsequently told to do so, and that he never received any subsequent instructions. He also testified that it was not in fact recorded at the time complainants' mortgage was put upon record, and that the recording was done by his deputy, without his direction or knowledge. He further testified that the fees for recording were not paid to him. Brown, for some reason, was not called as a witness, and the register's testimony was in the main undisputed.

Complainants in their bill allege that the mortgage from Brown to Rindge was given without consideration, and as a

fraudulent cover to his property. We are of opinion that this was the fact. Rindge admits that there was no debt from Brown to himself, but he claims that the mortgage was given as collateral security to a debt owing by Brown to a copartnership of which Rindge was a member. No such purpose appeared in the paper, and it was necessary to show the fact by parol evidence. The same evidence further showed that the copartnership held securities independent of this largely in excess of their demands, and from the fact that this mortgage was voluntarily made by Brown and brought to Rindge without having been asked for, goes far to establish the allegation complainants make respecting its fraudulent purpose. Nevertheless a man may give a voluntary mortgage if he chooses, and it is fraudulent only as to those who are or would be defrauded by it. *Gale v. Gould* 40 Mich. 515. And no one would be defrauded, in contemplation of law, who was merely a subsequent mortgagee with notice, actual or constructive, of the voluntary instrument.

In the present case, however, we are convinced that the Rindge mortgage was neither in fact nor in contemplation of law, on record when the mortgage to complainants was recorded. The register's evidence respecting the delivery of the mortgage to him by Brown stands uncontradicted, and we have no reason to doubt its truth. The fact that the mortgage was one by which Brown was the party to be benefited rather than Rindge, precludes Rindge from relying upon the register's certificate of record as against the actual fact, and makes his interest, such as it is, chargeable to the fullest extent for Brown's directions to the register. It is very clear that merely leaving the mortgage in the register's hands was not, under the circumstances, leaving it for record (*Austin v. Curtis* 41 Mich. 723); and there was consequently no constructive recording. As the actual copying of the paper into the record book did not take place until complainant's mortgage was recorded, we need not concern ourselves with the question whether that copying it into the book without direction to that effect was or was not a recording. It is sufficient for the purposes of this case that the register had

no right to record the paper as of the time when it was first left, even had he been willing to do so.

The court of chancery erred in allowing precedence to the Rindge mortgage. The decree in that particular must be modified, and in other respects affirmed. The complainants are entitled to the costs of both courts.

The other Justices concurred.

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136	2264
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f152	3247

EDWARD W. SPARROW v. HIRAM W. HOVEY

Ejectment—Adverse possession—Claim by tax title.

In ejectment where the plaintiff claims title by adverse possession, it is proper to permit him to show that the land was generally called and spoken of as his in the neighborhood, as this tends to prove the notoriety of his claim of title.

When title is claimed by an adverse possession for the statutory period, it should appear that the possession had been actual, continued, visible, notorious, distinct and hostile. And where the circuit judge was requested so to instruct the jury, and refused, but instructed them only that the possession must be actual, continued and visible, *held* to be error.

But a claim under a tax title is necessarily hostile to the owner of the original title.

Error to Shiawassee. Submitted June 9. Decided June 16.

EJECTMENT. Plaintiff brings error. Reversed.

O. L. Spaulding for plaintiff in error. General reputation is inadmissible to prove possession or ownership: *Yelverton v. Steele* 40 Mich. 538; *Musick v. Barney* 49 Mo. 458; *Fugate v. Pierce* id. 441; *Dixon v. Cook* 47 Miss. 220; *Carrol v. Gillion* 33 Ga. 539; *Beatty v. Mason* 30 Md. 409; *Denham v. Holeman* 26 Ga. 182; *Brown v. Cockerell* 33 Ala. 38. Payment of taxes only shows claim of title: *Paine v. Hutchins* 49 Vt. 314. Paying taxes and publicly referring

to one's claim do not show adverse possession: *Ewing v. Burnet* 1 McL. 266. Nor does the building a fence: *Soule v. Barlow* 49 Vt. 329; *Russell v. Davis* 38 Conn. 562. Nor entering at long intervals to cut wood: *Williams v. Wallace* 78 N. C. 354. Nor cutting timber on wild land: *Washburn v. Cutter* 17 Minn. 361. Nor splitting rails and cutting timber: *Parker v. Parker* 1 Allen 245; *Hole v. Rittenhouse* 37 Penn. St. 116.

Hugh McCurdy for defendant in error.

COOLEY, J. This was an action of ejectment, and the defense relied upon was the Statute of Limitations.

I. Defendant having shown his possession for the requisite length of time, under tax titles which are now conceded to be invalid, was suffered to prove that the land was generally understood to be and called his, in the neighborhood. Exception was taken to this evidence, but we think it was competent. It tended to establish the notoriety of defendant's possession, and claim of title; which were important facts in his defense.

II. The circuit judge was requested to instruct the jury that defendant to complete his defense must show that his possession for the requisite time was actual, continued, visible, notorious, distinct and hostile. The judge gave the instruction with the omission of the last three qualities, and refused to give it otherwise. Why he thus limited it does not appear and we cannot surmise. The request was entirely proper, and should have been given: *Yelverton v. Steele* 40 Mich. 538. It cannot be said that the instruction given covered the case, for a possession may be actual, continued and visible, without being either notorious or hostile, and no possession can be adverse within the intent of the Statute of Limitations that lacks either of these qualities.

Where possession is held by claim of title under a tax deed, it is perhaps of necessity hostile to the title of the claimant under the original title; and as that was the nature of defendant's claim in this case, we might overlook the

dropping of the word "hostile" in the instruction. But the distinctness and notoriety of the defendant's possession were the very things in controversy on the evidence, and the necessity that these should appear ought to have been impressed on the jury.

The defendant claimed a possession which was more constructive than actual, and which was limited in the main to cutting timber. He did not live on the land, and there were not at all times upon it visible evidences that any person was in occupancy. A passer-by, looking at the land, might have inferred that it had been the subject of frequent trespasses, without ever having been in the actual possession of any claimant. The facts respecting possession were so equivocal as to invite different conclusions from different minds, and there is much reason to believe the jury may have been misled by an instruction which left them to understand that notoriety and distinctness in the possession were unimportant. We think we have no alternative but to order a new trial with costs to the plaintiff.

The other Justices concurred.

JAMES A. LAMBERT v. ABNER J. GRIFFITH, JOHN RICE ET AL.

Partnership accounting—Cash Book Entries—Review on appeal.

Where an agreement for a settlement of partnership accounts provided that sums found due to either party should be added to, or deducted from, an agreed sum to be paid to one of them, the party claiming the benefit of any such additions or reductions has the burden of proving that the amount has been received and not accounted for, or paid out and not credited.

Cash book entries are not conclusive in a settlement of partnership matters if there is countervailing evidence. But if there is not, the settlement should be in accordance with the *prima facie* showing made by the books.

On an appeal in chancery the appellate court may examine the exceptions of the party who did not appeal.

Appeal from Berrien. Submitted June 9. Decided June 16.

BILL for accounting. Complainant appeals. Decree modified.

Franklin Muzzy and *Theodore G. Beaver* for appellant.

Edward Bacon for defendants.

MARSTON, C. J. Complainant seeks to foreclose a mortgage executed to him by John Rice and wife, and conditioned that Abner J. Griffith and said Rice should well and truly perform the conditions of a certain written agreement entered into by them with said Lambert, and dated August 25, 1873.

The matters in dispute relate to the allowance and disallowance of certain items in the settlement of the accounts of Lambert with the firm of which he had been a member. As this settlement is made under and in pursuance of the agreement of August 25th, a proper construction thereof may aid us in coming to a correct conclusion.

Complainant and defendants Rice and Griffith, previous to the date of this agreement, had been engaged in business under the firm name of Griffith & Co. Complainant, for a part of the time at least, had charge of the books and finances of the firm.

By this agreement Lambert agreed to sell to Griffith & Rice his interest in the property and effects of the firm, and also to surrender up a note for $4000, which he held against the firm. In consideration thereof they agreed to pay the firm debts, and to give complainant a bond of indemnity against such debts and demands. They also agreed to save and release him from all liability upon a firm note for $4000 which Rice held, and also agreed to pay him $4000 by assigning to him a bond or contract of Thomas Jones, which was to be taken at $2500, and they agreed to give him their promissory note for $1400, payable five months from the

date thereof, without interest. The contract contained this clause: "There shall be deducted anything that may be found due to the parties of the second part by reason of the appropriations or omissions of the party of the first part (Lambert) to account for any sums that may have come into his hands as a member of the firm of Griffith & Co., and not accounted for." They farther provided that the balance found due after such deductions Griffith & Rice should pay in one year, with ten per cent. interest.

The contract farther provided for an examination of the books of the firm, in order to ascertain the moneys received and not accounted for, and provided for an arbitration "to determine and award the amount so due to said parties of the second part by reason of the withholding of any money or moneys so received, and also shall so hear and determine and award how much, if anything, said party of the first part has paid out and not credited himself with on the books, and the balance so found due, if anything, to parties of the second part shall be deducted from the said sum of four thousand dollars; and if anything shall be found due to said party of the first part, such sum shall be added to the said sum of four thousand dollars." The parties agreed upon did not meet and adjust the accounts.

Under this contract Griffith & Rice agreed to pay complainant $4000 for his interest in the firm. If they claim such amount should be reduced by reason of firm moneys received by complainant and not accounted for, they must show the same; while if complainant claims that this sum should be increased on account of moneys paid out by him for the firm and not credited to him on the books, the burden of proof is upon him to that extent. Bearing this in mind, we will have less difficulty in passing upon the disputed items, where there is any doubt concerning them. Although this case was once sent back to enable the parties to take additional proofs, in order to remove some doubts then existing, it is somewhat singular that no attempt was made to ascertain from the firm books whether there was a balance in complainant's hands unaccounted for. The parties have

thought proper to confine themselves to particular items, and even as to some of these the existing uncertainties which we think might have been removed, are not.

The first item disallowed in the report of the commissioner, and to which complainant excepts, is that of $1000 deposited in the bank to the credit of the firm by Rice for Griffith. This was charged to complainant because, although appearing on the firm books, it was not accounted for on the cash book kept by complainant. It appears this money was all paid out by the bank upon the checks of the firm. Indeed, this was the only way it could be reached, and we have not found any testimony which shows that complainant appropriated to his own use any part of the funds so drawn out. As already said, it is not sought to charge complainant with a general balance, but with particular items, and when it appears that such sums have gone to the credit and use of the firm, we cannot charge complainant therewith, whether appearing upon the cash book of the firm or not.

The next item of importance is a draft, $45, received of R. Coblitz. The books show the receipt of this draft, and a credit to Coblitz of the amount thereof, but no credit to the firm. There was at a different time another draft of a like amount received and credited to Coblitz and to the firm; and it is claimed these two entries pertain to one and the same draft, the first when it was received, and the second entry when the draft was paid. This may be true, and it is singular that other competent testimony within reach was not obtained to clear up this doubt. *Prima facie* two separate drafts were received and paid, and complainant must be charged accordingly. The A. P. Mills draft was accounted for, and the report of the commissioner in respect thereto is correct.

The explanation of the $400 paid in by Lambert, as given by the commissioner, we do not fully understand. This sum was unquestionably paid into the bank by complainant to the credit of the firm and used by the firm, and we are not satisfied that he received credit therefor.

The amount of $999.52, claimed by the complainant as

due him from the firm at the time of the dissolution, is not covered by this mortgage, and cannot therefore be allowed. The report of the commissioner, and for the reasons given by him, as to this item, is correct.

These are all the matters we consider of sufficient importance to examine in detail, covered by complainant's exceptions. The defendants do not appeal, but under the rule adopted in *Grant v. M. & M. Bank* 35 Mich. 515, we will examine defendants' exceptions. Some of the defendants' exceptions are so general that they cannot be noticed.

The first item is one of $5 interest, which we are of opinion comes within the terms of the contract, and should have been charged to complainant. We agree with the commissioner that as to the two items, one of $31.50 and one of $40, said to have been received of Rice, it does not appear that complainant received these sums, and we also agree with him in his allowance of the Jones & Laughlin account, $139.66, and also in allowing for the king bolts, etc., not delivered to complainant.

Under this view there should be added to the amount allowed complainant by the decree of the court the sum of thirteen hundred and ninety-five dollars, with interest at ten per cent. from August 25, 1873, the date of the mortgage. The decree will also provide that the $1500 payment of June 15th (Exhibit 6) shall be cancelled, and complainant will recover costs.

The other Justices concurred.

Abigail Brink v. Alfred Freoff.

Chattel mortgage—Sale for single instalment—Special damages.

Where a mortgagee of chattels has seized the property mortgaged when only one instalment was due, and sold it to a third person for the satisfaction of the whole mortgage, a subsequent tender by the mort-

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gagor of the amount of the mortgage, and demand of the property, is a mere idle ceremony, since the demand cannot be complied with.

The mortgagor under such circumstances brought suit against the mortgagee to recover the value of the property which had been illegally sold. *Held*, that he was entitled to recover the value of the chattels which were sold after the first instalment had been satisfied, together with special damages if any were shown, but with deduction of the amount that then remained unpaid on the mortgage.

But special damages can only be recovered where they are alleged and claimed in the declaration.

Error to Wayne. Submitted June 9. Decided June 16.

TROVER. Defendant brings error. Reversed.

Hawley & Firnane for plaintiff in error.

Ward & Palmer for defendant in error.

COOLEY, J. This case was once before in this court, and the decision is reported in 40 Mich. 610. The suit was by Freoff in trover, for the conversion of various articles of personal property. The defense was that Brink sold the same to satisfy the amount of a chattel mortgage which she held upon them. But it appeared that the mortgage was payable in instalments, only one of which was due, and that Brink in selling disregarded that fact and sold property to satisfy the whole amount. The controversy turns upon the rule of damages; it being conceded that Brink, in proceeding to sell further after what was due had been satisfied, was chargeable with a conversion.

It was shown by Freoff that sometime after the sale he tendered to Brink the amount of the mortgage, and demanded his property back. On the first trial of the case the circuit court held that as such a tender would discharge the lien of the mortgage, it would entitle Freoff to recover in trover the full value of the property which had been wrongfully sold. But this court held that such a tender, accompanied by a demand which Brink, by reason of having parted with the property, could not comply with, would be an idle ceremony. Also that though Freoff was entitled to recover for the sale

of any further articles after the instalment which was due had been satisfied, yet that the recovery must be limited to actual damages. These damages would consist in the value of the articles wrongfully sold, and such others, if any, as the wrongful sale had caused, less the amount which Freoff would have been obliged to pay to satisfy the amount not yet due on the mortgage when the sale was made.

The second trial has evidently proceeded upon a misapprehension of our opinion. The jury were instructed in substance that if Freoff tendered to Brink the amount of the mortgage, less the amount of the first instalment which had been rightfully paid by the sale, and if he attached no condition to the tender, and Brink refused to receive it, Freoff was then entitled to recover the value of the property wrongfully sold, irrespective of the amount remaining unpaid. This was precisely the ground of the first recovery, which we held to be erroneous, except that the instruction in this case required the tender to be unconditional, while on the first trial it was understood to have been made on condition that the property be restored.

An examination of the opinion of Mr. Justice Marston in the former case will make it apparent that the conditional nature of the tender had nothing to do with the decision. Indeed, the opinion was intimated that the mortgagor of chattels in making tender of the amount due on the security, has a right to require surrender of the property; but in the particular case such a requirement was an idle ceremony, because compliance had been rendered impossible by the sale. It was not the condition that made the tender useless, but the impossibility of complying with the demand.

A moment's consideration of the position of the parties at the time this tender was made, will show, as we think, the reasonableness of our former decision. Brink had wrongfully sold a portion of Freoff's property, and the latter was entitled to recover its value. But if this were recovered, the mortgage debt would remain unsatisfied, and Brink could recover from Freoff the balance owing upon it. But the proceeds of the property sold had been actually applied to satisfy the

mortgage, and Brink when moneys were tendered to her in repudiation of the sale had refused to receive them. Why under the circumstances should not this application be allowed to stand, and the whole controversy between these parties be determined in one suit instead of permitting Freoff to recover the whole value of the property in one suit, and Brink immediately to recover back that portion of the value which she had already applied on the mortgage? We could discover no reason for preferring the latter course to the former. The law abhors needless litigation, and two suits to adjust the equities of the parties in a single transaction, when they can just as well be adjusted on the same principle in one, should not be tolerated.

On another point the previous opinion was perhaps misunderstood. It was said in that opinion that Freoff was entitled to add to the value of the property any special damages he might have sustained. By this was meant any damages additional to the loss of the value of the property. But these could only be recovered under the rules of law; and it is a familiar principle that damages which are peculiar to the case and spring from exceptional circumstances must be specially alleged or they cannot be recovered. In this case there was no allegation whatever of special damages, and therefore plaintiff was entitled to recover only such as might naturally follow in any case of unlawful conversion, irrespective of special circumstances. Nevertheless, evidence was taken in the case that plaintiff sustained by the conversion damages to a large amount: one witness estimating them much beyond the value of the property, but not explaining how this was possible. Of course such evidence had no warrant in the pleadings.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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PETER WEIRICH v. WILLIAM R. SCRIBNER AND FREDERICK A. POTTER, GARNISHEES OF JOSEPH WARD.

Garnishee's disclosure.

A garnishee's disclosure in justice's court must be explicit in its admissions to warrant judgment.

Case made from Kent. Submitted June 9. Decided June 16.

GARNISHMENT. Plaintiff had judgment. Reversed.

Charles J. Potter and *Turner & Smith* for plaintiff.

Stuart & Sweet for defendants. Recovery cannot be had against a garnishee unless his disclosure affirmatively makes him out to be indebted to the principal defendant. *Lorman v. Phœnix Ins. Co.* 33 Mich. 65; *Hackley v. Kunitz* 39 Mich. 398.

GRAVES, J. This case is governed by *Chapman v. Spears* 43 Mich. 541, decided at this term. The case was left to rest on the disclosures, and there is no room for saying that they established either an indebtedness to Ward or possession of any property of his at the time of the service of the process. Where, in these proceedings against garnishees under the statute relative to justices' courts, the plaintiff contents himself with the showing obtained from the garnishee, it must be clear and distinct in the statements or admissions on which recovery depends, or be considered insufficient.

The judgment must be reversed, and one entered here for defendants, with their costs of all the courts.

The other Justices concurred.

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SAMUEL A. FITCH v. THE CONSTANTINE HYDRAULIC COMPANY.

License of flowage—Arbitration and award.

A written agreement permitting the establishment of a dam, granting a right of flowage, providing for a perpetual use and for the settlement of damages, and containing no clause of forfeiture on default, is not a revocable license, but an absolute sale on time for credit.

The president and secretary of a corporation are proper officers to agree for it upon an arbitration.

Damages for a right of flowage are a proper subject of statutory arbitration, and the award is binding if it agrees with the express terms of the submission.

Error to St. Joseph. Submitted June 9. Decided June 16.

TRESPASS ON THE CASE. Plaintiff brings error. Affirmed.

O. F. Bean and *Charles Upson* for plaintiff in error. The president of a corporation has no authority to bind it by suing in its name: *Ashueloi Mnfg. Co. v. Marsh* 1 Cush. 507; Ang. & Am. on Corporations § 297.

H. H. Riley for defendant in error. A corporation is bound by the acts of its officers *de facto: Cahill v. Kalamazoo Mut. Ins. Co.* 2 Doug. (Mich.) 124. An executed license involving expenditure is regarded in equity as an executed agreement for a valuable consideration and will be enforced even when merely verbal and relating to realty: *Rerick v. Kern* 14 S. & R. 267; *Walsh v. Whitcomb* 2 Esp. 565; *Watson v. King* 4 Camp. 272; *Bromley v. Holland* 7 Ves. 3; *Wood v. Manley* 11 Ad. & El. 34; *Thomas v. Sorrell* Vaughan 330; *Wood v. Leadbitter* 13 M. & W. 884; *Rhodes v. Otis* 33 Ala. 578; *Wingard v. Tift* 24 Ga. 179; *Lane v. Miller* 27 Ind. 534; *Wilson v. Chalfant* 15 Ohio 248; *Lacy v. Arnett* 33 Penn. St. 169; *Snowden v. Wilas* 19 Ind. 10; *Stephens v. Benson* id. 367.

CAMPBELL, J. Fitch sued defendant for a private nuisance in unlawfully maintaining a dam, and overflowing his lands.

It appears that on the 31st of July, 1873, defendant, having been organized for hydraulic purposes, and finding it necessary to build a dam in the St. Joseph river to get the requisite facilities, entered into a written agreement with a number of riparian owners, including Fitch, for the purpose of "obtaining the right to perpetually flow such lands as may be necessary to the erection and maintenance of their water-power as aforesaid." The agreement proceeded as follows: It was first provided that the land owners would agree to allow the defendants to erect their dam and raise the water until August 1, 1874, without objection, and that at that time each should convey the necessary right of flowage to maintain the dam and power, provided defendants should pay such damages as had then accrued or might accrue, in the manner specified, which was—*First*, that defendants should within a reasonable time after the actual amount of damage could be ascertained, and before that day, pay such sum as should be agreed upon; *second*, if not agreeing, that they should arbitrate in accordance with the statute, the award to fix the damages and provide for a conveyance; or *third*, that the lands might be condemned.

Articles of arbitration were thereafter entered into, but did not fix any court in which judgment should be rendered. An award was made of one hundred dollars, but judgment of confirmation was vacated on the application of Fitch. The award was signed by one of the two arbitrators named in the agreement and by the third who had been chosen by the other two, and who was named in the agreement of submission.

Fitch afterwards notified defendants to abate their dam, and on failure thereof brought suit. The court held he could not recover, basing the ruling on the arbitration and refusal to accept the tender of the amount awarded.

We think there is no doubt this is such an arbitration as might have been covered by the statute if it had been made in due form. The statute only excludes freehold estates. Comp. L. § 6890. It is also clear that if the submission had mentioned any court, it would have been perfectly regular.

The objection that the award does not require a conveyance is of no force, because the submission does not. The signature of the two arbitrators instead of three would not make it void unless it was made to appear, on a motion to vacate, that they had signed in disregard of the conditions regulating execution by a majority. No presumption exists under the statute against it, and the parties seem to have acted in the first instance on the supposition that they were conforming to the statute.

We think that the parties, who could make any form of arbitration they pleased outside of the statute, did by the express terms of their submission agree to follow the statute except as they varied from it. And we think this award was therefore binding.

There is nothing in the objection that no authority is shown in the president and secretary of defendants to agree on arbitration. They are the officers presumably empowered to make ordinary agreements, and such a company cannot exist without power somewhere to agree on rights of flowage. A right to arbitrate any difference on this head is incidental.

But the nature of this species of litigation as liable to claims for continuing nuisances, makes it proper to refer to the agreement more directly. The works which such companies erect must necessarily be designed for permanence, and when they are given a right of flowage, it resembles the rights procured by other corporations, such as railways and canals, of subjecting land to permanent conditions in the use of permanent structures. The written agreement already quoted provides for a perpetual use, and contains no clause of forfeiture on default. It contains provisions whereby the land owners can obtain damages under provisions capable of legal and equitable enforcement. The damages are payable once for all. The agreement is an absolute sale and right of immediate and perpetual possession, in consideration of a future payment. It is in no sense a license of a revocable character. It is in its necessary meaning a grant as irrevocable as any other grant or sale on time and for credit. The interest once granted is no longer permissive but absolute. It would be

extremely absurd to regard a railroad company as a trespasser because it did not pay the land owner what it had promised to pay when he granted leave to locate it. The effect of such a grant of right is to encourage and procure the erection of large and costly structures which cannot be made subject to destruction at the whim of any one who thinks such a grant is no more than a perpetually revocable license. The law is not very well provided with common-law terms to reach cases like the present, but the idea of including such rights within the rules applicable to temporary licenses for temporary purposes is too extravagant to be entertained. The doctrines laid down in *Harlow v. Marquette, Houghton & Ontonagon R. R. Co.* 41 Mich. 336, apply to this case and dispose of it.

The judgment must be affirmed with costs.

The other Justices concurred.

ALLEN NOWLIN v. JOHN S. TIBBITS ET AL.

Suit on appeal bond.

A levy on real estate in case of a return of *nulla bona* upon an execution from justice's court is not prerequisite to a suit upon the appeal bond.

A justice's neglect to make return within ten days after an appeal is perfected does not preclude a remedy on the appeal bond; the default in prosecuting the appeal is that of the appellant, and not of the appellee.

Case made after judgment from Wayne. Submitted June 10. Decided June 16.

DEBT ON BOND. Defendants had judgment. Reversed.

R. V. Briggs and *Hawley & Firnane* for plaintiff.

Adam E. Bloom for defendant. Return of *nulla bona* is not enough to show an attempt to levy upon real estate: *Barker v. Dayton* 28 Wis. 367; *Woodward v. Harbin* 1

Ala. 108; *McDowell v. Clark* 68 N. C. 118; *Burk v. Flournoy* 4 Mo. 116.

MARSTON, C. J. The action in this case was brought to recover upon a bond given upon the appeal of a cause from justice's court to the circuit. The appeal was dismissed for non-payment of the proper fee, and an execution thereupon issued by the justice upon the judgment and returned unsatisfied.

The circuit court held that the plaintiff could not recover because he had not exhausted his remedy against the judgment debtor by causing a transcript of the justice's judgment to be taken to the circuit court, and issue and return of execution thereon.

This was erroneous. The statute provides that the plaintiff shall not be entitled to prosecute such bond until an execution on the judgment appealed from shall have been returned that sufficient goods and chattels could not be found to satisfy the same. Comp. L., § 5457. This was complied with, and this section is too plain to be extended by construction to requiring an effort to be made to collect from real estate. Were it not for this statute an execution from justice's court need not even be issued before suit brought.

The case of *Schermerhorn v. Conner* 41 Mich. 374 is relied upon, but has no application to the present case. In that case *all legal means* were to be used to collect the claim; such is not the requirement of the statute in this case.

It is also claimed that because the justice did not make his return to the circuit within ten days after the appeal was perfected, the plaintiff in this case can not recover. The plaintiff in this case is not responsible for such default of the justice. The appellant under the terms of his bond was to perfect and prosecute to effect his appeal. The default rests with him, and not the appellees. Upon the facts of this case, as presented, the plaintiff was entitled to recover.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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JACOB POGODZINSKI v. ANDREW KRUGER ET AL.

Fraud in mortgaging leviable property

Fraud, as in mortgaging property liable to execution after judgment, must be clearly made out; it is not enough to merely raise suspicion of good faith.

Appeal from Kent. Submitted June 10. Decided June 16.

BILL to set aside a mortgage. Defendants appeal. Reversed.

D. E. Corbitt for complainant.

Grove & Harris for defendants.

GRAVES, J. Complainant obtained a judgment against the defendant Andrew Kruger on the 4th of January, 1879, for $195 damages and costs; and on the 13th of the same month the latter mortgaged his estate, liable to execution, to his sister, the co-defendant. On the 5th of June following, the complainant caused an execution on his judgment to be levied on the mortgaged property, and soon afterwards filed this bill in aid of the execution. The bill alleged that the mortgage was made without consideration, and with intent to defraud creditors. The defendants answered and denied the fraud, and alleged that the security was given in good faith and for an actual indebtedness. The circuit court decreed that it was without consideration, and given to defraud complainant, and that it should be held null and void as against him; and moreover, that it should be discharged of record, and in case the defendant failed to discharge it, that it should be competent to record the decree as a discharge.

The question in the case is whether the mortgage was made on an honest consideration; and it devolved on complainant to make out that it was not, or in other words, that it was fraudulent; and (as in every issue of the like nature)

it was necessary to adduce a species and amount of proof so convincing as to cause a very hearty and firm belief of the fact. It was not sufficient to entangle the mind in perplexity, or generate mere doubt or suspicion. A party charging fraud is not entitled to succeed unless his proof creates a clear and full impression that the charge is true. It is unnecessary to write out a discussion of the evidence in the record. Upon close examination it fails to satisfy the understanding that the mortgage was a mere sham. It may have been, but there is too much room for thinking it may not have been.

The various circumstances connected with the relations of the parties and their contentions, their foreign birth and antecedent and present course of life and social and domestic characteristics have an influence and lend a peculiar color to the chief facts. It is quite impossible to give the same meaning to some of the prominent circumstances, or to make the same inferences from them that would be reasonable and natural in case the parties had grown up here under the influence of our own institutions and conditions. As it is, the case is not made out. My brethren go somewhat further and think the evidence is quite decisive in favor of defendants.

The decree should be reversed, and the bill dismissed with costs of both courts.

The other Justices concurred.

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LUCY ANN S. REED, IMPLEADED ETC. v. LOUISA E. BUYS.

Married woman's liability on her husband's note.

A married woman is not liable on a promissory note which she signed with her husband, if no consideration passed to her from the party to whom the note was given. A consideration as between herself and her husband is not enough.

Error to St. Joseph. Submitted June 10. Decided June 16.

ASSUMPSIT. Defendant brings error. Reversed.

D. E. Thomas and *H. H Riley* for plaintiff in error.

J. W. Flanders and *Chas. Upson* for defendant in error.

CAMPBELL, J. Mrs. Reed was sued as joint maker with her husband and son of a promissory note for four thousand dollars, dated January 24, 1874, but in fact given in June, 1874, in place of a former note of that date. She made some payments which were indorsed.

The defense was that the note was not given for any purpose relating to her own property or interest.

It is not disputed that the original note of January, 1874, was given by her husband and signed by her, in fact as a surety, for money due from him to the original payee Mr. Buys, partly for existing debts and partly for new advances. The second note was a substitute for the first, and nothing passed to Mrs. Reed or for her benefit in executing it.

The ground relied on for enforcing this liability is that in fact the consideration was the transfer from her husband of certain lands, as an inducement for her to execute it.

At the nominal date of the note her husband conveyed to her a tract of land, which was then supposed to be worth more than this debt. Mr. Reed having asked her to become his surety in his arrangement with Mr. Buys, she told him she ought to be secured for his old indebtedness to her before she should sign for him. He had received and used the proceeds of several items of property belonging to her, and among others four thousand dollars for a farm at Pigeon, which he owed her with interest. He offered to convey to her the land in question for what it was worth; it being encumbered, but in his judgment worth more than that debt. She refused to take it at more than four thousand dollars, but agreed that if she got more for it she would apply the balance on the debt to Mr. Buys. There is no

evidence tending to make out any substantially different case, but in the view we take of the facts this is not very material. The utmost that is claimed is that she was induced to sign for her husband by his conveyance.

We have decided several times, and once during this term (in *Kenton Insurance Co. v. McClellan* 43 Mich. 564) that a married woman can only contract in regard to her own separate property, either already owned or else to be acquired or affected by the contract. There must be a direct relation between the contract and her property.

In the present case no such connection existed. We do not think the testimony tended to show that even as between herself and her husband the acquisition of the land was the consideration of any contract to sign for him. Its value was fixed at the existing debt which it cancelled. But however this may be, that was a separate contract between herself and her husband, in which no one else was concerned. If he had made her a conveyance for no other purpose than to induce her to sign or indorse for him, her refusal could have given no one else a cause of action. Buys had nothing to do with it. The only consideration for the note in question passed from Buys to the husband. Buys did not take any step with the understanding or knowledge of this collateral arrangement. He no doubt acted on a mistake of law, supposing a married woman could contract generally. He was an entire stranger to the arrangement between husband and wife, and had nothing to do with its consideration. The two contracts had, so far as he was concerned, no relation to each other.

As there was no other consideration involved in the questions brought before us, we need not discuss any other points. We think the lands in question had nothing to do with the consideration of the note, and that Mrs. Reed was not authorized to contract with Mr. Buys so as to be bound by reason of her husband's arrangements with her.

The judgment, resting on a different view, must be reversed with costs and a new trial granted.

The other Justices concurred.

CHARLES McDANIELS v. SAMUEL W. WALKER JR. ET AL. 44 83 76 381

Settlement of estates—Emblements—Removal of crop.

Under Act 138 of 1877 an intestate's estate is subject to sale for his debts for six years after his death, but except for this and for the jurisdiction of equity to restrain waste, the heirs' right of enjoyment during that time is absolute. *Held* that an heir who had sown a portion of the estate before a probate order for its sale was asked for, was entitled after the sale to cut and carry the crop away, and could maintain trespass against the purchaser and the administrator for interfering with his right of possession.

Wherever the law gives a right it gives the means necessary to its beneficial enjoyment.

Error to Wayne. Submitted June 10. Decided June 16.

TRESPASS. Plaintiff brings error. Reversed.

Ward & Palmer for plaintiff in error. A tenant holding over three months after a foreclosure sale by sufferance of the purchaser, takes the emblements: *Allen v. Carpenter* 15 Mich. 38. So does a tenant who hires land subject to the lien of a judgment and plants before the lien matures by sale into a title: *Bittinger v. Baker* 29 Penn. St. 66.

Charles M. Swift for defendants in error. Unharvested wheat, even if partly cut, is real property until gathered: Schouler's Pers. Property 123; crops planted by the owner of the soil pass with the fee, 4 Kent's Com., § 468; 1 Washb. R. P., §§ 4–5: 3 id. 625; *Tripp v. Hasceig* 20 Mich. 254; even though the sale be on foreclosure: *Scriven v. Moote* 36 Mich. 64; *Gillett v. Balcom* 6 Barb. 371; or execution: *Sallade v. James* 6 Barb. 144; growing crops pass by devise of the land: *Cooper v. Woolfitt* 2 H. & N. 122.

GRAVES, J. April 5, 1877, the plaintiff's father, Levi McDaniels, died intestate, seized in fee of fifty acres of land in Wayne county, and leaving a widow and eight children.

November 9, 1877, letters of administration were issued to the defendant Walker, and commissioners on claims appointed. February 14, 1879, the latter filed their report containing an allowance of claims to the amount of $285.42. The widow and heirs were occupants of the farm, and they agreed between themselves that specific portions should be occupied in severalty, and pursuant to this arrangement the plaintiff on and prior to September 10, 1878, was in the exclusive possession and occupancy of the parcel of ten acres described in the declaration, and at that time he sowed it to wheat. November 25, 1878, the administrator petitioned for leave to sell the real estate so left by deceased and lawfully remaining in the enjoyment of the widow and heirs, for the purpose of paying the debts, and on the 24th of December the court granted leave to sell the ten acres held by the plaintiff. February 17, 1879, the administrator, pursuant to said license, sold and conveyed said parcel to William Brown, one of the defendants, who took possession of the land. July 15, 1879, the plaintiff was engaged in harvesting the wheat which had grown from this said sowing on such parcel, and the administrator, with the approbation of Brown and the assistance of the other defendants, entered and took the wheat away from the plaintiff, and disposed of it. The plaintiff brought trespass for the wheat, and the circuit judge ordered a verdict for the defendants.

The substantial question is, whether under the legal doctrine concerning emblements, the plaintiff was not entitled to the wheat and the free ingress, egress and regress in order to cut and carry it away, and we are satisfied he was. The estate descended to the heirs, but for the term of six years from the death of the intestate was subject to sale for the payment of debts under license from the probate court, and subject also, during the settlement of the estate, to the jurisdiction of the court of chancery against the commission of waste. Act 138, Public Acts of 1877, p. 126. Subject to these qualifications the estate of the heirs and the right of enjoyment were absolute. There is a concurrence of principles in the plaintiff's favor. Wherever it can be done con-

sistently with the rules of justice and equity, it is reasonable to encourage husbandry and the production of whatever is necessary to the support of human life. And it is also a general principle that wherever the law gives a right, it gives at the same time whatever is needful to its beneficial enjoyment.

When the wheat in controversy was sown, the possession and right of possession were in the plaintiff. He was entitled to the enjoyment to the exclusion of all others. Whether, for the purpose of settling the estate, the title and right of possession would be transferred was uncertain, and this state of uncertainty might continue for six years from the death of the intestate. In case the change should take place it would be by act of law and not by any act of the plaintiff. It was for the public advantage that the land should not lie fallow, and in order to favor its cultivation it was proper that the plaintiff should be under the protection of the rule which declares that he who sows shall reap. Again, the law gave him the succession and right of possession, and it is a natural presumption that the attending advantages were meant to be given also. It would be absurd to suppose that a barren occupancy was intended which might continue for several years.

An ancient application of the doctrine concerning emblements is worth citing. A lease was made to husband and wife during coverture, and the husband sowed the land, and afterwards they were divorced *causa præcontractus*. It was held that the husband, nevertheless, should have the emblements, and not the lessor; for although the suit was the act of the party, yet the sentence which dissolved the marriage was the judgment of the law. *Oland's Case* 5 Co. 116 *b*. See also *Bulwer v. Bulwer* 2 B. & A. 470.

So here the right and interest of the plaintiff were determined by an act of law which he was not in a condition to foresee, and he was entitled to the crop, and the interference complained of was undoubtedly a trespass, and he was entitled to recover for the wheat. As a crop in his ownership separate from the land, it was competent to sue defendants

for it as constructively severed, although a portion of it at the time of their forcible interference was still uncut.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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LUCIUS A. SKINNER ET AL. v. DAVID D. SHANNON ET AL.

Exemptions from execution for benefit of individual partners.

Each member of a firm against which execution is levied may claim the amount of goods excepted in Michigan from execution; and if several partners claim the same property the officer setting aside the exempt property may select for them.

Error to Shiawassee. Submitted June 10. Decided June 16.

TROVER. Plaintiffs bring error. Reversed.

J. B. Wilkins and *Hugh McCurdy* for plaintiffs in error.

H. H. Pulver and *Lyon & Kilpatrick* for defendants in error. The statutory exemption from execution cannot be claimed by each of several partners: *Bonsall v. Comly* 44 Penn. St. 442; *Pond v. Kimball* 101 Mass. 105; *Guptil v. McFee* 9 Kan. 30; *In re Handlin* 3 Dill. 290; *Gaylord v. Imhoff* 26 Ohio St. 317; *Wise v. Frey* 7 Neb. 134; *Billingsley v. Spencer* 64 Mo. 355.

MARSTON, C. J. Where a levy is made upon a stock of goods of a copartnership, is the firm as such, or the several members thereof, entitled to claim any part thereof as being exempt under the law of this State?

This question has arisen in several of the States, and thus far there is a want of harmony in the answers given thereto.

We must, therefore, in the light of those cases, look to the Constitution, statutes and decisions of this State, and unfettered by previous decisions, construe the statute in accordance with the letter and evident spirit thereof.

Our Constitution, in section 1 of art. xvi, provides that "The personal property of every resident of this State, to consist of such property only as shall be designated by law, shall be exempted to the amount of not less than five hundred dollars, from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this Constitution."

The eighth subdivision of our statute (2 Comp. L., § 6101), under which this claim comes, is as follows: "The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars."

The exemption laws of this State have ever received a most liberal construction in aid of the wise and humane policy so clearly set forth in our Constitution and laws. As was said in *Rosenthal v. Scott* 41 Mich. 633, the laws securing exemptions are not to be frittered away by construction so as to destroy their value. It has been held, accordingly, that one whose principal business was that of blacksmith might manufacture a wagon during his leisure time and offer the same for sale, and that it would be exempt while in process of manufacture and while held for sale. *Stewart v. Welton* 32 Mich. 56. So a farm homestead right cannot be put in jeopardy by the extension of village limits so as to bring such property within the village: *Barber v. Rorabeck* 36 Mich. 401. So the execution debtor is entitled to the full statutory exemption. Personal property subject to a mortgage for more than its appraised value, cannot be turned out to him: *Bayne v. Patterson* 40 Mich. 658. A homestead can be claimed in lands held in joint tenancy, or as tenants in common (*Lozo v. Sutherland* 38 Mich. 171), and in lands of which a party was in possession under a con-

tract to purchase: *Orr v. Shraft* 22 Mich. 261. So a house, exempt as such, might be removed to another parcel of land without danger of seizure while in transit: *Bunker v. Paquette* 37 Mich. 79. And a boarding-house keeper is entitled to the same exemption of household furniture as any other person: *Vanderhorst v. Bacon* 38 Mich. 669.

That the several members of a copartnership come within the language of the statute and Constitution, there should be no question, and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law, would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of a firm. The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not.

Indeed, it is not claimed that members of a firm are not equally within the words and protecting care of the Constitution and statute, but that the right is not given them, because of the peculiar rights of copartners to the firm property, as between themselves and also their creditors.

If the property is exempt under the statute, parties dealing with them must take notice of that fact, and it is no hardship whatever to enforce the right when the occasion arises which demands it. The creditor, in selling goods to an individual, knows that a certain portion of his debtor's property is not and will not be subject to his demands. And so if he sells to a firm, and the firm or each member thereof is entitled to a statutory exemption, the creditor sells in view of the hazard. There may be cases where, as between the members (and the same perhaps would not apply as to creditors), where one or more of the firm had no interest in the goods, but only in the profits, and some question might arise as to the right of such copartners to claim any part of the property as exempt; but such is not this case, and we do not therefore pass upon that question. So other difficulties may

arise. Very many of these supposed difficulties are imaginary only, but we need not anticipate them. In my opinion the execution debtors in this case were each entitled, under our Constitution and statute to his exemption: *Russell v. Lennon* 39 Wis. 570, and see the reasoning also in *Stewart v. Brown* 37 N. Y. 350. It is strongly urged that both may claim the same piece of property. If so, the officer may select for them where they cannot agree and therefore do not. Comp. L. § 6103.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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MARTIN SECORD, RELATOR v. CHRISTOPHER C. FOUTCH.

Probate judges—Informations in the nature of quo warranto.

Probate judges are not within the exception in Comp. L. § 7101, which permits informations in the nature of *quo warranto* to be filed in the circuit court except against State officers.

An election to fill a vacancy in the office of judge of probate, though held at the same time as a general election of other officers, is void unless some distinct and public notice was so given that voters might clearly understand that it was to be held.

Comp. L. § 34, in providing that vacancies in certain offices, if not supplied before the next general election may be filled then, is merely permissive.

A judge of probate having moved from the county during his term, the Governor appointed another to fill his place. In giving notice of the next general election it was intimated in two notices that an election would be held to fill the vacancy, but this intimation was afterwards omitted. At the election there was no competition, and the number of votes cast for the one candidate indicated that it was not generally understood a probate judge was to be chosen. *Held* on *quo warranto* proceedings against the Governor's appointee, that the election was void as held without sufficient notice, and that respondent was entitled to the position.

Error to Gladwin. Submitted June 10. Decided June 16.

INFORMATION in the nature of *quo warranto*. Relator brings error in Supreme Court. Judgment for defendant.

Albert Trask for relator.

James Van Kleeck and *M. H. Stanford* for defendant.

CAMPBELL, J. An information in the nature of a *quo warranto* was filed on behalf of relator in the circuit court for the county of Gladwin, to try the title of respondent to the office of judge of probate for that county. Respondent was appointed by the governor, in September, 1878, in place of the regular incumbent, Aaron D. Stevens, who had been elected for the term which began in January, 1877, but who, it is agreed, removed from the county in May, 1877. Relator claims to have been elected at the regular general election in November, 1878. No notice was given of this election as including a vacancy in the office of judge of probate as contemplated by statute; but the sheriff published a newspaper notice on the 10th and 17th of September containing such an intimation, but in his subsequent publications left it out. No action was had declaring the vacancy or explaining it, except the commission issued by the governor to respondent. At the election there were no votes cast for any one but respondent, and he received one hundred and three votes in one town, eight in a second and two in a third, or one hundred and thirteen votes in all.

The facts were all agreed upon, but the circuit judge on the hearing decided he had no jurisdiction and dismissed the case. He did so on the ground that this court had held that the judge of probate was not a county officer, but was a part of the judiciary system of the State. Such judges are not "State officers" in the sense in which that term is used in the statutes, and are not, therefore, within the exception of § 7101 of the Compiled Laws, which takes those officers out of the jurisdiction of the circuit courts in this class of cases.

There is no statute which makes it imperative that a vacancy in this office shall be filled at the next general election where there has been no special election. In *People v. Hartwell* 12 Mich. 508, we held no notice of an election to fill a city office at a general election was necessary, because the charter, having provided for ascertaining the existence of a vacancy by the declaration of the common council, made it imperative that it should be filled at the next election. But under the same charter we also held that a vacancy in the recorder's office could not be so filled without notice or some other action, because that office was excepted from the mandatory clause. *People v. Witherell* 14 Mich. 48. And in *People v. Canvassers of Kent* 11 Mich. 111, we held that in an election for circuit court commisssioners, where the notice was at first given for a choice of two commissioners, and then confined to one, although two persons were voted for but their combined votes equalled only the aggregate of votes cast by voters for single officers, they were to be regarded as running for one office and as to the other there was no election. In the present case it is entirely clear that there could have been no general idea that there was to be an election for judge of probate, for there were no opposition candidates and the number of votes cast is conclusive of the general understanding. The change in the notice here as in the Kent election, would indicate that no such election was to be had. It can only be on the theory that some positive rule of law required the people of Gladwin county to accept an officer whom they never knew they were voting for, that such an abuse can be established. We think there is no such rule.

It is a necessary safeguard to popular elections that the people be informed what officers they are to vote for. They may be expected to know what elections are to be made at the regular general elections, and as to those in ordinary cases, it might be dangerous to allow a failure to give notice to avoid the election. This would enable the popular will to be defeated by the misconduct of ministerial officers. But there can be no such knowledge assumed concerning vacancies in office, and without some distinct and public notice of some

sort, such an election could hardly fail to be capable of the worst kind of fraud and trickery. As to such matters the statutes concerning general elections are only permissive, and declare that vacancies *may* be filled—not that they *shall* be. Comp. L. § 34. This being so, we cannot regard the absence of a notice, where there has been no other equivalent action, as unimportant. Whether the sheriff could give it without the direction of the supervisors, or whether a finding of the fact of vacancy by them is not always required, as contemplated in sections 45 and 616 of the Compiled Laws, we need not now inquire. But it is enough for the purposes of this case to say that no such election can be had without some adequate notice.

The respondent is clearly entitled to the office, and inasmuch as the facts are all agreed upon of record, a judgment must be entered that the plaintiff is entitled to no relief and that the defendant is not guilty of any usurpation, and that he go hence without day and recover against relator his costs of both courts.

The other Justices concurred.

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Edwin P. Jennings v. Asa A. Sheldon.

Res judicata—Wrong form of action—Action on Warranty.

If one sues in assumpsit for the value of chattels, where by strict rules only an action of tort would lie, and obtains judgment, the judgment will determine the matters in issue as conclusively as though the proper action had been brought.

One who sells chattels with warranty of title, and who, when his vendee is sued for their value by the real owner, takes upon himself the defense of the suit, is bound by the result, whatever may have been the form of action.

A purchaser with warranty of title need not await the result of a suit by an adverse claimant, before bringing action against the warrantor,

though if he does not, he takes upon himself the burden of showing the breach which a judgment in a suit defended by the warrantor might have established.

Error to Midland. Submitted June 10. Decided June 16.

Assumpsit. Plaintiff brings error. Reversed.

Burton & Hemingway and *M. H. Stanford* for plaintiff in error.

James Van Kleeck for defendant in error.

Cooley, J. Jennings sued Sheldon upon a warranty of title of certain stone which Sheldon had sold to him. To show a breach of the warranty and his damages, he proved that one Dean had afterwards sued him for the value of the stone; that he had given Sheldon the defense of the suit, but that it had resulted in a judgment in favor of Dean for the value of the stone, which Jennings had paid. The circuit judge held that the recovery of judgment by Dean was no evidence as against Sheldon of a failure of title, because the suit was in assumpsit, and necessarily counted on an express or implied promise by Jennings to pay Dean for the stone; and he therefore directed a verdict for defendant.

It is a fair inference from the recitals in the bill of exceptions that plaintiff gave other evidence of the failure of title besides the Dean judgment; but this is not important, since it was clearly shown that the Dean suit was brought to recover for the value of the stone, and that Sheldon assumed the defense of it. It was immaterial that the suit was in assumpsit. It may be that the circumstances of the taking of the stone were such that assumpsit could not have been supported if objection had been made (*Watson v. Stever* 25 Mich. 386); but the parties were not bound to take that objection, and the title could as well be tried in an action of assumpsit, as in one of trespass or trover. The question was not of the form of action, but of what was in issue in the case; and this must commonly be shown by other evidence than the pleadings. Besides, the Dean suit was proved only

in order to fix conclusively the breach of warranty and the amount of damages; but these might be made out on other evidence; plaintiff was not compelled to have litigation with Dean, but as soon as he was satisfied the stone belonged to him he might surrender it and sue on the warranty at once.

It is objected that the declaration does not show that the warranty was a part of the consideration of the purchase; but though informal we think the pleading sufficient. It is also said plaintiff is not entitled to recover the amount of the costs of the Dean suit, because he gave defendant no written notice to defend; but if defendant took charge of the defense in that suit, the notice was immaterial.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

JAMES C. COOPER, ADM'R OF BENJ. HOLLAND v. A. ANDREWS AND JOSEPH REININGER.

Arbitration and award—Review of award.

Error does not lie on a judgment upon an award rendered by arbitrators under a statutory submission, where the submission is in due form, and the award is one that could have been lawfully made.

The statutory remedy against an award is by motion to vacate made at the next term, and the court may vacate it for cause, or order a rehearing, or modify and correct the award in certain cases. Comp. L., §§ 6896, 6899, 6900.

Error to Hillsdale. Submitted June 11. Decided June 16.

ARBITRATION AND AWARD. Cooper brings error. Affirmed.

Dickerman & St. John for plaintiff in error.

L. H. Salsbury for defendants in error.

CAMPBELL, J. Cooper brings error on a judgment upon an award, rendered by arbitrators under a statutory submission, concerning a controversy upon a lease. Several errors are assigned. The award was signed by two out of three arbitrators named. The objections made are that there is nothing to show that the arbitrators were sworn, or appointed a time and place for hearing, and that they did not sign officially, and did not all sign. Also that the award is uncertain, and extends beyond the submission, and does not disclose how much was due and unpaid on the lease. Also that Cooper could not lawfully make a submission; that the law knows no such person as A. Andrews, and that the arbitrators could not decide that the lessees should pay no more rent.

It does not appear from the record just what the lease was, and we cannot assume that it was in any such shape as to create any difficulty. It is referred to in the submission only by its date and description of lands. All that we can infer is that a controversy of some kind, which is not described, had arisen under it and that the parties were willing to settle it. And we cannot assume that the award, which required Cooper to pay damages to the amount of ninety dollars, and released the lessees from further rent, was in any way improper, or that any other award should have been made.

The objections taken are very technical, and in our opinion entirely unauthorized; and if there was any reason why this award should not have been made, the plaintiff has mistaken his remedy. The statute has expressly declared what the judgment record shall contain. It does not require anything more than a statement of the submission, hearing and award. Comp. L., § 6903. And the concurrence of a majority makes a good award if the case was properly heard. § 6895.

The statute provides that a party complaining of an award may apply to the court to vacate it. The grounds on which complaint may be made are all set forth. § 6896. This application must be made at the next term, and the court may vacate it for cause, and may order a rehearing if that is proper, or may modify and correct the award in certain cases. §§ 6899, 6900.

It was never designed that these amicable proceedings should fail for technicalities, or that the record should have any inferences raised against its correctness unless it shows on its face some palpable error. If any wrong has been done it must be affirmatively shown, and where mistakes have occurred, the submission may still be saved and a new hearing had if possible. The law favors and maintains proceedings of this sort as far as possible. *Beam v. Macomber* 33 Mich. 127; *City of Detroit v. Jackson* 1 Doug. (Mich.) 106; *Chicago & Mich. Lake Shore R. R. v. Hughes* 28 Mich. 186.

Error cannot be sustained on the record alone, if it shows what the statute requires. Here the submission was in due form, and the award was one which could have been lawfully made. This being so, any other objections should have been made by the proper application to the circuit court, where complete justice was possible.

The judgment must be affirmed with costs.

The other Justices concurred.

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MARY H. RICHARDS v. GEORGE W. PROPER.

Wife not liable to surety on her note for her husband's debt.

A surety on a promissory note given by a wife for an unpaid balance upon her husband's debt, could not, after paying the note, recover against the wife, on a showing that the husband after contracting the debt had conveyed encumbered real estate to her, especially as it did not appear what the value of the property was or the amount of the encumbrance, or that the conveyance was fraudulent as against creditors.

Error to Hillsdale. Submitted June 11. Decided June 16.

ASSUMPSIT. Defendant brings error. Reversed.

N. J. Richards for plaintiff in error.

S. D. McNeal and *John D. Conely* for defendant in error.

MARSTON, C. J. This action was brought to recover the amount paid by Proper, as surety, on a promissory note dated February 20, 1877, given by plaintiff in error while a married woman, for the unpaid balance of her husband's debt contracted as early as 1873. It appeared that in the fall or winter of 1873 Mrs. Richards' husband conveyed to her certain encumbered real estate: the value thereof, or amount of the encumbrance, does not appear, nor does it appear what other property he then owned or the amount of his indebtedness.

Plaintiff below claimed that because Mrs. Richards had received a conveyance of the real estate referred to she should be held liable upon this note. At the time the note was given (or a previous one given by her for the same debt which this was to take up), she was told that she should give the same if she were to have her husband's property. The argument advanced in this court is that the principal debtor, having while indebted transferred his property to his wife under such circumstances that the creditors could still follow the property, she, in consideration of the premises, could bind her estate by giving a note. In other words, that knowing the consequences she preferred to charge her property by giving this note, rather than that the creditors should seek to deprive her of the property she had received from her husband in fraud of their rights.

It is a sufficient answer to this position to say that there is no evidence tending to show the conveyance to Mrs. Richards to have been fraudulent as to her husband's creditors. The property conveyed to her was encumbered; the value thereof over and above the encumbrance does not appear. Her husband may have had sufficient other property, real or personal or both, at that time to meet every obligation against him. In other respects the case fails to show a conveyance fraudulent as to creditors. Even if it did, we are not prepared to say that Mrs. Richards could be held upon this note upon the theory advanced in this case. We may well doubt whether a fraudulent conveyance by the husband of his property to his wife would confer power upon her to

bind herself in this manner to an unlimited extent. Such would be the effect of the doctrine contended for in this case. We need not, however, give any opinion upon such a question, as it does not arise in the present case. See *Reed v. Buys* ante. p. ——.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

ANDREW BLANCK, RELATOR, v. INGHAM CIRCUIT JUDGE.

Entry of rule to plead.

The rule to plead should be entered before service of a copy of the declaration, but when both acts are done on the same day and within a short time, and the defendant is not misled by the omission to enter the rule until after service, he has no right to have the declaration stricken from the files.

Motion for order to show cause why a declaration should not be stricken from the files. Submitted June 15. Denied June 17.

Waddell & Montague and *Dennis Shields* for the motion.

M. V. Montgomery against.

MARSTON, C. J. This is an application for a mandamus. On the 8th day of May at two o'clock P. M., a paper purporting to be a declaration, was served upon the relator as commencement of suit under the statute. No declaration was filed or rule to plead entered in the office of the clerk of the circuit court until nine o'clock P. M. of the same day.

The service of a copy of a declaration as commencement of suit, before a rule to plead was entered, was clearly unauthorized. The question, however, arises whether this case does not come within the rule that courts will not inquire

into fractions of a day, and we are of opinion that it does. It may sometimes happen that where the declaration has been properly filed and rule to plead entered, yet owing to variation in time as kept by different individuals, and the short intervening time between the entry of the rule and service upon the defendant, disputes may arise as to which, in point of fact, was first in order. We are of opinion, therefore, that where the defendant has not been misled by reason of non-entry of the rule to plead, he has no just cause of complaint, and that it would prove seriously embarrassing to have the question raised where the time between the service and entry of the rule would be so insignificant as to injure or mislead no one. Had the defendant in this case, after service upon him, made an examination in the clerk's office, and ascertained that no rule to plead had been entered, and relied thereon, he might, should any farther steps be taken against him, then be entitled to relief. Upon such a state of facts we express no opinion.

We think the writ should be denied.

GRAVES and COOLEY, JJ. concurred.

CAMPBELL, J. I think there can be no case in court until the declaration is filed, and that notice of a filing and rule to plead which have no existence is invalid.

CHARLES C. JENNINGS, RELATOR v. KALAMAZOO CIRCUIT JUDGE.

Execution—Amendment of date.

An execution on the judgment in a cause appealed from before a justice was antedated, and a motion to require the sheriff to return it for correction was denied. Mandamus to compel the circuit judge to grant the motion was denied, as in any proceeding against the sureties on the appeal bond the facts could be shown.

MANDAMUS. Motion for order to show cause. Submitted June 15. Denied June 17.

Howell & Carr and *G. H. Mason* for the motion.

MARSTON, C. J. This is an application for respondent to show cause why a certain motion made in a cause pending in the circuit court should not be granted. In a cause heard on appeal from justice's court, judgment was rendered December 1st, 1879, against one of the defendants for damages and costs. On the 31st day of January, 1880, an execution was issued, but dated back so that it appeared on its face to have been issued December 22d, 1879. A motion was afterwards made, based upon a showing of the above facts, for an order that the execution be returned by the sheriff, and that the same be set aside or amended by having it bear date as when issued. This motion was denied.

We think no mandamus should issue. In any question hereafter arising in an action brought against the sureties, the facts above set forth could then be shown. They are not, therefore, without ample remedy.

The motion must be denied.

The other Justices concurred.

MARY TEWKSBURY v. JOSEPH M. FRENCH.

Testator's intent—Construction of devise.

A testator's intent is to be determined from the whole will which is to be given effect as far as it may lawfully be done.

A man devised to one of his daughters the s. ¼ of the s. ½ of the s. ½ of a specified quarter section, and farther described it as containing 15 acres and as being 15 rods wide by 160 long. There was a similar devise to another daughter, and another was to have a strip 12½ rods wide and containing 12½ acres. There were three remaining daughters who were to receive the residue share and share alike. The actual quantity in each of the first devises, according to the first clause in the descriptions, would be 30 acres, but if they were con-

strued as giving 30 acres each, there would have been no residue for the last three devises. *Held*, that they covered only 15 acres.

A clause in a will described certain property as "being the same land on which the said Sidney Tewksbury now lives." *It seems* that such a description does not necessarily cover the entire tract within the enclosure.

Error to Wayne. Submitted April 28 and 29. Decided June 23.

EJECTMENT. Plaintiff brings error. Affirmed.

Fraser & Gates for plaintiff in error.

Wm. H. Wells and *Ashley Pond* for defendant in error.

MARSTON, C. J. Plaintiff brought ejectment to recover possession of certain real estate, and her right to recover depends upon the construction to be given the second clause of the will of George Young, deceased, through whom she claims title. If under the clause but fifteen acres were devised to her, then she is not entitled to recover, while if thirty acres were devised she would be entitled to a verdict and judgment.

George Young, being the owner of a certain tract of land containing one hundred or one hundred and two and one-half acres of land, made certain specific bequests of portions thereof to certain of his children, and to three other of his children all the rest and residue of his real estate, share and share alike. Besides the above land he owned none other.

In three of the specific bequests he described the land according to the government subdivisions; he also described it by metes and bounds, giving the frontage of each piece on a certain road, and the depth of each parcel, and the number of acres therein contained. These descriptions did not harmonize. If the number of acres given, and the number of rods frontage and the depth were to govern, and in these respects there was no conflict, then plaintiff must fail.

That portion of the will under which plaintiff claimed was as follows:

"2d. I give and devise to my daughter, Mary Tewksbury, wife of Sidney Tewksbury, for and during her natural life, with the remainder to her heirs forever, in fee-simple, the south three-quarters of the south half of the south half of quarter section lot number seventeen, in the ten thousand acre tract, so-called, situate in the said township of Hamtramck, containing fifteen acres of land, and being bounded westerly by the road running from the city of Detroit to Pontiac, known as the Pontiac turnpike, being fifteen rods wide on said turnpike, running back eastwardly of the same width one hundred and sixty rods and being the same land on which said Sidney Tewksbury now lives."

The south three-quarters of the south half of the south half of quarter section seventeen contained thirty acres, and plaintiff claims this description must govern and control what follows, in accordance with the well-established rule of construction that prominent monuments control.

The general rule undoubtedly is that in the construction of the description of lands contained in a deed, known monuments control courses and distances, and the reason given for this rule is that "ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land." 3 Washburn on Real Pr. 631. In some cases where accurate measurements had evidently been made, great confidence was placed therein as a means of ascertaining what was intended to be conveyed. Id.

Another rule given is that "where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that be rejected in regard to which mistakes are more apt to be made." Id.; 1 Greenleaf on Ev. § 301, note, and cases cited. Indeed all rules on the subject are but aids to assist in arriving at the expressed intention of the parties, which, when ascertained, is to be

carried out. "To determine this we must look at the whole will and give it effect according to its intent, as far as that can be done lawfully." *Toms v. Williams* 41 Mich. 565; *Jameson et al., appellants etc.* 1 Mich. 99; *Kinney v. Kinney* 34 Mich. 254; *Jones v. Jones* 25 Mich. 401.

It is very evident that where there is a fixed, permanent monument, as a river, lake or highway, or one established by the parties, that while a mistake may occur as to the course or distance or the quantity of land, there could not well be as to the visible monument, or the lands intended to be conveyed. The land and the fixed, permanent monument are visible to the parties; they can see what their minds have agreed upon, and what is to be described by words in their conveyance. In giving such a description by mentioning the monuments, there is but slight chance for mistake; and yet, no matter how clearly the monuments may be described, if courses or distances or number of acres are attempted to be given, mistakes may much more readily occur.

So also the descriptions of lands by sections and subdivisions thereof are ordinarily well known, and mistakes could not be likely to occur where parties had adopted and used such a description. Where, however, the parties attempt, as in this case, to describe a small part of an entire parcel, very great care must be exercised to avoid mistakes. Any attempt to so subdivide a quarter section of land as to correctly describe fifteen acres from off one of the sides thereof would require a very deliberate use of terms, and could not be done in haste or without careful computation. In the absence thereof, it may safely be said that a mistake would almost inevitably occur.

It appears that the lands owned by the testator had a frontage of one hundred rods on the Pontiac road, and that the lot was one hundred and sixty rods deep. Each rod fronts on the Pontiac road, and running back the same width the full depth of the farm, would contain one acre. This seems to have been well known to the testator, as clearly appears from the same and other clauses in the will. Thus,

the tract he has attempted to describe he says contains fifteen acres of land, being fifteen rods wide on said turnpike, and running back eastwardly of the same width one hundred and sixty rods. In the fifth subdivision of the will he gives to his daughter Sarah Ann twelve and one-half acres, lying next north of a certain other parcel, "to be twelve and one-half rods wide fronting on the Pontiac turnpike, and running back the depth of the said quarter section seventeen."

It seems quite clear to my mind that the testator, in giving the number of acres with a frontage and depth corresponding thereto, was much less likely to make a mistake than in his attempt to follow the governmental subdivisions.

Again, if we give each of the specific bequests to the devisees named in accordance with the first description, the entire real estate of the testator will have been disposed of, leaving nothing for Eliza, Adelaide and Ellen; while if we follow the number of acres, to each of these three will be given a share equal to that of Sarah Ann.

It appears that thus far we have given no effect to that clause which speaks of this as "being the same land on which said Sidney Tewksbury now lives." Evidence was introduced tending to show that Sidney Tewksbury then lived upon and cultivated the front part of the thirty acres. Admitting this, the clause is equally applicable to a devise of but fifteen acres. A devise of fifteen acres would be the same land, but not the whole thereof. Besides, it clearly appears that the house in which Tewksbury lived was upon the fifteen acre parcel; and under the evidence it might be a matter of some considerable doubt whether it could fairly be said that Tewksbury was living upon the thirty acre tract. Certainly, a part thereof was not and never had been in his possession, either actual or constructive.

I am of opinion that no error was committed and that the judgment should be affirmed with costs, and the record remanded for farther proceedings under the statute.

GRAVES and COOLEY, JJ. concurred.

CAMPBELL, J. dissenting. Plaintiff sued in ejectment for a parcel of fifteen acres, as devisee under the will of her father George Young, being on lot or quarter section seventeen of what is known as the ten thousand acre tract, north of Detroit. Mr Young owned originally the whole lot, which contained nominally one hundred and sixty acres, but really about one hundred and sixty-two and one-half. He also owned all or a part of lot twenty-four, immediately south of seventeen, of which he retained absolutely a strip six feet wide next to seventeen, and held the fee of twenty acres south of that, sold under contract to one Whiting, and not fully paid for.

The dispute in this case is whether the devise to plaintiff covered fifteen or thirty acres, and it arose under these circumstances: The devise purported to cover the south ¾ of the south half of the south half of quarter section lot number seventeen, in the ten thousand acre tract, so called, situate in the township of Hamtramck, containing fifteen acres of land, and being bounded westerly by the road running from the city of Detroit to Pontiac, known as the Pontiac turnpike, being fifteen rods wide on said turnpike, running back eastwardly of the same width one hundred and sixty rods, and being the same land on which Sidney Tewksbury now lives. It then described further the 6-feet wide parcel before referred to, between this and Whiting.

The south ¾ of the south ½ of the south ½ would contain thirty acres and not fifteen. The description therefore contains some element which is incorrect. The question is what is the wrong element?

There can be no doubt that plaintiff's land is in the extreme south of the lot. If governed by the number of acres expressed and the width and depth, it would contain fifteen acres. If by the subdivisions of the tract, it contains thirty acres. Sidney Tewksbury's occupation covering the front of the whole thirty acres might possibly under the testimony, which is conflicting on that point, be reconciled with either.

The chief reasons for disputing the claim for thirty acres

are found in the supposed fact that under that construction some devises would fail. That theory is based on the fact that in the same will testator under precisely similar descriptions which by metes and bounds would cover only half of their contents as regular subdivisions, made three devises, which in the larger sense would just exhaust the land on lot seventeen, while in the smaller sense they would leave forty acres not devised in specific parcels, but left as a residue to three daughters, or the survivor of them, in common. The specific devises were to Elizabeth Tewksbury the same amount as to Mary—that is, either fifteen or thirty acres; to Peter Young either twenty or thirty acres; and to Sarah Ann Young twelve and one-half acres exactly. The residuary devise was "to my daughters Eliza Young, Adelaide Young, and Ellen Young, or such of them as may be alive at the time of my death, all the rest and residue of my real estate, share and share alike."

There was extrinsic evidence admitted on the trial tending to show that testator was not known to have other lands, and also concerning Sidney Tewksbury's holding. The circuit court took the case from the jury, and ordered a verdict for defendant. This could only have been done on the theory that the will itself required it.

I am myself disposed to think that there is no room for extrinsic evidence beyond, perhaps, Sidney Tewksbury's possession, which amounts to very little one way or the other, and the location of the narrow strip on the south.

But my view of the will is different from that of the circuit court.

If testator by clear and plain words disposed of all of lot seventeen to Mary, Elizabeth, Sarah and Peter Young, the fact that he gave the residue of his land to his three younger daughters could not disturb the other devises. This would be so even if he spoke of a residue in that lot. But he in no way indicates in his will whether he had other lands than these or not. I do not see how that fact can come in issue here. He does not attempt to give his three children any interest in this particular property. I think it strange, if he

meant to do so, that he did not say so. It is the more strange because in every other instance he gave specific parcels in severalty, and if he meant to convey an interest in these lands there is no reason given and none very intelligible why he left these shares in common. If it should turn out that he had other lands, here or elsewhere, their shares would absorb it; and they unquestionably took the title to the Whiting lands subject to his contract.

My reasons for construing the will as conveying to plaintiff thirty acres may be stated briefly. In the first place the subdivision of such lots into equal halves, quarters and subdivisions of quarters is one of the most familiar methods used by all land owners, and the one least likely to be misunderstood. There are very few government subdivisions strictly accurate in lines or dimensions. But the tracts themselves are dealt with constantly by name. The tract belonging to Whiting, which is referred to in the will, was sold correctly as the north half of the north half of the north half of lot twenty-four, and as containing twenty acres, but incorrectly as being one-fourth of the lot. The use of these terms was evidently familiar to testator. But however this may be, he used the terms, and in such a way as to render some of his devises utterly void unless used literally.

The meaning of the will can only be got at by reading it as a whole. And doing so the necessity of giving force to these terms is manifest.

As already stated, the divisions named as plaintiff's contain thirty acres. Her devise is followed by one to Elizabeth. That also gives the latter a description by subdivision, containing thirty acres. But if Mary and she each take but fifteen then Elizabeth's land lies entirely outside of the description given it, and can only be identified by bounding on Mary's, and containing fifteen acres, fifteen rods wide and one hundred and sixty deep.

The next description is Peter Young's. That on defendant's theory is utterly incapable of identification. It purports to be the north half of the north half of the south half, and ten acres in addition to the northward, but no other

description is given except that the whole contains twenty acres. Now the first parcel contains twenty acres, and would throw the second into the north half of the lot seventeen. But if the first tract is not all conveyed, no boundary or starting point can be found, and an arbitrary selection must be made or it must fail. It might be the north part or south part, or any other part, equally well. If Mary and Elizabeth each took thirty acres, the whole is harmonious, because then their lands and his join. If not, there is no gift of a strip of thirty acres between Elizabeth and the north quarter of the south half lot, and an uncertainty what part of that north quarter goes to Peter.

But this is not all. Sarah Ann has an exact 12½ acres "lying next north of the land last above devised to my son Peter." If Peter's description is not located definitely by the will, Sarah's fails also.

Under the construction which takes the subdivisions as controlling, all the land goes to devisees named, and without difficulty. Under any other, only two devises can be located at all.

As already said, the will does not assert that testator supposed he was giving his three youngest daughters any share in this specific land, and if he did there was no reason why their shares were not made specific like all the rest. There are other considerations which might be suggested, but I do not think it necessary to dwell on them.

I think the construction which I have indicated and which is claimed by plaintiff, is not only the most natural one in accord with common usage, but the only one which can save the other devises, or prevent the will from substantially failing in its purpose.

I think the plaintiff should have judgment.

ANN TRACY v. JOHN MURRAY AND HENRY TINE, EXECUTORS.

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102 516

44 109
d152 124

Surrender of dower and acceptance of legacy—Costs.

A widow's relinquishment of her "thirds" and acceptance of a legacy do not place her in the position of a purchaser for a valuable consideration so far as to entitle her claim as legatee to priority over the claims of creditors of the estate; she is placed on the same footing with other creditors, and, if the estate is insufficient, is entitled to share *pro rata* with them.

A widow's release of dower and acceptance of a legacy, though a purchase, is not completed until the provisions of the will are accepted after her husband's death, and her claim then becomes simply a debt of the estate.

Costs of a litigation of doubtful questions arising in the settlement of an estate, are allowed to be paid from the estate.

Appeal from St. Joseph. Submitted June 10. Decided June 23.

BILL to determine rights under a will. Complainant appeals. Decree modified.

Severens, Tryon & Ranney for complainant. A legacy to a wife is a price offered for her dower interest, and if taken in lieu thereof, the acceptance completes a contract of purchase: *Loocock v. Clarkson* 1 Desaus. Eq. (S. C.) 471; *Stuart v. Carson* id. 500; *Isenhart v. Brown* 1 Edw. Ch. 411; *Hubbard v. Hubbard* 6 Met. 50; *Pollard v. Pollard* 1 Allen 490; *Davenhill v. Fletcher* Amb. 244; *Lord v. Lord* 23 Conn. 327; Willard's Eq. Jur. 552. Such a legacy is not scaled down with the general legacies where there is a deficiency of assets: *Wood v. Vandenburgh* 6 Paige 277; *Williamson v. Williamson* id. 298. The purchase being *bona fide* and for a valuable consideration, the widow has a lien upon testator's land for unpaid sums of the purchase price. *Flynn v. Croniken* 9 How. Pr. 214. Release of dower interest is a valuable consideration: *Randall v. Randall* 37 Mich. 563; *Farwell v. Johnston* 34 Mich. 342.

H. H. Riley and *D. C. Page* for defendants. Where a widow accepts a devise in lieu of dower, she takes it subject to the same charges as other devisees: *Stevenson v. Brown* 4 N. J. Eq. 503; *Adsit v. Adsit* 2 Johns. Ch. 448; the widow is considered a purchaser for a valuable consideration, to the value of her dower, and her claim is preferred as a lien on the estate to those of creditors to that extent: *Hall's Case* 1 Bland 203.

MARSTON, C. J. Eleazer Tracy died in May, 1877, leaving a will in which he had made certain bequests, the first being to his widow, the complainant, $4400, and to the others $2000. The will was duly probated and letters issued to defendants. The complainant renounced her dower in his estate, accepting the legacy in lieu thereof under the statute. Claims have been proved against his estate to upwards of $5000. The real and personal estate of the deceased is insufficient to pay the debts and legacies. The executors are about to sell the lands of the deceased, and complainant claims that because she accepted her legacy in lieu of dower in the lands of her husband, she is in the position of a purchaser for a valuable consideration, and that she is, therefore, entitled to priority over the other legatees and creditors, and that her legacy is a permanent lien upon the lands of which her husband died seized, and that she is entitled to have the same satisfied out of the proceeds of such sale before any of the other legacies or claims against the estate are paid.

There is a conflict in the authorities as to the rights of the widow under the facts stated.

In *Burridge v. Bradyl* 1 P. Wms. 127, where £3400 was devised for the purchase of annuities to be enjoyed by the wife of the deceased, she releasing her dower, it was held she was entitled to preference over the pecuniary legacies. This was put upon the ground that she was a purchaser of the annuities for her life, by her releasing her dower. This was followed in *Davenhill v. Fletcher* Amb. 244, citing the above case, and also *Blower v. Morret*, since reported in 2 Ves. 420. This same rule has also been adopted and followed

in New York and some other States, as a reference to authorities cited by counsel for complainant will show.

In New Jersey the above rule is not followed, the court saying that where a provision is made by will for a wife, in lieu of dower, she is not bound to accept, and that time is given her to determine, as in this State, whether to take the bounty of her husband or the dower at law; that the provision in the will may be more valuable than dower, and if so, there could be no possible equity in charging it on the land as against the devisee. *Paxson v. Potts* 3 N. J. Eq. 313.

In Maryland the court said the widow was to be considered as a purchaser of the devise to the value of her share or legal right. If the devise falls short of the value of her dower, she is to be recompensed out of the residue of the estate, but if it exceeds, such excess would be subject to the claims of others. *Thomas v. Wood* 1 Md. Ch. 300.

The difficulty with this last view arises when we attempt to place a value upon the widow's dower. Such interest is one for her life, and the value thereof would depend upon so many contingencies that it would be wholly uncertain. So if we adopt the view of the early English decisions, the creditors of the deceased are left entirely at his mercy, subject only to the right to attack the bequest as fraudulent. This we think would be likely to create litigation in many cases where the bequest would not be largely, if at all, in excess of the fair value of her dower interest. Accepting as correct the doctrine of those cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provisions of the will after her husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation, if not paid, would simply become a claim against his estate, and take its place, when proven against the estate, with the other allowed claims. The husband, during his life-time, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seized, makes an offer therefor which is not to be submitted to her for acceptance until

after his decease. If then accepted, the consideration to be paid becomes a claim and charge against his estate, and takes precedence over the legacies. It is but a debt against the estate. If there are sufficient assets to pay all the claims allowed against the estate in full, the widow receives the full amount of her claim; if not, she receives her *pro rata* share with the other creditors. This, while just to the creditors, cannot be considered as unjust to the widow; as she has ample time, after the decease of her husband, to determine whether she will sell her dower right by accepting the provisions of the will, or reject such legacy and retain her dower. This but carries out to a logical conclusion the principle asserted in the authorities of a purchase and sale, and is, we think, a much safer rule, and less likely to lead to injustice or vexatious litigation, than the one which complainant seeks to have established by her bill.

The decree of the court below will be modified, and a decree entered in accordance with this opinion. Costs will be paid out of the estate.

The other Justices concurred.

ANNIE B. SUTTON ET AL., EXR'S v. MARTIN V. B. ROWLEY.

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103 581
103 583
44 112
106 500

Parol agreement for transfer of land.

An unwritten agreement to pay for work by giving a conveyance of land is void under the statute of frauds, and cannot be considered in measuring damages, or for other purposes.

Error to Hillsdale. Submitted June 10. Decided June 23.

APPEAL from award of commissioners on an estate. The estate brings error. Affirmed.

J. S. Galloway, *A. Dickerman* and *George A. Knickerbocker* for plaintiffs in error.

Edwin J. March and *Ezra L. Koon* for defendant in error.

CAMPBELL, J. Rowley presented and established before the commissioners appointed to determine claims against the estate of Robert B. Sutton, deceased, a demand of $500 for superintending and completing certain hydraulic works. This claim was affirmed on appeal and is brought before us on error. The only questions insisted upon on the argument relate to an agreement between Sutton and Rowley to pay for the work by the conveyance of a lot of land. Several different propositions were presented and discussed, but we do not think it necessary to consider them. There is no claim that this agreement was in writing, and there is nothing to indicate that it could be enforced as a parol agreement on account of facts taking it out of the operation of the statute of frauds.

The case therefore comes within the principles of *Scott v. Bush* 26 Mich. 418; *Colgrove v. Solomon* 34 Mich. 494; and especially of *Hillebrands v. Nibbelink* 40 Mich. 646.

There being nothing in the record to indicate that the agreement differs from any other parol agreement concerning lands, it was void and cannot be considered in measuring damages or for any other purpose, and Rowley was entitled to the value of his work.

The judgment must be affirmed with costs.

The other Justices concurred.

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67 28
44 113
86 657
44 113
88 8

LEMUEL D. PUTNAM v. PATRICK REYNOLDS AND JOHN FITZGERALD.

Chattel mortgage—Filing—Assignment by mortgagor.

A chattel mortgage not filed is void as against the creditors of the mortgagor by the express terms of the statute, when the mortgagor is left

in possession as before giving it. Whether it is not also void as against one to whom the mortgagor has assigned for the benefit of his creditors is left undecided by this case.

A mortgagor of goods who had been left in possession, and whose mortgage was not filed, made a general assignment for the benefit of his creditors. The assignee took possession and proceeded to sell the goods in execution of his trust. The mortgagee filed a bill in equity to foreclose. *Held*, that as the statute declared his mortgage void as against the very parties for whom the assignee was trustee, he had no standing whatever in equity, and his bill was dismissed. If under any harsh rule of the common law he may have an advantage, he will be left to seek it at law.

Wrongful conduct can never be the foundation of an equitable right.

Appeal from Kent. Submitted June 10. Decided June 23.

FORECLOSURE of chattel mortgage. Defendants appeal. Reversed and bill dismissed.

Simonds & Fletcher for complainant.

McBride & Carroll and *A. T. McReynolds* for defendants. If a chattel mortgage is not filed and the mortgagor is allowed to retain possession and sells the goods with the mortgagee's knowledge, either it is fraudulent and void as matter of law, or the good faith of the proceeding is a question for the jury: *Griswold v. Sheldon* 4 N. Y. 581; *Edgell v. Hart* 9 N. Y. 213; *Ford v. Williams* 13 N. Y. 577: 24 N. Y. 359; *Miller v. Lockwood* 32 N. Y. 293; *Russell v. Winne* 37 N. Y. 591; *Mittnacht v. Kelly* 5 Abb. Pr. [N. S.] 442; *Frost v. Warren* 42 N. Y. 204; *Southard v. Benner* 72 N. Y. 424; *Swift v. Thompson* 9 Conn. 63; *Rood v. Welch* 28 Conn. 163; *Shipman v. Ætna Ins. Co.* 29 Conn. 245; *Gaylor v. Harding* 37 Conn. 508; protection against such a mortgage is not confined to judgment creditors: *Olson v. Morrison* 29 Mich. 395.

COOLEY, J. Putnam filed a bill in equity to foreclose a chattel mortgage given to him by the defendant Reynolds, and which bore date April 9, 1879. It covered a stock of

goods, and was given to secure a debt of $500. Permission was given to the mortgagor in it to remove the goods from Grand Rapids, where they were when the mortgage was given, to Stanton in Montcalm county, and the mortgagee availed himself of this condition and made sale of the goods from time to time in the usual course of retail trade. Meantime the mortgage was not filed in the office of the city clerk of Grand Rapids, or in the proper office at Stanton, and by reason thereof, it became, by the express terms of the statute (Comp. L. § 4706), "absolutely void as against the creditors of the mortgagor." *Fearey v. Cummings* 41 Mich. 376. July 7, 1876, Reynolds having become insolvent, made a general assignment for the benefit of his creditors to the defendant Fitzgerald, who had no knowledge of the mortgage, and the assignee took possession and proceeded to make sale of the goods in execution of his trust under the assignment. Two days thereafter Putnam filed his mortgage at Stanton, and a little later still at Grand Rapids, and demanded possession of the goods, which Fitzgerald refused to give. After such demand and refusal the present bill was filed.

It is insisted on behalf of complainant that his mortgage, notwithstanding the failure to file it, was perfectly good as against the mortgagor, and that the latter could not, by a voluntary assignment, transfer a right to assail it which he did not himself possess. 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.

As matter of law the mortgage of complainant was void

as to the mortgagor's creditors, and it was made void for the reason that the conduct of the mortgagee, even when he had no such purpose in view, tended to defraud them. If the mortgage was purposely left off the record, it was an act of bad faith, which might justify its being declared void in fact irrespective of the statute (*Shipman v. Seymour* 40 Mich. 274); and there is reason to believe that such was the fact here, and that it was done to give the mortgagor a credit to which he was not entitled. But whether the mortgage was void in fact as against creditors, or merely void in law, it is plain that the mortgagee cannot have a shadow of equity to enforce it as against a trustee for the creditors who is proceeding to dispose of the property in good faith for their benefit. If any strict and harsh rule of the common law will enable the mortgagee to defeat the just claims of the creditors under the circumstances, he may be at liberty to take advantage of it, and on the other hand the assignee may rightfully hold any legal advantage he may have obtained. But whatever may be the case at law, a complainant in equity must have a better standing than a security which the statute, because of his own treatment of it, has declared to be void as against the very parties from whom he seeks to withdraw property by its enforcement. The maxim applies here that a tortious act can never be the foundation of an equitable right: *McCredie v. Buxton* 31 Mich. 383, 388.

The decree must be reversed and the bill dismissed with costs of both courts. The defendant Fitzgerald will be at liberty to withdraw from court the proceeds of assigned property paid in by him.

The other Justices concurred.

44	117
103	434
44	117
104	231
44	117
110	70
44	117
111	147

JANE DEAN v. GEORGE W. ADAMS.

Parol testimony as to consideration of deed—Animals.

The consideration for a deed may be shown, by oral testimony, to include chattels not mentioned therein.

Animals may be sold without writing.

Error to Hillsdale. Submitted June 10. Decided June 23.

REPLEVIN. Plaintiff brings error. Affirmed.

George A. Knickerbocker and *James S. Galloway* for plaintiff in error. Parol evidence of a greater or different consideration than is expressed in a written agreement is inadmissible: *Schemerhorn v. Vanderheyden* 1 Johns. 138; *Maigley v. Hamer* 7 Johns. 340; *Cocks v. Barker* 49 N. Y. 107; *Halliday v. Hart* 30 N. Y. 474; *Renard v. Sampson* 12 N. Y. 561; *Adair v. Adair* 5 Mich. 210.

Dickerman & St. John for defendant in error. Parol evidence is admissible to show the terms of the contract on which a conveyance was made: *Trevidick v. Mumford* 31 Mich. 467; *Doty v. Martin* 32 Mich. 462; *Strohauer v. Voltz* 42 Mich. 444; *Collins v. Tillou's Adm.* 26 Conn. 368; *Frey v. Vanderhoof* 15 Wis. 398; *Hahn v. Doolittle* 18 Wis. 196; *Willis v. Hulbert* 117 Mass. 151; the consideration of a bond is generally open to inquiry: *Bowker v. Johnson* 17 Mich. 42; the clause acknowledging consideration paid may be rebutted by parol testimony: *Clapp v. Tirrell* 20 Pick. 247; *Drury v. Improvement Co.* 13 Allen 168.

GRAVES J. The plaintiff brought replevin before a justice of the peace for a mare and two cows, and recovered, but on appeal the circuit court gave judgment for the defendant. The plaintiff brought error.

June 7, 1875, the plaintiff owned a place of eighty acres in Hillsdale county, and the personal property in question. Her husband, who was then living, but died soon after, joined with her in an agreement with the defendant by which the farm was to be conveyed to him and he was to maintain them during their lives. They went before an attorney in Hillsdale to have the proper papers drawn and executed to carry out the agreement, and they explained to him the terms settled on. Adams was to secure the agreed support and maintenance by his bond and a mortgage on the farm received from the plaintiff. The deed and bond and mortgage were accordingly prepared and executed. The condition of the bond contained the following preamble: "Whereas the said Jane Dean and the said Robert Dean have this day conveyed to the said George W. Adams that lot of land known as the east half of the north-east quarter of section number seventeen (17) in said township of Jefferson, in consideration of the support and maintenance of the said Jane and the said Robert by the said George," now the condition, etc.

On the trial the defendant was allowed, against objection, to show by the attorney and others that the animals in question were conveyed by the plaintiff to the defendant at the time of the deed and bond and mortgage and as part of the same transaction, and that their value formed a part of the consideration for the undertaking to support the plaintiff and her husband; that when the attorney came to read the papers as prepared, it was discovered that no mention had been made of the mare and cows, and that he then informed the parties that no writing for their transfer was necessary, and that an actual delivery would answer every purpose.

The only question which is presented arises on the reception of this oral evidence. It is objected that in permitting it the court allowed to be introduced the oral statements made by the parties at the same time they entered into writings, and authorized the proof of an item of consideration not recognized by the papers and not in harmony with the recital in the bond.

We think there was no infringement of the rules of evidence. No writing was necessary for the disposal of the animals. It was for Mrs. Dean to transfer them to Adams, and in case of any writing for the purpose it must have proceeded from her. But none was made. The bond and mortgage belonged to the other side of the transaction, and their office was to describe and secure performance of the undertakings on the part of Adams. It was not essential that they should detail the whole particulars of the consideration. The recital that the consideration on which the plaintiff and her husband gave the deed was their support and maintenance was true. There is no statement that they gave nothing more than the farm. Neither is there any statement that the farm was the sole consideration for the support and maintenance. The recital assumed to state on what consideration the deed was founded, and was not intended to imply that nothing more was founded on the same consideration, or that Adams had no other consideration than the farm for his undertaking. Hence, there was no inconsistency between the papers and the oral evidence. The inquiry was directed to show the actual ingredients of the consideration of the bond and mortgage, and there was nothing in the papers to exclude it. The case appears to fall under previous decisions. *Doty v. Martin* 32 Mich. 462; *Trevidick v. Mumford* 31 Mich. 467; *Bowker v. Johnson* 17 Mich. 42; *Strohauer v. Voltz* 42 Mich. 444.

The judgment must be affirmed with costs.

The other Justices concurred.

JAMES W. DRYSDALL v. HARLAN P. SMITH.

Rescinded sale—Evidence of profits—Unprejudicial error.

S. sold D. as much timber as D. should take away before a certain date, but before that time sold the land without reservation to M. and agreed to settle with D. who presented a claim for the amount he had

paid and for getting out the timber. S. did not pay however, and D. sued him. *Held* (1), that the action was not based on the contract of sale, but the later transactions, to which the contract and the deed to M. were mere matters of inducement, and it was for the jury to determine whether D.'s claim was well founded; (2), that it was not material whether or not he had notice of the sale; (3), that as D. recalled the price he had paid and claimed payment for his outlays, he could not show what profits he might have made.

Where evidence improperly admitted is evidently not considered by the jury, the error does not require a reversal of judgment.

Error to Saginaw. Submitted June 11. Decided June 23.

ASSUMPSIT. Plaintiff brings error. Reversed.

Albert Trask for plaintiff in error.

Camp & Brooks for defendant in error.

GRAVES, J. Drysdall recovered judgment before a justice and the circuit court reversed it on *certiorari*, and on that reversal this writ of error is brought.

February 21, 1879, the defendant in error, by writing under his hand and in consideration of $100 then paid to him by Drysdall, sold to the latter so much of the oak, ash and basswood, not less than twelve inches on the stump, as he might remove from the south-west quarter of section 34 in township 11 north of range 2 east between the date mentioned and April 1, 1880.

March 21, 1880, Smith conveyed the premises, by warranty deed, to James C. McInnis, and there was no mention in the deed of the transaction with Drysdall. About the first of October following Drysdall found out that the land had been conveyed without making an exception of the timber, and he proceeded to talk with Smith about it. The latter explained that it was a mistake and that he would fix it, and according to Drysdall's claim which Smith does not deny, the latter told him to go upon the land and cut timber and make roads, etc., so as to give notice to the world that he was in possession; that he accordingly went on the land about the 12th of October, and proceeded to cut roads and carry on lumbering ope-

rations and continued doing so until McInnis notified him that he claimed to be owner of the timber, and proposed to sell it; that subsequently one Carl claimed to own the timber and notified him to stop cutting; that he then called on Smith again, who told him he had written him as to what he would do, and on returning home he found Smith's letter which was in these terms:

"EAST SAGINAW, Mich., Nov. 5, 1879.

J. W. Drysdall, Esq., St. Charles, Mich.

DEAR SIR: Your postal card is received. I do not want you to take any risk on my account, or to expend any more money or labor on the timber with a view of looking to me for indemnity. I am prepared and ready to pay the damages at this time, and will do so if it cannot be arranged in some other way that will suit you better.

Please deliver the enclosed to McInnis, after you have read it, and notify me what you want."

Smith claims that Drysdall had asked him to become responsible for advances to furnish his camp with provisions, and that it was to that he had reference in this letter. Drysdall made an itemized statement of what he "wanted" and presented it to Smith in compliance with the suggestions in the letter. It covered the $100 paid as consideration, and in addition thereto, $159.27 charged for work and expenses performed and incurred pursuant to Smith's directions to go on and make roads and commence lumbering, etc. He claims that Smith agreed to pay the amount if he would subscribe a writing then made by Smith on the back of the statement, and that he then consented and in fact signed that writing, but that Smith immediately placed the paper in his desk and refused to pay; that Smith then agreed however to call in a few days and pay the amount in case he was not able to arrange the matter with McInnis so that he, Drysdall, could have the timber, and that Smith accordingly did endeavor to get an adjustment which would enable him to have it, but was unable to make any. Smith does not deny this explanation any further than this: He says he did not agree to pay the amount of the bill or any amount whatever; that he never

intended to have the plaintiff understand that he would pay anything more than he was legally bound to pay.

Now it is important to observe that the plaintiff based his action on these transactions which grew out of the contract to sell the timber, and the conveyance by Smith to McInnis, and not on the breach, if there was one, of the contract of sale itself. That contract, together with the grant to McInnis, were mere matters of inducement. The parties assumed that a breach of the contract of sale had been caused by the deed to McInnis, and the plaintiff thereupon, at the request of defendant, made an amount of expense which, as plaintiff claims, the defendant agreed to pay together with the purchase price of the timber. Whether this claim was well or ill based was for the jury.

The case presents two questions, and they arise upon rulings made by the justice in excluding and admitting evidence. *First.* The court refused to allow evidence that McInnis had notice at the time he received the deed, that the timber had been sold to plaintiff. The reasons given for the ruling are of no importance. The purpose of the proof was to show that in point of law McInnis, the grantee of Smith, was not in a position to enable him to defeat the sale of the timber. But this was not material to the issue. The cause of action did not turn upon that hinge. Whether the plaintiff, in a controversy with McInnis, might or might not have held the timber, the right growing out of the new arrangement would not be changed. *Second.* The plaintiff was allowed to testify that if he had obtained the timber he would have made a profit of at least $100 and probably three or four hundred. It is very plain that this evidence was not consistent with the theory of the case. It was not competent to claim profits and at the same time recall the price paid for the materials and insist on payment of all the outlay.

But the record satisfactorily shows that the defendant was not prejudiced. The jury allowed only $209.27, and it seems plain on inspecting the items of the claim and other features of the case, that nothing was given for profits. The bill the plaintiff rendered to the defendant, and which specified the

particulars of the claim, was, as previously stated, for $259.27, and it contained no charge for profits. On the occasion on which it was rendered the defendant gave to the plaintiff $50 as a temporary expedient and under a special understanding concerning its application, and it is only necessary to deduct this money from the plaintiff's bill to obtain the exact amount found by the jury. They evidently confined their verdict to that claim, after deducting the $50 as payment, and as it embraced nothing for profits none were allowed. It follows that the rulings by the justice were not such as to impugn his judgment.

The determination of the circuit court must be reversed with costs and the judgment of the justice affirmed.

The other Justices concurred.

44 123
75 48

ROBERT P. SINCLAIR v. GEORGE R. SLAWSON ET AL.

Mortgage—Record-entry—Mistake—Notice.

Under the statutes of Michigan a mortgage is considered as recorded when it is filed for record, and the register is required to make an entry in what is called an entry book, of the date of reception, the names of the mortgagor and mortgagee and the township in which the lands lie.

The entry in the entry book, until the mortgage is copied in full into the record, constitutes the constructive notice to purchasers, and refers them to the mortgage on file for full particulars.

In copying a mortgage into the record, the register omitted the name of the mortgagee. *Held*, that this error did not defeat the mortgage as to subsequent purchasers, but that as the entry book would supply the name of the mortgagee, that book and the record book together gave full information and constituted notice to all parties concerned.

Appeal from Montcalm. Submitted June 11. Decided June 23.

FORECLOSURE. Complainant appeals. Reversed.

Isaac H. Parrish for complainant.

Ellsworth & Sapp for defendants.

COOLEY, J. This is a bill to foreclose a mortgage. The defendants claim the premises as *bona fide* purchasers under the mortgagor. The only question of law which is raised by the record is whether the mortgage is defeated by the conveyances to these defendants by reason of an error in recording it. It appeared that the register of deeds was making use in his office of books made up of printed blanks and that in attempting to fill up one of these for the record of the mortgage in suit, he wholly omitted the name of the mortgagee. It is not pretended that in any other particular the record was incorrect. The defendants bought without making an examination of the record, and there is no claim that they had express notice of the mortgage. The question, then, is whether the defective record was of any avail to complainant as constructive notice of his mortgage.

Under a New York statute which provided that no mortgage should "defeat or prejudice the title of any *bona fide* purchaser unless the same shall have been duly registered," Chancellor Kent held that "the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser." The statute, he adds, intended the registry "as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am

satisfied that this was not the intention, as it certainly is not the sound policy, of the statute. *Frost v. Beekman* 1 Johns. Ch. 288, 299. The mistake in the record in that case consisted in a misrecital of the amount secured. The case has been often followed. In *Sanger v. Craigue* 10 Vt. 555, the error consisted in misdescribing the land. In *Jennings v. Wood* 20 Ohio 261, the name of the grantor in a deed was incorrectly given. In *Parret v. Shaubhut* 5 Minn. 323, the mistake consisted in the omission of one of the subscribing witnesses, whereby the deed was made to appear insufficiently executed. In *Shepherd v. Burkhalter* 13 Ga. 443, the name of the mortgagor was not appended to the mortgage as recorded. In *Sawyer v. Adams* 8 Vt. 172, the deed was recorded in an unused book and not indexed. *Terrell v. Andrew County* 44 Mo. 309, was another case of error in giving in the record the amount of the mortgage, and the following are cases in which the thing conveyed was misdescribed: *Chamberlain v. Bell* 7 Cal. 292; *Miller v. Bradford* 12 Iowa 14; *Baldwin v. Marshall* 2 Humph. 116; *Brydon v. Campbell* 40 Md. 331; *Breed v. Conley* 14 Iowa 269; *Gwynn v. Turner* 18 Iowa 1. This court has also held that a sheriff's notice of attachment was ineffectual where by mistake it failed to describe the land attached. *Barnard v. Campau* 29 Mich. 162.

On the other hand it has been held in Illinois, under a statute which gave a deed effect as against subsequent *bona fide* purchasers from the time it was filed for record, that the grantee was not affected by errors in recording; he having done all that the law required of him when he had filed his deed with the recorder. *Merrick v. Wallace* 19 Ill. 486; *Polk v. Cosgrove* 4 Biss. 437; *Riggs v. Boylan* 4 Biss. 445. So in Alabama, under a statute which made a conveyance "operative as a record" from the time it was left for registration, it was decided that a mortgage was a valid lien for the whole amount though incorrectly recorded as for a smaller sum. *Mims v. Mims* 35 Ala. 23. The following are cases which recognize the rule that filing a deed for

record gives it effect as a record: *Dubose v. Young* 10 Ala. 365; *Bank of Kentucky v. Haggin* 1 A. K. Marsh. 306.

The different conclusions in these cases are the result in the main of differences in the statutes under which the records have been made or attempted, and perhaps if all the statutes had been alike, all the decisions would have been harmonious. The doctrine that he who claims the benefit of registry laws must bring himself within them is universally admitted. It becomes important, then, to see what our own statutes are which bear upon this case; for these after all, and not the decisions of other States, must control.

We have no statute which makes a record necessary to the validity of a conveyance as between the parties. *Godfroy v. Disbrow* Wal. Ch. 260; *Brown v. McCormick* 28 Mich. 215. The recording is only for the preservation of evidence, and for notice to subsequent purchasers and encumbrancers. Every register of deeds is required to keep an entry book of deeds and an entry book of mortgages, each page of which shall be divided into six columns with the following headings: Date of reception; Grantors (or Mortgagors); Grantees (or Mortgagees); Township where the lands lie; To whom delivered after being recorded; Fees received. In the entry book of mortgages he shall enter all mortgages and other instruments intended as securities, and all assignments of any such mortgages or securities; and he shall note in such books the day, hour and minute of the reception and the other particulars in the appropriate columns, in the order in which such instruments are respectively received; and every such instrument shall be considered as recorded at the time so noted. Comp. L., §§ 4226, 4227. These instruments are afterwards to be recorded at full length in proper books procured for the purpose (Comp. L., § 4228), and a general index made of them all, with the names of the parties alphabetically arranged. Comp. L., § 4230.

This mortgage, therefore, was in the law considered as recorded, and for all the purposes of notice and protection was recorded when it was left for record, and noted in the entry book. No one pretends there was any defect or mis-

take in that entry. The complainant proved his mortgage with the register's certificate of due record indorsed thereon, and the defendants in their endeavor to show that it was not recorded in fact, showed only the error in copying the mortgage at large in the book kept for that purpose, and did not question the record in the entry book. It must be assumed, therefore, that that record was correct, and that it showed the names of the parties, the date of record, and the township in which the land was situated. Usually in such offices considerable time must elapse between the entry and the actual copying of the instrument upon the record book, and during all that time the entry book will constitute the record, and will be the means whereby third parties will be notified of conveyances. The record in that book will not be complete in itself, because it will not contain a particular description of the land, but it will direct the inquirer to the deed on file, and the two together will give full information. The one supplies all deficiencies in the other.

This mortgage, then, was recorded for the purposes of notice when it was filed, and remained effectual as against subsequent purchasers and encumbrancers for a time at least. When, if ever, did it cease to be recorded? Was it when a more complete record was attempted? Did the failure to make the more complete record render nugatory the one already made?

No doubt the entry in the entry book loses its importance when the instrument entered is properly recorded, because from that time the completed record gives the fullest information, and it will be that to which the general index will refer persons who are searching the records. But it will remain a record nevertheless, and it may have its importance in some cases. Every man who finds a mortgage recorded is notified by the date of the record that there is a record of certain particulars respecting the mortgage in the entry book, which he can at once refer to; and if any of those particulars chance to be omitted in the record book of mortgages, he understands where he can obtain information concerning them.

Now there was no omission or mistake in this case in respect to the name of the mortgagor. Any one searching for mortgages by him would have been directed by the general index to the defective record of this mortgage, and he would have found that record just as readily as he would have found it if correct. In this the case differs from one like *Jennings v. Wood* 20 Ohio 261, in which the name of the grantor was omitted in the record; for the means of tracing conveyances are lost when you do not find in the index, as grantor or mortgagor, the name of the party in whom the title appears to stand.

The defective record is of a mortgage which upon the face of it appears to be a mere nullity; for it is manifest that there can be no mortgage without a mortgagee. But the very nature of the defect in the instrument is one that would instantly challenge attention; for no one for any conceivable purpose could be supposed to have an interest in placing such an instrument upon record. If actually defective as the record would indicate, no one could claim a lien by virtue of it; and if made dishonestly by the mortgagor, it could charge nothing, cover nothing and deceive nobody. The suggestion of mistake when the record is examined is inevitable and spontaneous.

It is not necessary, however, to discuss or raise any question of the implications that may be supposed to arise from such a record; and in this opinion we neither express nor intimate any opinion upon the question whether a purchaser would be bound to take notice of this record if it stood by itself, or would be put upon inquiry by it. This record does not stand alone. All persons are notified by the law that the entry record remains, and that it contains certain particulars, among which is the very one which is absent from the record where the mortgage is recorded at large.

It may be said that the entry-book record is temporary in purpose, being designed as a guide merely to the deeds remaining in the files, and being superseded by the complete record when made. But the admission of this does not fully meet the present case. If the register before the deed was

recorded were to take and destroy it, the mortgage would not thereby be lost, but in the words of the statute would be still considered as recorded, and the entry would evidence the fact. If he made a pretense of recording it, without intending to do so in fact, but made a defective record purposely, the result must be the same. In each case the reason for the temporary record remains and is as forcible as ever. Indeed, the reason holds good in every case until a perfect record is made, which supersedes the entry record, because it embraces all the particulars there found and many others. It holds good, therefore, in this case.

We say nothing about and express no opinion upon any case that differs in its facts from this. Here the entry record has not been wholly superseded, and it still remains and purchasers must take notice of it. With the other record it shows a mortgage complete in all its parts; the one supplementing the other completely and giving to a purchaser information as full and definite as he could have if the original mortgage were spread out before him.

The decree appealed from must be reversed, and the cause remanded with directions to enter decree for complainant in the usual form. The complainant will recover costs of both courts.

The other Justices concurred.

JOHN H. McLEAN, MARVIN R. DYER AND SAMUEL H. DAVIS v. WILLARD B. ISBELL, EMMA J. MERRILL AND ALBERT W. BRADFORD.

44 129
147 492

Service—Special appearance—Surety for costs—Certiorari—Return.

Judgment for a joint conversion cannot be entered against a defendant who had not been served with process.

A special appearance for the sole purpose of making an objection is not a submission to jurisdiction.

Comp. L., § 6133, providing that final adjournment for costs may be rendered against the surety for costs as well as against his principal, applies to a case where a justice's judgment for plaintiff is reversed in the circuit on *certiorari*.

The return to a writ of *certiorari* to a justice may properly show whether security for costs was filed in actions by non-residents.

Certiorari to a justice is in the nature of an appeal so far as to allow the circuit judge to include the surety in the judgment for costs against his principal.

Error to Wayne. Submitted June 11. Decided June 23.

TRESPASS on the case. Plaintiffs bring error. Affirmed.

John C. Howland for plaintiffs in error. The writ of *certiorari* is the beginning of a new suit: *Fenno v. Dickinson* 4 Den. 84. The power to give judgment against sureties in legal proceedings without a separate action is statutory, and cannot be extended by implication: *Willard v. Fralick* 31 Mich. 431; *Ortmann v. Merchants' Bank* 42 Mich. 464.

George W. Bates for defendants in error. The surety for costs in justice's court continues liable on appeal: *Dunn v. Sutliff* 1 Mich. 24; *Smith v. Crouse* 24 Barb. 436; *Traver v. Nichols* 7 Wend. 434; *Ball v. Gardner* 21 Wend. 272; and on *certiorari: Bennett v. Brown* 20 N. Y. 102.

GRAVES, J. McLean and Dyer, who were non-residents, brought an action of trover against the defendants in error before a justice of the peace for an alleged joint conversion of certain fish, and Davis became security for costs pursuant to the statute. Comp. L. § 5259. The justice sustained the action and gave judgment against the defendants in error for $57 damages and costs of suit. The circuit court on *certiorari* reversed the recovery allowed by the justice, and gave judgment for costs not only against McLean and Dyer but against Davis, their surety for costs, also. These parties thereupon joined in bringing error.

The circuit court was warranted in reversing the judg-

ment. The female defendant was not served with process, and it was not competent for the justice, without her submission to the jurisdiction, to receive evidence to prove her guilty with the others of the alleged joint conversion, and proceed and award judgment against her. In other words the cause of action charged could not be maintained.

The only ground for claiming that she submitted to the jurisdiction is that an attorney professed to appear before the justice for all the defendants. But this appearance was for the sole purpose of presenting an objection, and was carefully confined to that object. The record will permit no other construction and it is quite immaterial whether the objection proposed was tenable or not. The appearance being for the specific purpose mentioned it availed neither party for any other, and as to everything beyond, the parties were in the same plight as though there had been no appearance at all.

Passing the points arising on the proceedings before the justice, an objection is based on the joining of Davis in the judgment below for costs.

In adjudging against him in this manner the circuit court relied for authority on Comp. L. § 6133, and if the case was within that provision the point that it was error to include the surety cannot be sustained.

The section provides "that whenever any person shall become security for costs for another, in any court in this State, whether such security be required by law to be given, or be required by order of the court, in case the defendant in any such action shall recover final judgment or decree for costs against the plaintiff or complainant, thereupon judgment or decree shall be immediately, and in such suit, entered, as well against such surety as against such plaintiff or complainant, and execution may issue against such surety, in the same manner as if he had been himself a party to such suit."

The ground of the plaintiffs is that the statute applies only in cases where the defendant's right to costs arises in the *same action* as that in which the surety makes his undertaking, and supposing the *certiorari* to be analogous to a writ of

error and the latter as being a new suit, then the *certiorari* was a new action and not the same as that which was commenced before the justice, and hence the circuit court acquired no power by this statute to render any judgment against the surety on deciding the question raised by the *certiorari.*

The argument leads to this extent. The law in order to protect the defendant proceeds to encumber the right of the non-resident to sue, with the duty to give security for costs, and then immediately makes that security wholly ineffectual in every case where the defendant is compelled to resort to *certiorari* to protect his rights against the action. The effect is not merely to take away the power to award judgment in that proceeding against the surety. By necessary inference the reasoning goes further and negatives the right even to bring an action against him. As his principal recovered before the justice he was not liable there, and as there was no appeal there were no further proceedings in the same action to cause him any other liability. A construction marked by effects so unreasonable ought not to be sanctioned unless found to be necessary on account of the words or the force of surrounding considerations, and neither requires it. Moreover the general practice has been against it.

The argument for the objection starts by assuming that in all cases and for all purposes a writ of error is a new suit distinct from the case to be reviewed, and then reaches the result by ascribing the same character to the statutory *certiorari* provided for reviewing judgments passed by justices of the peace.

There must be no discussion on the claim that for many things a similarity exists between the two proceedings. But the assumption that a writ of error when sued out, as was the *certiorari* here, for the mere purpose of defense is to be deemed to all intents a new action and in no respect a proceeding in the nature of an appeal, cannot be admitted.

In *Cohens v. Virginia* reported in 6 Wheaton 264, it was objected against the jurisdiction of the Supreme Court of the United States that the writ of error to the State court was

the commencement of a *suit against the State* contrary to the 11th amendment of the Constitution. The question was fully considered and the court, by Chief Justice Marshall, took pains to show that by the principles of the common law a writ of error is only "in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing which is withheld from him, not when its operation is entirely defensive," and proceeding to apply the principle to the case which was before the court it was determined that since the only purpose of that writ was to uphold a lawful defense against the prosecution carried on by the State, it did not operate as the commencement of a new suit, but simply by way of appeal against the decision of the lower court on a point of law. See also *Nations v. Johnson* 24 How. 195–204; 3 Bouv. Inst. p. 537.

In considering the point now in question this explanation of the theory of a writ of error is an important factor, and it follows from it, that, in case the analogy ascribed to the *certiorari* is true, the latter was not only not a separate suit, but was in fact a *proceeding in the nature of an appeal.* Its purpose was "entirely defensive." Hence the ground of reasoning relied on to maintain the objection decisively overrules it.

The doctrine quoted to prove that the statute did not warrant the entry of judgment against the surety turns out to be authority for the view of the court below that it did warrant it.

There is no force in the point that the record the circuit court had before it contained no basis for any judgment against Davis. As his undertaking was a material step in the cause before the justice and was liable to be a ground of judgment against him in the circuit court it was a proper thing to be returned with the answer to the writ, and the circuit court had power to compel it. And it appears by the record that the justice returned the fact that security for costs was filed, and sent up the original undertaking.

The present case requires nothing further. But it may be expedient to add that in making this provision for entering

judgment against sureties the Legislature does not seem to have proceeded on the distinction explained in *Cohens v. Virginia*, supra, or to have considered that the mode authorized for reviewing by the circuit court of doings before justices of the peace on points of law was a new and distinct suit. The intent appears to have been to treat the *certiorari* as of the nature of an appeal *in all cases* in so far as to allow the circuit court to include the surety in the judgment for costs against the principal.

The judgment of the circuit court must be affirmed with costs.

The other Justices concurred.

WILLIAM BIRDSALL v. FANNIE JOHNSON, GEORGE JOHNSON, FREDERICK A. JOHNSON, BERTHA JOHNSON AND LUTHER JOHNSON.

Conflict of conveyances—Laches.

A deed from a father to his minor son was left unrecorded for some months, but was finally taken by the son from a trunk where it was kept, and recorded. Afterwards the father conveyed a tract including the parcel covered by the son's deed, to another person who had notice of the prior conveyance within three years afterwards, but beyond beginning an action of ejectment five years later, and suffering nonsuit, took no steps to clear his title until twenty-four years had gone by from the date of his own deed, and the prior grantee had died. He then entered the land and being sued in trespass filed a bill to enjoin the action and to clear his title. *Held*, that the bill was properly dismissed. It was not likely that the son would have fraudulently recorded his deed, as the wrong could be easily found out, nor that the other grantee would have neglected when the facts were recent to seek a remedy if he was entitled to it. The latter's long unexplained delay and acquiescence would have cut off any equities he might have had, so that both at law and in equity he would have had no claim for redress.

Appeal from Kent. Submitted June 11. Decided June 23.

INJUNCTION to restrain action of trespass. Bill dismissed. Complainant appeals. Affirmed.

Taylor & Eddy for complainant. Where a deed remains in the grantor's custody with a condition or qualification, the estate remains in him: 4 Kent's Com. 544–7; *Parker v. Parker* 1 Gray 409; *Jackson v. Dunlap* 1 Johns. Cas. 114; *Jacobs v. Alexander* 19 Barb. 243; a promise of a deed does not amount to delivery: 2 Washb. R. P. (2d ed.) 603–4; *Hadlock v. Hadlock* 22 Ill. 384; *Young v. Young* 23 Alb. L. J. 395, 1880; the grantor must part with possession and control and with the right to recall it: *Cook v. Brown* 34 N. H. 460; *Johnson v. Farley* 45 N. H. 510.

Foote & Wanty, for defendants, cited as to the delivery of the deed: *Bryan v. Walsh* 2 Gilm. 557; *Walker v. Walker* 42 Ill. 311; the right to enforce an equity may be lost by unreasonable delays: *Russell v. Miller* 26 Mich. 22; *McLean v. Barton* Har. Ch. 279; *Campau v. Van Dyke* 15 Mich. 381; *Craig v. Bradley* 26 Mich. 354.

CAMPBELL, J. The bill in this cause was filed to stay a trespass suit and remove a cloud upon title. Birdsall in 1855 purchased from one Minor T. Johnson an eighty acre lot in Kent county, being the north $\frac{1}{2}$ of the south-east $\frac{1}{4}$ of section 8 in town 8 north of range 12 west. When he bought, a deed was on record of the north forty acres of this tract, made in May, 1854, by Minor T. Johnson to his son James E. Johnson, who was then under age, and about sixteen or seventeen years old. This deed was recorded October 2, 1854.

It is claimed by complainant that this latter deed was never delivered, and was put on record fraudulently.

The testimony shows that on getting his deed from the original purchasers, under which he secured his own patent

from the State, Minor T. Johnson had this deed to his son drawn up and executed, and expressed to others his intent to give him the land. On his return to his house he openly showed the deed to his son and told him either that he should have it as soon as he was able to take care of it, or as soon as he got money enough to record it. He then put it in a trunk which was not kept locked, and where miscellaneous letters and papers were kept, with other documents. The son in October took it and had it recorded.

Birdsall claims he did not discover or know of the record, although he searched and inquired. It appears, however, that in 1857, and perhaps earlier, he tried to sell the land and the intended purchaser would not buy because the deed to James was on record. In 1862, Birdsall began an action of ejectment for the land, but submitted to a nonsuit the next year.

The land was from the beginning assessed to James Johnson, and he paid the taxes except in 1862 when he was in the army, and when, it is assumed, Birdsall paid them. Birdsall claims that James paid them early so as to anticipate him.

In November, 1878, James died, leaving four children, all under twelve years old. The next spring, April 8, 1879, Birdsall went upon the land and a suit in trespass was begun against him on behalf of the children on the 23d of April. On the 10th of May, 1879, this bill was filed, and an injunction granted which was afterwards dissolved. Proofs were taken and the bill dismissed. Birdsall appeals.

We think the evidence predominates in favor of the title of James E. Johnson. His father shows that he meant his son to have the deed whenever he chose, and the other testimony indicates that there was no secret made about the intent to give him the land. It is not at all likely that a young lad would undertake to commit a fraud which would be so readily found out, and it is less likely that Birdsall would submit to losing his land and fail to file a bill when he discovered it, and when all the facts were fresh. He had actual and not merely constructive notice within a year or two after his purchase, but took no steps until James had gone to the front with the army, and discontinued those proceedings without

going to trial. He then did nothing, and seems to have made no claim, until he had no one to contend with but minor children.

In our opinion the deed was valid and vested title in James E. Johnson. We are also of opinion that the long and unexplained delay and acquiescence of Birdsall would cut off any equities if he had them, and that he has neither a legal nor an equitable claim to relief.

The decree is affirmed with costs.

The other Justices concurred.

Ebenezer M. Ball v. The Watertown Fire Insurance Company.

The Watertown Fire Insurance Company v. Cyrus E. Perkins, William H. Van Horn and Ebenezer M. Ball.

Liability on insurance agent's bond—Premiums uncollected when bond was given—Costs.

The bond of an insurance agent who had assumed an indebtedness of a former agent for uncollected premiums, does not cover the debt, but if the agent collects any part of the premiums it covers the amount.

An insurance agent's bond covers moneys collected by him within his district on policies issued independently of him; also, unearned premiums returned by the company on cancelled policies and remitted to the agent to be paid back to the assured.

A firm were appointed agents for an insurance company, one of them having previously been the agent, alone. They gave a bond for the faithful performance of their duties, which was conditioned, among other things, for the payment to the company of all moneys, etc. and other property belonging to it. They also gave their firm note for an amount covering a large amount of uncollected premiums due from the former agent. In an action on the bond to recover the amount due on the note, it was *held* that the firm could not charge their surety by assuming the amount due the company, but that if they collected any part of that amount the bond would cover it.

Costs are denied to either party where they would be about the same on both sides and both parties have sued out writs of error and neither has prevailed.

Error to Kent. Submitted June 11. Decided June 23.

ASSUMPSIT.- Both parties bring error. Affirmed.

Taggart & Wolcott for Ball.

Butterfield & Withey for the Insurance Company.

MARSTON, C. J. William H. Van Horn had been acting as agent of the Watertown Insurance Company for some time previous and up to the 1st day of March, 1878. There was then a balance due the company for uncollected premiums, of upwards of $400. About March 1st Perkins & Van Horn were duly appointed agents of the company, and gave a bond for the faithful performance of their duty, signed by plaintiff in error Ball as surety. June 1st, 1878, Perkins & Van Horn gave their firm note to the insurance company for $473.77 "to balance their account as it stood April 1st, 1878." This action is brought to recover upon their bond the amount due upon this note. It was claimed, and evidence was given tending to show, that Perkins & Van Horn had, for a consideration, agreed to and did assume the balance due the company at the expiration of Van Horn's agency.

There is one portion of the charge of the court which points out so clearly the duty of the jury that I here include it:

"I am clearly of the opinion that if there had been no premiums coming from the old business, but the premiums had all been collected, and there was nothing left of the old business excepting the debts which Van Horn should have paid, he having collected all the money and put it in his pocket, that then the surety could not be held for any of such liability, even though they have a note for it, given as against the surety, that ought certainly to be treated as an accommodation note; but if this firm, as a firm, have collected to a considerable amount, or any amount, of debts which belong to the company from the old business, I cannot see any reason why the bond should not cover them."

The material question in the case is whether the bond covers moneys so collected by the new firm on policies issued by Van Horn.

The bond was conditioned that Perkins & Van Horn should, among other things, "pay and deliver over to said company all moneys, record books, papers, or other property, belonging to said company," which should come into their hands as agents of the company.

As the court charged the jury, Perkins & Van Horn, by assuming the amount due the company at the expiration of Van Horn's agency, could not thereby charge their surety. If however they collected such balance, or any part thereof, in my opinion the bond given would cover the amount so collected, and their surety would be responsible therefor.

Uncollected premiums belonged to the company, and not to the agent who issued the policy. That such premiums could become the property of the agent under certain circumstances, we do not question, but no such circumstances exist in the present case. It does not appear that Van Horn's agency was continued after March 1st for the purpose of collecting premiums or policies theretofore issued, and that the firm of Perkins & Van Horn had authority to collect the same in virtue of their agency there can be no question. Such premiums were collected by the firm in the regular course of their duties, and when collected the same constituted moneys in their hands belonging to the company, and which they could not lawfully appropriate to their own use. The bond was not restricted to moneys coming into the agent's hands from policies issued by them after their appointment. The company might, independently of them, have issued policies, and directed them to collect the amount thereof, and if collected by them within their district, their bond would cover the same. So, had the company cancelled one of the policies issued by Van Horn and remitted to these agents the unearned premium to return the assured, for an appropriation thereof to their own use their bonds would cover the same.

I am of opinion that the charge of the court was correct

and that the judgment should be affirmed. Each party having sued out writs of error and each failed, no costs will be awarded either party. Costs if allowed would be about the same to each.

The other Justices concurred.

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HIRAM SNYDER v. RICHARD WINSOR AND HORACE G. SNOVER.

Pleadings in justices' courts—Statute of limitations—Proof of indorsements.

Pleadings in justices' courts are to be liberally construed and amendments to obviate merely technical errors favored.

Suit was brought on a promissory note which was payable one day after date, and had run eight years. The defendant pleaded *non assumpsit* within six years when he should have pleaded *actio non accrevit* within six years. The error being pointed out, he asked leave to amend, but the justice refused it. *Held*, that the plea as it stood fairly apprised the plaintiff of the defense relied upon, namely, the statute of limitations, and the justice should have allowed the defendant the benefit of it, either with or without the amendment.

A note purporting on its face to be eight years overdue had upon it two indorsements, dated within six years of the time of bringing suit upon it. The only proof offered by the plaintiff in the case was that no *other* payments than those indorsed had been made. *Held* that this did not prove or tend to prove the indorsed payments.

Error to Huron. Submitted June 11. Decided June 23.

ASSUMPSIT. Defendant brings error. Reversed.

James H. Hall, for plaintiff in error, as to the sufficiency of the notice of defense in the justice's court, cited: *Hurtford v. Holmes* 3 Mich. 460; *Comstock v. Howd* 15 Mich. 237; *Smith v. Dodge* 37 Mich. 354; *Eddy v. Manshaun* 42 Mich. 532. Unexplained indorsements will not take a case out of the statute of limitations: *Mich. Ins. Co. v. Brown* 11 Mich. 265; *Rogers v. Anderson* 40 Mich. 290.

Winsor & Snover and *H. B. Carpenter* for defendants in error. *Non assumpsit infra*, etc. is no answer to a count on a promissory note payable at a day later than its date: *Stillwell v. Hasbrouck* 1 Hill 561. A plea answering in form the whole *narr.*, but containing matter legally answering only part of it, is bad: *Wilcox v. Kassick* 2 Mich. 165. A justice has the same power as to amendments as a court of record, before judgment: Tiff. Just. Guide 529; *Near v. Van Alstyne* 14 Wend. 230. The plea of the statute of limitations is a strict defense, and if one omits to plead it he has no right to amend: *Varick v. Jackson* 2 Wend. 166.

Cooley, J. Defendants in error brought suit upon a promissory note purporting to be made by Snyder, bearing date October 1, 1871, and payable one day after date. Upon the note was an indorsement of $29.69, under date of July 1, 1873, and another of $24, dated 1874, without month or day. Defendant pleaded the general issue, with notice that he did not undertake and promise, etc. within six years.

The suit was begun May 2, 1879, so that all remedy upon the note had been barred for some time when suit was instituted, unless saved by payments. The statute provides that indorsements shall not be evidence of payments for this purpose (Comp. L., § 7164); and it therefore became necessary for the plaintiffs to make proof of the payments or of one of them, provided the defense of the statute of limitations was well made.

The plaintiffs insisted before the justice that the notice should have been that the cause of action did not accrue within six years; and that *non assumpsit* within six years was insufficient. When this objection was made defendant asked leave to amend, but it was denied. Thereupon the case was submitted; there being no evidence of the payments which were indorsed on the note, though a witness testified that no others had been made.

If the notice of defense was technically insufficient, defendant should have been suffered to amend. He gave a notice, the purpose of which no one could have misunder-

stood, and the objection to it was purely technical. Pleadings in justices' courts must not be subjected to such strict rules; it is mischievous to permit it, and defeats the purpose for which these courts are created: *Wilcox v. Toledo, etc. R. R. Co.* 43 Mich. 584. But we are inclined to hold the present notice sufficient. Defendant thereby apprised the plaintiffs that he relied upon the statute of limitations; and had he said that in the fewest possible words it would have been sufficient. Instead of doing so he undertook to put his notice in legal form, and failed to make it express the exact legal idea. But it nevertheless notified the plaintiffs of the defense relied upon, as completely as if it had been correct by the test of strict rules. This is all that should be required in justices' courts.

It is claimed in the brief for defendants in error that the evidence that no *other* payments were made on the note was sufficient to justify the justice in finding that the two which were indorsed were made. But there is no ground for such a claim. There was an entire absence of evidence respecting them; and even if it were admitted they were made, the time of payment needed to be shown, to give them any importance.

The judgment must be reversed, with costs of all the courts.

The other Justices concurred.

CHARLES F. CORBIN v. HENRY W. SAGE ET AL.

Question for the jury as to agent's power to contract.

Where there was a conflict of testimony as to whether an agent had power to contract, or whether the other party had reason to rely on such power, it was proper to call the attention of the jury to any of the bearings of the case as throwing light on the probabilities.

Error to Bay. Submitted June 11. Decided June 23.

ASSUMPSIT for breach of contract. Plaintiff brings error. Affirmed.

A. C. Maxwell for plaintiff in error.

T. F. Shepard for defendants in error.

CAMPBELL, J. Corbin sued defendants for a failure to put in their saw-mill a lath machine which he claims they had agreed to have set up, and to employ him to run it during the season of 1866–7 at a compensation named.

The jury found no such contract was made. The testimony conflicted as to what actually took place between Corbin and the agent of defendants. We have not discovered anything which indicates very clearly if at all that proof was made that the agent had power to make such a contract, or that Corbin had reason to rely on such power. But this was left to the jury. In his charge the judge told the jury that in such a conflict of testimony they should look at all the probabilities, and among other things to the likelihood that an agreement wonld be made which would require the mill to have its power increased, and to be idle while this was being done, during the sawing season.

The only exception to the charge is confined to this part of the charge, and we think it is without foundation. It is entirely proper to call the attention of the jury to any of the bearings of the case, as throwing light on the probabilities. We cannot discover anything in the charge which shows that there was unfairness in this discussion.

The judgment must be affirmed with costs.

The other Justices concurred.

The Metropolitan Life Insurance Company v. Melissa Ethier.

Removal of causes for local prejudice.

A showing of local prejudice was made for the removal of a cause from the State to the Federal court, but it was not presented to the court and action invoked upon it for more than a year. *Held* that the paper had become inofficious and would not avail for the purpose.

The showing of cause for the transfer of a cause to the Federal court, and the motion upon it, must be substantially contemporaneous.

Error to Menominee. Submitted June 11. Decided June 23.

Assumpsit on insurance policy. Defendant brings error. Affirmed.

Edward Cahill for plaintiff in error. The act of Congress for the removal of causes in providing that the removal must be applied for "before final hearing or trial," permits it to be asked for after trial in the State court if that is not the end of the litigation: *Insurance Co. v. Dunn* 19 Wall. 214; *Kellogg v. Hughes* 3 Dill. 357; *Trust Co. v. Maquillan* id. 379; *Minnett v. Mil. & St. Paul Ry. Co.* id. 460; *Hurst v. W. A. R. R.* 93 U. S. 71.

B. J. Brown for defendant in error. A petition for the removal of a cause for local prejudice and the affidavit in support of it are not valid for the purpose if not used for a year after they were sworn to: *Delaware R. R. Construction Co. v. Davenport & St. Paul Ry. Co.* 46 Iowa 406; if not duly filed, the inchoate right arising upon the petition for removal is extinguished: *Broadnax v. Eisner* 13 Blatch. 366; *Bright v. Mil. R. R.* 14 Blatch. 214; *Hanover Nat. Bank v. Smith* 13 id. 224; *McLean v. St. Paul & C. Ry.* 16 Blatch. 309.

COOLEY, J. Two verdicts have been recovered by defendant in error in this case, the first of which we set aside and ordered a new trial. The second, with the judgment upon it, is now before us. It is alleged for error that the circuit court erred in proceeding to a second trial in the case, because before doing so a petition had been filed for the removal of the case to the circuit court of the United States, whereby the jurisdiction of the State court was superseded. On the other hand, it is insisted that there were fatal defects in the proceedings to remove the case to the Federal court, which required and compelled the court below to overrule the petition. No other question but this is now before us.

An inspection of the record shows that the order of this court, setting aside the first verdict and judgment, was made June 13, 1876. The *remittitur* was applied for and issued August 29, 1876, but for some unexplained reason was not filed in the court below until September 1, 1877. The petition for the removal of the cause is dated September 7, 1876, and the affidavit on which it was based, was made on that day. Had it been immediately presented, it must have been denied without an examination of its merits. This is settled by *Vannevar v. Bryant* 21 Wall. 41 and *Railroad Co. v. McKinley* 99 U. S. 147, in which it was decided that a party cannot move for the transfer of his case to the Federal court for a second trial until his right to have a second trial has been perfected, and this is not done until *remittitur* is filed.

The petition, however, was not presented to the State court for its consideration until September 21, 1877, more than a year after its date, and the bond was not perfected until September 15, 1877. And the question now is, whether a showing made at a time when the case is not in condition for moving can be retained in the office of counsel and made use of a year or any indefinite time afterwards when the necessary steps shall have been taken to put the case in the proper condition.

The ground on which the transfer was demanded was that "from prejudice and local influence the said Metropolitan Life Insurance Company of New York, the defendant in said

cause, will not be able to obtain justice in the State court, where the same is now pending." The showing of cause was upon belief merely, as it must be usually, since the nature of the case will scarcely admit of more. Now nothing can be more evident than that a cause which may have prejudiced a fair trial in September, 1876, may have wholly passed away in September, 1877, or that a showing made in the most perfect good faith and on grounds apparently sufficient at the first date, may, long before the year was over, have been shown, to the satisfaction of the party making it, entirely mistaken and baseless. Indeed it is possible to conceive that stale papers may have been used because new papers could not be verified; for local feelings and prejudices change frequently, and a prejudice against one party at one date may be equally strong in his favor in much less time than had elapsed in this case. Courts must often take notice of such changes; a railroad company may have a whole community ready to tax their estates to aid in the spring, and equally ready to tear up its track in the fall, and an accused party when he has been convicted may have the same persons petitioning for his pardon who strove as a mob to hang him when first arrested. Such changes are too common to be ignored in legislation, and those not so striking in character are often sufficient to affect the general sentiment of a community without attracting much attention. We have no doubt that the intention of the statute permitting such transfers is that the showing of cause and the motion upon it should be substantially contemporaneous. We will not undertake to say what lapse of time after the one and before the other would be overlooked, but it is plain that after a year the showing has lost its force and cannot avail to move the judicial mind.

As this is the sole error relied upon, the judgment must be affirmed with costs.

The other Justices concurred.

JAMES HOGAN AND JAMES HOGAN, BY PATRICK HOGAN, THEIR NEXT FRIEND v. HANNAH HOGAN AND JOHN CAHALEN AND MICHAEL FOX, EXECUTORS OF THE WILL OF MICHAEL HOGAN.

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Construction of devise.

A man devised certain real estate to two nephews, to be sold when they became of age, and the proceeds to be equally divided between them, but he also provided that his wife was to have control of the property until they became of age. *Held*, that she was to have meanwhile the exclusive and beneficial right of enjoyment.

Where a decree construing a will was found to be incorrect, and valid objections to the jurisdiction were made, the Supreme Court on appeal reversed the decree and dismissed the bill with costs of both courts to defendants.

Appeal from Ionia. Submitted June 11. Decided June 23.

BILL to obtain the construction of a will. Defendants appeal. Reversed and bill dismissed.

Mitchel & Pratt for complainants.

Lemuel Clute for defendant Hannah Hogan. A widow who takes a bequest in lieu of dower is entitled to the full benefit of all she gets for it: *Isenhart v. Brown* 1 Edw. Ch. 411; *Hubbard v. Hubbard* 6 Met. 50; *Williamson v. Williamson* 6 Paige 298. In providing that the widow shall have the control of land devised to minors, until they reach their majority, the testator evidently means that she shall have the use of them; and use is sometimes construed as meaning the entire interest: *Patterson v. Stewart* 38 Mich. 402.

GRAVES, J. It seems to have been the substantial purpose of this bill to obtain a construction of certain provisions of the will of Michael Hogan, in respect to which the parties

have put forward conflicting claims. A copy of the will is set forth in the margin.*

The contention has arisen on the following clauses:

"I also bequeath the rest of my real estate lying on section 15, town 8, range of 5 west, being in Ionia county, to my brother Patrick Hogan's son James and also to my brother John Hogan's son James. The said real estate shall be sold when they become of age and the money divided equally between both of them. My wife, Hannah, is to have fire-wood of five acres of the south-east corner. My wife, Hannah, is to have control of these 32 acres on section 15, town 8, range of 5 west, until these children become of age."

The position on behalf of complainants is that, apart from the right to obtain fire-wood on five acres as given and subject thereto, the entire beneficial interest in the thirty-two

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"*In the name of God, I, Michael Hogan, being in good bodily health and of sound mind and memory, being desirous of settling my worldly affairs, and directing how these states, for which there has pleased God to bless me, shall be disposed of after my decease, this my last will and testament. And first I commend my immortal being to Him who gave it, and my body to the earth. My will is that all my just debts and funeral charges shall by my executors.

First. I give, devise and bequeath to my wife, Hannah Hogan, the west half of my real estate on section 22, town 8, of range 5 west in Ionia county, it being my residence, to have and to hold during her lifetime and after her death it goes to my brother Dennis, and in case he should die before her it then shall go to his heirs. I also bequeath to my wife, Hannah Hogan, all my personal property of whatsoever name or nature, and also all the growing crops now on the ground except 30 bushels of wheat that shall be given to my mother. I also bequeath to my brother, Dennis, the east half of my real estate on section 22, town 8, range of 5 west. My wife, Hannah, is also to have the use of half the big barn and the other half to my brother, Dennis.

And I also bequeath the rest of my real estate lying on section 15, town 8, range of 5 west, being in Ionia county, to my brother Patrick Hogan's son, James, and also to my brother John Hogan's son, James, the said real estate shall be sold when they become of age, and the money divided equally between both of them. My wife, Hannah, is to have fire-wood of five acres of the south-east corner. In consideration of what I give my brother Dennis, he is to provide for my mother during her lifetime. My wife, Hannah, is to have control of these 32 acres on section 15, town 8, of range 5 west, until these children become of age. I do nominate and appoint John Cahalen and Thomas Fox to be the executors of my last and testament.

"Witnesses,
"JOHN CAHALEN,
"JOHN MCKELVY.

his
MICHAEL × HOGAN.
mark.

"North Plains, July 7, 1877."

acre parcel was herein devised to them and vested immediately on the testator's death, and that the widow acquired no interest in the premises or any right to the usufruct, and that the testator, in putting in her hands the control of the land during the minority of his nephews, only intended to commit the care and management of the property to her during that interval for their exclusive benefit. The court below accepted this theory and decreed accordingly. We cannot assent to this view. Neither the general scheme of the will, nor anything in the provisions other than those in question, nor any outside matters which can be consulted, lead to any such inference or suggest any such interest.

The state of things which the testator must have contemplated presented no reason for requiring an arrangement of that kind. On the contrary, the surrounding conditions were unfavorable to it. He undoubtedly considered that this intended bounty to his nephews would not fall in until they attained majority, and would then be realized in the form of money, through conversion of the land, and that during this interval they would have no interests needing special attention; that having devoted the land to their future benefit, he would allow his widow to hold it under her exclusive and beneficial control in the meantime. It could not have been his intention to impose on her the burden of managing, leasing and taking care of this land for a series of years for the ease and profit of his nephews.

His meaning in the provisions relative to her, so far as it can be gathered from the tenor and spirit of the will, was obviously to confer benefits, and we look in vain for anything indicating the existence of a wish or thought to inflict on her any needless labor and responsibility, and we think the effect of the gift to the nephews, and that of control to his widow, was to give to the nephews the entire interest, subject to the gift of fire-wood and subject to her exclusive and beneficial right of enjoyment for the period during which their right of enjoyment is postponed. Having briefly explained our impressions on the merits, it remains to observe that serious objections have been urged

to the jurisdiction, although both sides have pressed for intimations sufficient or likely to be sufficient to foreclose further contention.

The defendants' counsel has argued that the alleged grievance of complainants was cognizable at law and that no sufficient case had been made for equitable redress, and this position appears so forcible that instead of proceeding to make a declaratory decree, we shall content ourselves by reversing the decree below and dismissing the bill with the costs of both courts to defendants.

The other Justices concurred.

DANIEL L. CORBITT v. WILLIAM BRONG IMPLEADED WITH ANDREW PURNELL.

Chattel mortgage—Replevin.

B. sold some horses and took back a mortgage which he assigned to L., who seized the horses under it and re-assigned to B., who afterwards joined in a note with him for an individual debt, and to secure it gave another mortgage on the same horses. Afterwards on paying L.'s note when it was past due, B. cut his own name off and assigned the note to P. in order to keep it alive against L., and P., without B.'s knowledge, assigned it to C., but paid B. the balance due from L. B. then demanded the horses from L. under the original mortgage, and the officer seizing them took them from C., who brought trover as for their conversion. *Held* that on receiving the amount due from L., B. had a right to suppose the transaction with him ended, and that he had a right to foreclose the original mortgage; and that C., on purchasing the mutilated and past due note without making inquiry of B., could not treat him as estopped to deny the second mortgage as an existing lien, and had no claim on the property.

Replevin is the only remedy for getting specific chattels.

Case made from the Superior Court of Grand Rapids. Submitted June 11. Decided June 23.

TROVER. Defendant had judgment. Affirmed.

E. A. Maher for plaintiff, urged that B. had signed the notes as surety for L., and was entitled to be subrogated to the mortgage lien: Herman Chat. Mortgages, § 150; and that having invested P. with an apparent mortgage lien upon the horses he was estopped from asserting as against the plaintiff who dealt with P. on the basis of his supposed ownership of the lien, that the mortgage was not a valid subsisting lien: *McNeil v. Tenth Nat. Bank* 46 N. Y. 325: 55 Barb. 59; *Crocker v. Crocker* 31 N. Y. 507; *Weaver v. Barden* 49 N. Y. 286; *Taft v. Chapman* 50 N. Y. 445; *Moore v. Met. Bank* 55 N. Y. 41; and that B. was estopped by the warranty in the last mortgage that the property was free from liens, from claiming that it was not paramount to the first mortgage: *Lawrence v. Stratton* 6 Cush. 163; *Givan v. Doe* 7 Blackf. 210; *Olmsted v. Elder* 2 Sandf. 325.

John A. Fairfield for defendant.

CAMPBELL, J. Corbitt sued to recover damages for the conversion of certain horses which he claims were unlawfully taken from him by defendants and sold by their procurement. The facts so far as material are these:

Brong held a mortgage for purchase money of these horses and some other property, executed to him in November, 1877, by the original purchaser from him, James Farley, due $200 in six and $200 in nine months, with power to take possession in case of any attempt to sell or remove them from Grand Rapids. Farley sold them in a few days to James H. Brown. Shortly thereafter Brong assigned the mortgage to one Lord, who took possession of the horses and continued in possession until just before this controversy arose, in June, 1879.

In March, 1878, Brong accepted a re-assignment of the mortgage from Lord, who had put the horses in charge of one Kennedy, and who paid Kennedy for their keeping. Lord then took charge of the horses with Brong's knowledge and approval.

On the 18th of March, 1878, Brong and Lord signed a note on Lord's private account to one Fitch for $60, and both joined in a chattel mortgage of the horses to him. This was reduced by Lord to $40. In June, 1879, Brong paid this note and procured an assignment to Purnell in order to keep up the claim against Lord. Purnell, without Brong's knowledge, assigned it to Corbitt for $42, which was afterwards paid to Brong by Purnell, but it is not found that Brong knew where the money came from. Brong's name was cut off from the note, which was overdue.

In June, 1879, three days after Brong's settlement with Fitch, Brong sent a constable to demand the property from Lord under the Farley mortgage, who told the officer he must demand of Corbitt. A replevin was then sued out in Purnell's name, and the property taken and sold under the Farley mortgage. No further proceedings were had in the replevin case. Corbin bought up a claim of Lord for keeping the horses. Lord never presented it to Brong, and Brong did not know he claimed anything.

Corbitt now claims that he is entitled to redress because he owned the Fitch mortgage, and also because of the claim for keeping the horses.

It may be true that Mr. Fitch could have held his mortgage paramount to any claim of Brong under the Farley mortgage. But when Brong, who was the only party interested in the horses, paid Fitch and cut off his own name from the note, there was nothing left except the right against Lord. And Corbitt by purchasing this mutilated and past-due note and making no inquiry of Brong, cannot treat him as estopped to deny this mortgage as an existing lien. Brong when Purnell paid him the balance due from Lord, had a right to suppose the whole transaction was ended, and that he might enforce his Farley mortgage.

This being so, Corbitt had no claim on the horses, and cannot complain that they were taken away from him. We see no reason to hold there was anything fraudulent in replevying them. That is the only remedy to get property specifically; and there is no finding of bad faith. Even if there

had been, it is not easy to see why the defendant in replevin had not as good a remedy in that proceeding as in any other. And he certainly would have no claim for the value of property which did not belong to him.

There is nothing in the case to show that there was any reason why Brong should owe Lord for care of the horses. There was no such understanding, and under all the circumstances it was not unnatural in the absence of any claim to that effect, to suppose that Lord found their use sufficient to satisfy him for his trouble. The court below was satisfied that no such claim existed, and the finding of facts does not preclude the correctness of such a conclusion.

We think the court did not err in holding that Mr. Corbitt made out no case.

The judgment must be affirmed with costs.

The other Justices concurred.

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L. Eugene Hewitt v. Ingham Circuit Judge.

Costs on appeal to the circuit courts.

Costs in cases heard and determined on appeal in the circuit, are under the control of the court under Comp. L. § 7427, and its discretion in deciding thereon will not be reviewed.

Mandamus. The relator recovered judgment in justice's court against respondent for $248.66. On appeal it was reduced to $104, and costs were given to defendant, whereupon relator moved to vacate the later judgment, as to costs, and on denial of the motion asked for a mandamus to vacate it and enter judgment for relator for his damages and costs. Submitted June 11. Denied June 23.

Wm. W. Osborn for relator cited Comp. L. § 7387, 5249, 4944 and 7427, and *People v. Bacon* 18 Mich. 247.

M. V. & R. A. Montgomery for respondent.

MARSTON, C. J. Under the proviso in 2 Comp. L. § 7427 the costs in cases heard and determined on appeal in the circuit court are under the control of the court. Although our attention has been called to several other sections supposed to have some bearing upon this question, none of them repeal, change or affect this proviso. See also § 5459. The discretion of the court in the premises we cannot review, and as the action of the court was authorized by law, the writ must be denied with costs.

The other Justices concurred.

CHARLES CARTER v. WILLIAM GLASS.

Horse trade—Breach of warranty—Form of the action.

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A party who has been induced to exchange a horse for another by means of a false warranty of the horse received, may sue in tort for the deception, and set out in his declaration the false warranty as the means whereby he was injured.

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The fact that he sets out the warranty in his declaration, and avers its breach, does not make his declaration one in *assumpsit*, when the essentials of a declaration in case appear.

Error to Cass. Submitted June 15. Decided June 23.

TRESPASS ON THE CASE for damages. Defendant brings error. Affirmed.

Howell & Carr for plaintiff in error cited on the form of the declaration: *Weall v. King* 12 East 452; *Johnson v. McDaniel* 15 Ark. 109; *Lassiter v. Ward* 11 Ired. 443; *Bartholomew v. Bushnell* 20 Conn. 271; *Kimball v. Cunningham* 4 Mass. 502; *Applebee v. Rumery* 28 Ill. 280. A declaration for deceit should allege a *scienter: Hartford*

Live Stock Ins. Co. v. Matthews 102 Mass. 221; and a return or offer to return the property: *Miller v. Barber* 66 N. Y. 564.

Harsen D. Smith for defendant in error cited in favor of the declaration: 2 Chit. Pl. 281; *Norton v. Colgrove* 41 Mich. 544.

COOLEY, J. But one question is presented by this record, namely, whether the count in the plaintiff's declaration on which he was permitted to recover in the court below, was a count in tort or upon a warranty. The count is as follows:

"And for that whereas the said plaintiff heretofore to wit, on the 28th day of November, A. D. 1879, at the township of Porter, in the county of Cass and State of Michigan, at the special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant the certain horse of the said defendant and for a certain horse of said plaintiff's of great value, to wit, of the value of one hundred and fifty dollars, the said defendant then and there warranting the said horse to be sound and all right every way, then and there falsely and fraudulently sold and exchanged the same horse with the said plaintiff for the said horse of the said defendant to be delivered to said plaintiff as aforesaid, and the said plaintiff confiding in the said warranty that said horse was sound and all right every way as aforesaid; afterwards, to wit, on the day and year aforesaid, at the township of Porter, in the county of Cass and State of Michigan, delivered his said horse to the said defendant in exchange for the said horse of the said defendant. Whereas, in truth and in fact at the time of the making of the said false warranty as aforesaid, and of the said exchanges as aforesaid, the said horse of the said defendant was not sound and all right every way, but on the contrary thereof there was, and still is, unsound, and hath become, and is of no use or value to the said plaintiff, and also by means of the promises the said plaintiff hath lost and been defrauded of the use of his said horse, to wit, at the township of Porter, in the county of Cass and State of Michigan aforesaid, and so the said plaintiff saith that the said defendant on the said sale and exchange falsely and fraudulently deceived and defrauded the said plaintiff as aforesaid, at the township of Porter, in the county of Cass and State of Michigan aforesaid, and also

the said plaintiff was then and there put to great expense and charges in and about feeding, keeping and taking care of the said horse. Wherefore the said plaintiff saith that he is injured, hath sustained damages to a large amount, to wit, to the amount of one hundred dollars, and therefore he brings suit," etc.

The court below treated this as a count in tort, and allowed the plaintiff to recover, as upon a rescission of the contract. The defendant insists that it is a count in assumpsit, and in affirmance of the contract.

It was decided in *Beebe v. Knapp* 28 Mich. 53, that an action on the case may be maintained for false representations in the sale of property whereby the vendee was deceived and defrauded, even though the vendor was not aware of the falsity of the representations when he made them. But there is no doubt the representations in such a case may be treated as warranties, and assumpsit brought at the option of the vendee. *Hawkins v. Pemberton* 51 N. Y. 198; *Wheeler v. Reed* 36 Ill. 81; *M'Gregor v. Penn* 9 Yerg. 74; *Henshaw v. Robins* 9 Met. 83; *Burge v. Stroberg* 42 Ga. 88; *Stone v. Covell* 29 Mich. 359. As the declaration in either case must set out the facts, there must necessarily be considerable similarity, and this is not the first instance by many in which a count meant to be in case for the deceit has been mistaken for one in assumpsit. But the leading case of *Williamson v. Allison* 2 East 446 fully sustains the ruling of the court below. It was there said by Lord Ellenborough that "the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and "the form of the action cannot vary the proof in that respect." The same case decides that it is not necessary either to aver or prove the *scienter*, and to render the case more completely like the present in principle, the declaration there as here failed to aver an offer to return the property in the sale of which the tort was committed. The doctrine of that case is familiar law in this country. *Beeman v. Buck* 3 Vt. 53; *West v. Emery* 17 Vt.

583; *Johnson v. McDaniel* 15 Ark. 109; *Hillman v. Wilcox* 30 Me. 170; *Newell v. Horn* 45 N. H. 421; *Ives v. Carter* 24 Conn. 392. An examination of *Ross v. Mather* 51 N. Y. 108, which questions the soundness of *Williamson v. Allison*, will show that the criticism was based on a misapprehension of the point decided.

All the errors relied upon in this case depend upon the one noticed. The judgment was right, and must be affirmed with costs.

The other Justices concurred.

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103	71
103	296
103	582

VINCENT DAVIS v. JAMES STROBRIDGE.

44	157
106	502

Oral land contract—Failure of consideration—Action for money paid—Interest.

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134	$^{2}101$

An oral contract for the sale of land is made valid by part performance.

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135	^{2}	6
d135	^{2}	668

When a person who has contracted to sell land proceeds to rescind the contract and oust the other party the latter may acquiesce and consider it at an end; and as there is a failure of consideration for whatever he has paid on the contract, he may recover it back under the equitable count for money had and received.

44	157
146	$^{1}190$

44	157
152	$^{2}58$

Interest is recoverable in an action for money paid without consideration under a land contract where the amount recovered does not adequately compensate for damages.

Where land is cleared in reliance on a contract for its sale, and the contract is rescinded without fault of the party relying on it, and the benefit of the work is appropriated by the other, the latter becomes liable to pay for it.

Error to Oceana. Submitted June 15. Decided June 23.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Fred. J. Russell for plaintiff in error. Money paid upon a rescinded contract may be recovered back: *Raymond v. Bearnard* 12 Johns. 274; *Gillet v. Maynard* 5 Johns. 85;

Simmons v. Putnam 11 Wis. 193; *Wilbur v. Flood* 16 Mich. 40; *Thomas v. Sowards* 25 Wis. 631; *Payne v. Atterbury* Har. Ch. 414. And where the contract is for land, and the purchaser relying on it makes improvements the benefit of which the other party obtains, the latter is liable for them: *McIndoe v. Morman* 26 Wis. 590; *Minert v. Emerick* 6 Wis. 355; *Cole v. Clarke* 4 Chand. 29: 3 Wis. 323; *Thompson v. Thompson* 16 Wis. 94; *Waterman v. Dutton* 6 Wis. 265; *Green v. Dixon* 9 Wis. 532.

Ed. E. Edwards and *A. G. Day* for defendant in error. Where a land contract is rescinded after payments have been made under it, the purchaser cannot recover back all that he has paid if he has had the use of the land meantime: *Hunt v. Silk* 5 East 449.

GRAVES, J. This is a case made after judgment. The action was commenced before a justice of the peace and taken by appeal to the circuit court and there tried without a jury. The hearing was on the common counts and the general issue. A portion of the evidence is brought up, but not all. The judge made special finding, which he subsequently amended at defendant's instance. No means are afforded for inquiring whether the evidence required the finding of other facts or a modification of the series of facts actually found.

The only question raised is whether the judge's conclusions of fact support the judgment. They are, in substance, that in March, 1876, the defendant orally agreed to sell the plaintiff forty acres of land for $750; that the plaintiff was to pay down $100 and at least $100 in each year thereafter until the whole amount with interest should be paid, and that the defendant within a few days would cause the agreement to be reduced to writing; that the plaintiff immediately paid the first instalment of $100, and was at the same time admitted into actual possession under and in pursuance of the contract; that the plaintiff proceeded to occupy the land and made an improvement in the form of clearing of the value of $20, and in October of the same year paid $50 more on

the purchase price; that in December following the plaintiff offered to pay $200 more if the defendant would have the contract put into writing according to the understanding, but the defendant refused and informed the plaintiff that unless the whole residue of the purchase price was paid in twenty days he would dispossess the plaintiff of the premises; that the plaintiff offered to surrender the land if defendant would refund the amount, being $150, which had been paid, but defendant refused to do so; that the defendant in January, 1877, notified the plaintiff in writing to surrender the premises, and that the latter elected to consider the notice as a rescission of the agreement and vacated the premises in accordance with it; that up to the time of the demand of possession the plaintiff had kept the agreement on his part. The amount allowed consisted of the purchase money and interest and the value of the clearing, making in all $177.24, and for this judgment was given.

The contract of sale became a valid one by part performance (*Scott v. Bush* 26 Mich. 419), and when the defendant proceeded to take measures to oust the plaintiff and put an end to the contract, the latter was at liberty to acquiesce and consider it as determined by the former. This he did, and as a consequence there was a failure of consideration for the purchase money which had been paid, and the defendant became liable to pay it back under the equitable count for money had and received, and according to our previous decisions the allowance of the interest was not illegal. The clearing was a valuable service to the land. It was made in reliance on the partly executed agreement, and by repudiating that agreement the defendant appropriated it. By so doing he made himself liable for it. He could not retain the benefit without paying for it.

As no error is shown the judgment must be affirmed with costs.

The other Justices concurred.

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Oliver C. Joslin v. Alonzo Le Baron.

Negligence—Collision of vehicles.

There is no error in refusing to charge on specific points that are practically covered by other instructions.

Leaving a buggy standing at an angle to the beaten track and so near that by backing one foot it would be in the way of passing vehicles, is negligence.

Where a charge is based on the theory that the question of negligence is for the jury, it is not error to omit to state that rule.

Where a jury finds that a party was traveling in a beaten track there can be no finding that he was on the wrong side of the road.

One who is guilty of contributory negligence cannot recover for negligent injury.

There is no presumption of negligence in not turning out of the traveled track to avoid colliding with a team hitched by the roadside, but negligence must be proven.

Error to Clinton. Submitted June 15. Decided June 23.

Trespass on the case for damages. Plaintiff brings error. Affirmed.

Randolph Strickland for plaintiff in error. Failure to turn out seasonably to avoid striking a vehicle left standing by the roadside is *prima facie* evidence of negligence: *Burdick v. Worrall* 4 Barb. 596; negligence is not a question of law, but is a question of fact for the jury: *Chicago & Alt. R. R. v. Pennell* 21 Alb. L. J. 214, 1880; *Southworth v. Old Colony R. R.* 105 Mass. 342; *Eilert v. Green Bay & Minn. R. Co.* 48 Wis. 606.

A. Stout for defendant in error.

Campbell, J. This case which was before us at a former term (*Le Baron v. Joslin* 41 Mich. 313) now comes up on error after a second trial in which defendant prevailed. As the chief facts appear very much as they did before, a brief reference will be all that is needed.

Joslin sued Le Baron for driving his wagon against a wheel of plaintiff's buggy and breaking it. Joslin had hitched his team to a post by the side of a travelled highway, in such a manner that the buggy stood out diagonally in the street between sixteen and seventeen feet. The finding of the jury shows that this brought the wheels so near the track which was actually travelled that when Le Baron's wagon was passing along the way Joslin's horses backed the buggy about a foot so as to produce the collision. Joslin claimed Le Baron should have left the track which was actually taken, and turned out. Le Baron claimed that the occurrence was either accidental or owing in part to Joslin's own carelessness. He also claimed that there was no negligence at all on his part. The jury having found the plaintiff had no cause of action, must have done so either because the injury was accidental, or due in part at least to Joslin's carelessness. Joslin insists the charges were misleading.

The court expressly charged, at his request, that plaintiff in hitching his team as he did, was not guilty of negligence if he did what a man of usual and ordinary prudence should do. It was also charged that in passing a team and carriage hitched by the road side with no one present or in charge, as much diligence was required as in passing a team and carriage in charge of a driver. The case was considerably narrowed by these charges and by the finding that had it not been for the backing of Joslin's team, defendant who was driving in the beaten track would not have hit the wheel.

The court could not be in error in refusing to charge on specific points which were practically covered by other charges, any more than if they were wrong or ambiguous. It was not necessary to lay down the abstract rule that the question of negligence was for the jury when the whole charge was framed on that basis. As the jury found the defendant was traveling in the beaten track there could not be a finding that he was on the wrong side, and he could not be presumptively in fault for not turning out of it, but negligence in not doing so must be proved. There was no error in refusing to charge otherwise.

But we think that when it is found that Joslin left his horses so hitched that so slight a backing as they made would necessarily bring the wheel into the travelled track, that was such negligence in itself as would preclude him from complaint for such a mishap. Nothing else could be expected without very considerable care and forethought on the part of passers-by, and as even their negligence would create no liability if he was negligent, the cause of action cannot be made out under such a finding.

We think there was no error, and the judgment must be affirmed with costs.

The other Justices concurred.

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SAMUEL H. STEVENSON, RELATOR v. KENT CIRCUIT JUDGE.

Appeal from justice's court—Payment of fees.

A justice's receipt for "ten dollars as *fees* and costs on appeal of case" so binds him that he must make return to the appeal even though the fee for making it has not in fact been paid. The appellant has a right to rely on the receipt and cannot be deprived of his appeal by a misunderstanding with the justice.

MANDAMUS to compel respondent to vacate his order refusing to compel a justice to make return to an appeal taken by relator. The justice had receipted for the costs paid on taking the appeal in these words: "Rec'd of Norris & Uhl ten dollars as fees and costs in appeal of case of *Arthur Meigs v. Samuel H. Stevenson*, tried before me." He refused, however, to make return to the appeal on the ground, among other reasons, that the sum paid did not include the fee for making return, and that he had no right to make one. Submitted June 15. Granted June 23.

Norris & Uhl for relator. Mandamus is the proper proceeding for compelling a justice to make a return: *Wiley v. Allegan Judge* 29 Mich. 488.

Godwin & Earle for respondent.

MARSTON, C. J. The receipt given by the justice in this case shows that he had received "ten dollars as fees and costs on appeal of case," etc. The claim afterwards set up by him that the costs were taxed at ten dollars, and that, while the costs were paid him, the one dollar for making his return had not been, would be in direct conflict with his receipt. He may have a claim against the appellant for the amount unpaid, but it was his duty to make due return to the appeal. The party had a right to rely upon the receipt given, and he should not be deprived of his right to an appeal because of a misunderstanding with the justice.

The writ must issue.

The other Justices concurred.

JAMES M. LANE v. THOMAS LEECH.

Waiver of defects in practice by appearance.

An appearance for the purpose of objecting to irregularities does not waive them, but if it is for some other purpose, as for obtaining a continuance, it is a waiver, and no objection can afterwards be taken to prior defects even though the motion for which the appearance was made was denied.

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Error to Muskegon. Submitted June 15. Decided June 23.

ASSUMPSIT. Defendant brings error. Affirmed.

Andrew B. Allen for plaintiff in error. Appearance does not necessarily waive jurisdictional defects unless there is a joinder of issue: See *Barber v. Taylor* 1 Mich. 352; *Spear v. Carter* id. 19; *Gilbert v. Hanford* 13 Mich. 40; *Wright v. Russell* 19 Mich. 346; *Brown v. Kelley* 20 Mich. 27; *Burson v. Huntington* 21 Mich. 415; *Pierce v. Rehfuss*

35 Mich. 53; *Vliet v. Westenhaver* 42 Mich. 593; *Allen v. Edwards* 3 Hill 499; *Tifft v. Culver* id. 180; *Malone v. Clark* 2 Hill 657; *Wood v. Randall* 5 Hill 264; *Fanning v. Trowbridge* id. 428; *Conway v. Hitchins* 9 Barb. 378; *Weeks v. Lyon* 18 Barb. 530; *Andrews v. Harrington* 19 Barb. 343; *Osburne v. Gilbert* 52 Barb. 158; *Lester v. Crary* 1 Den. 81; *Dunham v. Heyden* 7 Johns. 381; *Willoughby v. Carleton* 9 Johns. 136; *Hill v. Downer* 11 Johns. 461; *Wheeler v. Lampman* 14 Johns. 481; *Clapp v. Graves* 26 N. Y. 418.

R. J. Macdonald for defendant in error.

GRAVES J. Leech recovered judgment against Lane before a justice of the peace, and the circuit court affirmed it on *certiorari*. Lane asks a reversal on writ of error.

On the return day of the summons the parties respectively appeared and put in their pleadings, and on motion of defendant Lane the justice adjourned the cause. On the adjourned day the parties again appeared, and after the refusal by the justice of the defendant's motion to require the plaintiff Leech to give security for costs, on his admission that he was not responsible, the cause was again adjourned on defendant's motion, and during the time of this continuance the attorneys stipulated in writing for a further postponement of thirty days. The stipulation was not dated and the plaintiff's attorney left it with the justice, and he thereupon entered an adjournment for thirty days from that time. The case was subsequently adjourned several times at the instance of the plaintiff's attorney and on defendant's failure to appear.

The proceedings on these occasions were not regular. The last postponement was until the 18th of October and at that time both parties attended by their attorneys and answered, and the essential point in the case is whether the defendant's attorney on that occasion appeared specially and for the specific purpose of arresting the suit on account of previous irregularities, or whether his appearance went fur-

ther and had reference to additional and future proceedings in the cause. If the first position is the true one, there was no waiver of the errors which had been committed. But if the appearance was for another purpose and with a view to prolong the pendency of the action, and it contemplated a step adapted to a case regularly on foot, it was a waiver of the prior defects. *Falkner v. Beers* 2 Doug. (Mich.) 117; *Clapp v. Graves* 26 N. Y. 418; *Briggs v. Humphrey* 1 Allen 371; *Rittenour v. M'Causland* 5 Blackf. 540; *Heeron v. Beckwith* 1 Wis. 17; *State v. Messmore* 14 Wis. 115; *U. M. T. Co. v. Whittaker* 16 Wis. 220; *Baizer v. Lasch* 28 Wis. 268; *Abbott v. Semple* 25 Ill. 107; *Swift v. Lee* 65 Ill. 336; *Ulmer v. Hiatt* 4 Greene (Ia.) 439; *Clark v. Blackwell* id. 441; *Deshler v. Foster* Morris 403.

Now the justice returns that the defendant's attorney, on answering to the case, first applied for an adjournment to a later hour of the same day, and that the plaintiff's attorney objected, and that the motion was decided adversely to the defendant; that on the termination of that proceeding the defendant's attorney stated that he appeared specially to object to further proceedings, and that he, the justice, overruled such objections as were then made.

The motion for a continuance was a step in the cause, and one which meant that the action should be presently kept on foot, and there was nothing to qualify it. The subsequent explanation did not abate its effect. It was not made until the motion was denied, and at that time the representation of the parties had become complete and the irregularities were waived.

The judgment should be affirmed with costs.

The other Justices concurred.

The Marquette, Houghton & Ontonagon Railroad Company v. Henry M. Atkinson.

Corporate deeds—Right of action under execution purchase—Removal of timber.

Act 89 of 1875, in making valid the conveyances of corporations made in good faith though not according to law, does not make them presumptive evidence of the rightful character of the sale. A deed in proper form and a sale in good faith for value must be clearly proven.

Execution purchasers of real estate can sue as if they were absolute owners for any injury done the property (Comp. L. §§ 4657-8) as for timber wrongfully severed from the freehold.

Where the same person owns a parcel of land, in part by original title and in part by purchase under an execution, and sues for the removal of timber, he is not bound to show from which portion the timber was taken.

Error to Marquette. Submitted June 16. Decided June 23.

Replevin. Plaintiff brings error. Reversed.

W. P. Healy for plaintiff in error.

E. J. Mapes for defendant in error. Execution purchasers have only an inchoate title and can base no action on it apart from the statute, which provides for actions on the case in regard to waste but not for replevin: *Whiting v. Butler* 29 Mich. 122.

Campbell, J. Plaintiff brought replevin for wood and timber cut by defendant on section 19, town 48 north of range 26 west. They proved title from the State of Michigan by patent granted in 1873. In May, 1872, a corporation known as the Marquette & Ontonagon Railroad Company conveyed a part of the same section by warranty deed to the Morgan Iron Company, a mining corporation. On the 21st

of October, 1874, it is claimed the Iron Company conveyed to the Atlantic Iron Company. It does not appear on what part of section 19 the wood was cut.

On the 29th of January, 1876, plaintiff levied an attachment against the Morgan Iron Company on the whole of section 19. On the 15th of August, 1878, plaintiffs, who had purchased under execution on their judgment in the attachment case, obtained the sheriff's deed. The wood was cut after the sale on execution.

A question was raised concerning the identity of plaintiff with the Marquette & Ontonagon Railroad Company. In the view we have taken we need not pass upon the formality of the testimony, as the point is not material and there is probably no doubt of the fact.

The deed to the Atlantic Iron Company, if regular in form, on which a question is made, is not shown to have been authorized by the stockholders. It appears to have been signed and acknowledged by the secretary of the Morgan Iron Company, but it does not appear what right he had to make it. The mining company laws, as amended in 1869, expressly provided that no alienation, sale or mortgage of lands by a mining company should have any force or effect "unless authorized by the vote [of] three-fifths in interest of the entire stock of said company actually present, or legally represented at some meeting of stockholders called, and notified in accordance with the provisions of the preceding section of this act," etc. Comp. L. § 2888. Provision was made by § 2889 for obtaining and recording evidence of such action.

In 1875 a law was passed which is supposed to have rectified this defect. Laws 1875, p. 128. This statute declares that "when any corporation has heretofore disposed of its property, by sale or lease, in the usual manner in which corporations perform such acts, and has done the same in good faith and for a fair and valuable consideration, then such sale or lease is hereby declared legal and valid, although not done in the manner provided in section two thousand eight

hundred and eighty-eight of the Compiled Laws of eighteen hundred and seventy-one."

It is enough to say that under this last statute the deed is not made presumptive evidence of the rightful character of the sale. There must be proof, first, of a deed in proper form, and in addition thereto, of a sale in good faith for value. All of this must distinctly appear.

In the absence of such proof the title to section 19 was found to be in plaintiff either by original title or by execution sale. As execution purchasers they were entitled not only to "maintain an action for any injury to such real estate" (Comp. L. § 4657) but to maintain against the person doing such injury the same actions they might have sustained had they been absolute owners at the time of the injury. Comp. L. § 4658.

They had therefore a perfect right to sue for the wood and timber wrongfully severed from the freehold; and as they owned the whole section by one or the other title, they were not bound to show on what particular part of it the wood grew.

Without therefore passing on the regularity of the record evidence of conveyances, which can no doubt be rectified if irregular, the plaintiffs made out a complete cause of action.

Judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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Loren Peterson v. Samuel J. Tilden.

Labor debts—Bill of particulars.

A declaration against a stockholder upon a labor claim against the corporation must show the nature of the work and when it was done, to establish the defendant's liability.

A bill of particulars that has been properly demanded is not waived by pleading or noticing the case for trial.

Where a plaintiff refuses to comply with a proper demand for a bill of particulars, an objection to his evidence is properly sustained.

Error to Marquette. Submitted June 16. Decided June 23.

ASSUMPSIT. Plaintiff brings error. Affirmed.

F. O. Clark for plaintiff in error. If defendant is entitled to a bill of particulars he can move to compel it to be given, or for nonsuit: 1 Green's Prac. 510; Circ. Court Rule 38; *Brewster v. Sackett* 1 Cow. 572; *May v. Richardson* 4 Cow. 56; *Stanley v. Millard* 4 Hill 50.

W. P. Healy for defendant in error.

MARSTON, C. J. The declaration in this case did not sufficiently apprise the defendant of the claim made, either as to the time the work and labor were performed or the nature and character thereof, so as to show clearly that the defendant as a stockholder would be liable therefor. The defendant, having properly demanded a bill of particulars of the plaintiff's demand, did not waive his right thereto by pleading to the declaration or noticing the case for trial. The plaintiff refusing to comply with the demand made, and insisting upon the right to a trial, the court rightly sustained the objection to the evidence offered.

There is no error in the record and the judgment must be affirmed with costs.

The other Justices concurred.

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THE MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY v. FRANK B. SPEAR ET AL.

Contributory negligence—Sparks from locomotive.

One who invites another to bring upon his premises for use a dangerous implement, knowing it to be such, will take upon himself the consequences which naturally follow.

The owners of a warehouse owned a railroad track running on their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was set on fire and burned by sparks emitted by it. *Held*, that the owner had no redress against the railroad company for the burning.

It is immaterial that the railroad company, on repeated applications made that it should repair the engine, had promised to do so "sometime," the use continuing thereafter with the knowledge of the plaintiffs, and on their own application.

Error to Marquette. Submitted June 16. Decided June 23.

TRESPASS ON THE CASE. Defendant brings error. Reversed.

W. P. Healy for plaintiff in error.

M. H. Maynard and *Dan H. Ball* for defendants in error. The burning of property by sparks from a locomotive is *prima facie* evidence of negligence on the part of the company: *Aldridge v. Great Western* 3 Man. & Gr. 515; *Piggot v. Eastern Counties* 3 M. G. & S. 230; *Smith v. Lond. & S. W. Ry. Co.* L. R. 6 C. P. 14; *Bass v. C. B. Q. R. R.* 28 Ill. 9; *Ill. C. R. R. v. Mills* 42 Ill. 407; *Toledo, Wabash & Western R. R. v. Larmon* 67 Ill. 68; *Burke v. L. & N. R. R.* 7 Heisk. 451; *Spaulding v. Chic. & N. W. R.* 30 Wis. 110; *Burlington & Missouri R. R. v. Westover* 4 Neb. 268; *Fitch v. Pacific R. R.* 45 Mo. 322; *Bedford v. Hannibal & St. Joseph R. R.* 46 Mo. 456; *Clemens v. H. & St. J. R. R.* 53 Mo. 366; *Coale v. H. & St. J. R. R.* 60 Mo. 227; *Coates v. M. K. & T. Ry* 61 Mo. 38.

COOLEY, J. Defendants in error sued the railroad company in case for negligently setting fire to a quantity of hay and a warehouse, whereby they were destroyed. The facts as they were developed on the trial were that plaintiffs owned

the warehouse and a quantity of hay stored near it on premises of their own, and that upon these premises they had caused to be laid a track upon which railroad engines and cars might be and had been running for their accommodation for a long time before the fire. When plaintiffs had occasion for cars, they had an arrangement with the railroad company to draw them in and take them out. A particular engine belonging to the railroad company, named Birchrod, was made use of for this purpose, and about the time of the fire it was going in and out several times a day. One of the plaintiffs testified that on the occasion of the fire she went in and out throwing sparks. "The engine went out with one train of cars throwing sparks, as she was accustomed to do all the time." He was sitting in the office watching her, and saw as she passed that a spark had communicated fire to the hay. There was quite a brisk breeze blowing at the time. The engine "was noted for throwing sparks, and had two or three times before set loose hay on fire on the dock. She had set fire, thrown fire around on the dock, and set loose hay on fire before on the dock that season—that spring. She was in the habit of throwing sparks in going up the hill when she puffed hard, and had a load behind her. She threw live cinders I suppose a quarter or a half an inch in diameter." This witness had called the attention of the train dispatcher of the railroad company to the dangerous condition of the engine that season and the season before, and he said he would see it fixed. Plaintiffs had always had trouble with it, and were afraid of it, because of its throwing sparks. The train dispatcher kept putting off the fixing; said "it would be fixed some time." Nevertheless plaintiffs continued to employ from day to day this dangerous implement, until such a calamity as they had feared actually occurred.

It seems almost unnecessary to do more than to recite this evidence in order to dispose of the case. Instead of showing a cause of action, it effectually disproves the existence of one. This was not the case of a defective locomotive moving through the country and scattering desolation among those to whom its proprietors owed the duty of a care correspond-

ing to its dangerous nature; but it was a case of private employment, whereby the proprietors of the engine were solicited to send it upon the private business of the employers into a place where the latter well knew, and had for a long time known and understood it was likely to do mischief. If there was negligence on the part of the railroad company, it was to be found in consenting to be thus employed. There is just the same and no more reason for plaintiffs to complain of it that there would have been had they hired the owner of a vicious animal, known by them to be such, to bring him for their purposes upon their premises, and then been injured by him as they should have anticipated they might be. That which one consents to, and invites, he cannot complain of in the law as an injury. *Motz v. Detroit* 18 Mich. 495; *Maxwell v. Bridge Company* 41 Mich. 453.

But it is argued that the company promised to repair the engine, and plaintiffs had a right to rely upon this being done. The promise was to repair it "sometime;" and meantime the instrument was being employed by plaintiffs from day to day with knowledge that the repairs were not made. When there is a promise to repair immediately, or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right to complain; but this is no such case. The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened.

The judgment must be reversed with costs and the record remanded for a new trial.

The other Justices concurred.

EDWARD V. CICOTTE v. THE COUNTY OF WAYNE.

Order of pleadings—Demurrer and plea to the merits—Suits against counties.

A demurrer and a plea to the general issue are inconsistent, as the first admits what the last denies.

A plea to the merits excludes the right to demur and must be withdrawn if the defendant wishes to demur to the same counts.

There cannot be issues of fact and of law on the record at the same time.

Demurrer should be taken before going to issue on the facts.

A plea to the merits filed after demurrer waives, supersedes or overrules it.

A bill of particulars is not part of the declaration; though it may have the effect of a pleading in so far as it restricts the proof; its purpose is to secure such information as will enable the parties to make intelligent preparation for trial.

Pleadings are not amended by service of a bill of particulars, nor is the issue changed by amending the bill; and a plea or demurrer to it would be anomalous.

A declaration on the common counts is not made demurrable by the bill of particulars.

A county may be sued by a declaration on the common counts.

Error to Wayne. Submitted June 16. Decided June 23.

ASSUMPSIT. Plaintiff brings error. Reversed.

Griffin & Dickinson and *G. S. Hosmer* for plaintiff in error.

Henry N. Brevoort for defendant in error. The bill of particulars is an amplification of the declaration, forms part of it and is meant to give it greater certainty: 1 Green's Prac. 512; 1 Tidd's Prac. 599; 1 Chit. Pl. (16th Am. ed.) 35 n. 1; *Brown v. Williams* 4 Wend. 368.

GRAVES, J. This record is remarkable. It shows that the plaintiff sued the county by declaration on the common

counts, and it contains a bill of particulars furnished by the plaintiff, a plea of the general issue, a demurrer to the declaration but no joinder, a stipulation to put the case on the "jury docket" for the May term of 1878, and a final judgment on the demurrer against the plaintiff in August of that year. The date of the plea does not appear, and whether it preceded or followed the demurrer is therefore not explained. In case it was put in before the demurrer, the demurrer was not regular. (The plea to the merits should have been withdrawn. If it was put in afterwards the effect was to waive or supersede the demurrer.) There cannot be an issue of fact and one of law on the same record at the same time in respect to the same matter. They are incompatible. One admits what the other denies. (In the order of pleading the defense by demurrer is required to be taken before going to issue upon the fact, and in case a plea has been made and it appears desirable to demur to the same count or counts the plea should be withdrawn from the record. So long as it stands it excludes the right to demur. If the plea is put in subsequent to the demurrer, it overrules it.) These are familiar rules, and the record contains no explanation in terms to rescue the case from their operation.

But let it be assumed that the demurrer was in the record to be adjudicated. The claim is made that the bill of particulars became incorporated in the declaration, and that it hence appeared that the cause of action was not suable against the county, and this seems to have been the theory on which the court below proceeded in allowing the demurrer. Of course this view is wholly inadmissible. The object of the practice for the production of bills of particulars is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to enter upon the investigation before the court or jury with an understanding as to what is really in controversy. The bill is often mentioned as being an amplification of the declaration or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is never in strictness a

component of the pleading. It may have the effect of a pleading in so far as it restricts the proof to what it contains. To consider it as pleading would be a circuitous return to the practice of special pleading within certain limits; and this would contradict one of the necessary implications of the introduction of bills of particulars. The remedy by the method of general pleading was to be improved without impairing its convenience and without bringing in the technicalities and refinements of pleading. No one has ever supposed the service of a bill of particulars constituted an actual amendment of the pleadings, or that an amendment of the bill operated as a change of the issue on the record. And a plea or demurrer to a bill of particulars would be an anomaly. The declaration in the record was no more subject to demurrer after the bill of particulars than it was before. It continued to be the usual declaration on the common counts, and whatever question there was or might be in regard to the right to sue the county for matters described in the bill of particulars, would have to be raised in some other way. It would naturally arise at the trial. It was not impossible that the bill might be entirely changed so as to obviate all objection.

The result is that the only point the demurrer could raise was the abstract right to bring a suit by declaration on the common counts against the county, and in regard to that there is no room for discussion. The right is plain. *Endriss v. Chippewa County* 43 Mich. 317.

The judgment must be reversed with costs and the case be allowed to proceed according to law.

The other Justices concurred.

Eunice Barker v. Egbert Wheeler.

Justice's judgment when defendant is in custody—Motion for farther return.

Where a justice's judgment is rendered within the time that would ordinarily be proper, it cannot on appeal be assumed without proof that he has exceeded his jurisdiction by delaying judgment while the defendant was in custody; and if he in fact did so, an order to compel a farther return should be applied for to show it.

A justice's judgment rendered within four days was held sufficiently regular to sustain an appeal where the parties appeared at the hearing by attorney only, and no objection to an adjournment was shown to have been made, and there was nothing to show that defendant was in custody, and that judgment ought therefore to have been rendered at once.

Error to Shiawassee. Submitted June 16. Decided June 23.

Trespass. Plaintiff brings error. Reversed.

McBride & Fraser for plaintiff in error.

M. V. B. Wixom for defendant in error. Where the statutes require a justice's judgment to be rendered forthwith, it is void if delayed to a later day: *Sibley v. Howard* 3 Den. 72; Tiff. Justice's Guide (3d ed.), 287, 436.

Campbell, J. In this case which was commenced before a justice by warrant, the justice rendered a judgment, after four days' adjournment from the hearing, in favor of defendant. Plaintiff appealed, and the circuit court of Shiawassee county dismissed the appeal on the ground that the defendant was in custody at the time of hearing, and that the justice was bound to render judgment at once, and lost jurisdiction by the adjournment. Comp. L., § 5380.

Assuming it to be true—which we do not now feel warranted in holding without further consideration—that if the defendant had been in actual custody at the hearing the delay

in judgment would have prevented an appeal, we do not think it appears he was in such custody, and as no return was procured from the justice to show how the fact was, it is too late now to assume anything not appearing in derogation of the justice's action. It cannot be assumed the justice exceeded his jurisdiction, where he gave judgment within the time proper in ordinary cases. If he did, there should have been an application to compel a further return.

The record shows that the suit was begun by warrant under which defendant was brought into court November 17, 1879. The cause was adjourned by consent after pleading, until November 21. On that day a written stipulation was made, signed by the attorneys of both parties, which provided that the cause "is hereby adjourned to November 25th, A. D. 1879, at 10 o'clock A. M., without the appearance of either party, at which time it is hereby agreed that the case shall be tried." The return shows the parties appeared at the hearing by attorney. It is fairly to be presumed there was no personal appearance, and if so the rule as to the course to be taken on defendants being in custody could hardly apply, unless in some manner the fact was brought to the attention of the justice. It does not appear that any one objected to the adjournment.

We think therefore that the appeal was valid and should not have been dismissed.

The judgment of dismissal must be reversed with costs and the cause remanded for hearing.

The other Justices concurred.

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EDWARD S. FRANKS ET AL. v. HERMAN C. FECHEIMER ET AL.

Judgment for costs no bar to suit on merits—Discontinuance of appeal.

Judgment for defendant for costs, on the ground that the claim sued was not yet due, is no bar to a new suit.

Where the judgment of a justice is pleaded in bar it may be shown not to have been upon the merits.

If a justice's judgment is for costs only, and is not upon the merits, and does not give defendant any substantial rights, the plaintiff, after appealing from it, may discontinue his suit, and on paying the costs can begin a new suit in the circuit if the case involves the jurisdictional sum.

Discontinuance of a suit after appeal is not a discontinuance of the appeal within the meaning of Comp. L., § 5456, which provides that on the discontinuance or dismissal of an appeal a justice shall proceed as if it never had been taken.

Error to Shiawassee. Submitted June 16. Decided June 23.

ASSUMPSIT for goods sold and delivered. A suit was brought before a justice and judgment given for defendant for costs, the only defense being that the account was not due. Plaintiffs appealed, but, after the appeal was filed, discontinued their suit and paid the defendants' costs, and brought a new suit in the circuit to which defendants pleaded the justice's judgment in bar. It was conceded on the hearing that if the plea in bar was overruled, the plaintiffs were entitled to judgment for the amount of their claim. Plaintiffs had judgment, and defendants bring error. Affirmed.

McBride & Fraser for plaintiffs in error.

Goodell & Brown and *A. Sloman* for defendants in error. Where a justice's judgment is pleaded in bar, evidence is admissible to show what was really in issue: *Lyman v. Becannon* 29 Mich. 466; *Emmons v. Dowe* 2 Wis. 332; *Royce v. Burt* 42 Barb. 655; *Hall v. Jones* 32 Ill. 38; *Sturtevant v. Randall* 53 Me. 149; *Barger v. Hobbs* 67 Ill. 592; Freeman on Judgments, §§ 273–4. A judgment cannot be used as an estoppel unless it is on the merits: id., § 260; *Taylor v. Larkin* 12 Mo. 103; *Bell v. Hoagland* 15 Mo. 360; *Houston v. Musgrove* 35 Tex. 594; *Blackwood v. Brown* 34 Mich. 4; *Tucker v. Rohrback* 13 Mich. 73; *Columbus & Shelby R. R. v. Watson* 26 Ind. 50; *Stilwell v. People* 49 Ill. 45; *Wilcox v. Lee* 26 How. 418.

MARSTON, C. J. Under the facts found by the court in this case the judgment must be affirmed. The plaintiffs had undoubtedly the right to show that the judgment of the justice of the peace was not on the merits. The court so found as a fact, and held that it would be no bar to the present action.

Plaintiffs in error rely upon Comp. L. § 5456, which provides that upon an appeal being discontinued or dismissed, upon the same being certified to the justice, he shall proceed as if no appeal had been taken. The appeal taken in this case was neither discontinued nor dismissed, but the plaintiffs, after the case was in the circuit, discontinued their suit. This they had a right to do. The judgment of the justice was one for costs against them only, and these they had paid on taking their appeal. The defendants had obtained no substantial right in the case when appealed which would preclude the plaintiffs and appellants from discontinuing their cause of action. Had the justice's judgment been one in favor of the defendants for damages and costs, and the plaintiffs had appealed therefrom, then whether in such a case the plaintiffs could discontinue and thus deprive the defendants of the substantial right which they had acquired by the judgment, may be a different question. In the present case we have no doubt but that on the facts found, the justice's judgment rendered against the plaintiffs, because the claim sued upon was not due at the time the action was commenced, would be no bar to the second suit.

The judgment must be affirmed with costs.

The other Justices concurred.

Reuben B. Crowner v. Sarah A. Crowner.

Divorce for adultery—Testimony of children.

In a suit for divorce for alleged adultery, it is improper to call children of the parties of a tender age, to testify to facts tending to show a want of chastity in the defendant.

To make such children witnesses is censurable, not only as it touches them in their natural affections, and tends to demoralize them, but also because their evidence, from their immaturity and liability to misconceive the facts and be tampered with, is unreliable.

A divorce refused, where the principal evidence against the defendant was that of two children of the parties, the eldest of whom was but twelve years of age.

Appeal from Clinton. Submitted June 16. Decided June 23.

Divorce. Defendant appeals. Reversed; bill dismissed.

J. O. Selden for complainant.

Cook & Daboll for defendant.

Cooley, J. The bill in this case is filed for a divorce because of alleged adultery. The parties were married in 1866, and the adultery is alleged to have taken place in May, 1879. There is no direct evidence of the alleged offense, but circumstances of a suspicious nature are sworn to by two children of the parties, the eldest of whom was twelve years of age when sworn, and both of whom would seem, if their evidence is trusted, to have precocious understanding of the nature and criminality of the conduct charged. We had occasion in *Kneale v. Kneale* 28 Mich. 344, to comment upon the manifest impropriety of calling children of such a tender age to testify against their mother to establish an offense against chastity. It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the

evidence of such children to acts which will naturally be construed by their prepossessions and immature and incorrect notions is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined. We shall not grant a divorce upon such evidence unsupported, and there is not much other evidence in this case.

The decree must be reversed and the bill dismissed.

The other Justices concurred.

DAVID BRYCE v. LUDOVIC S. KING.

Ejectment—Question for the jury.

A case of ejectment cannot be taken from the jury where the fact of possession is in question; and where, if there was possession, it was explainable as a tenancy that had not been terminated by notice; or where the defendant denies ever having set up any claim; or where the testimony is such that there is a question as to the extent and shape of the land in dispute.

Error to St. Clair. Submitted June 17. Decided June 23.

EJECTMENT. Defendant brings error. Reversed.

Brown & Farrand for plaintiff in error.

Whipple & Voorheis for defendant in error.

CAMPBELL, J. In this case King sued Bryce in ejectment for a small parcel of land called in the declaration about a foot wide, and claimed to lie between the line of land owned by Bryce, and a lot lying west of it. It appears, if there is any such space, that it once formed part of a lot which Bryce held under lease and afterwards purchased, that extended beyond the 42 feet in width which was the measure of the

lot he now owns. Upon the testimony it appeared that in 1855 he took a lease till 1858; and that in 1857 he got a further three-year lease running from April, 1858, with a provision whereby the lessor was to purchase and to pay for his buildings. After this second lease was granted, but during the continuance of the first term, on the 14th of July, 1857, the lessor conveyed to Peter and John P. Sanborn, who, during the same month, on the 23d, conveyed to him 42 feet in width. If there was any excess over this, Bryce does not claim to own it. In 1876, the Sanborns quit-claimed this narrow strip to the plaintiff below.

The deeds all refer to two streets, Walter and Military streets in Port Huron, as the starting point, where they intersect. The excess is claimed by Bryce to be due to the uncertainty of the former location of these streets.

The court below directed the jury to find a verdict for one and two-tenths feet of land.

We think there were several facts on which the case should have gone to the jury. The testimony concerning not only the width but also the shape of the gore, if there is one, presents difficulties. The streets are said by some testimony to make an angle of ten degrees, varying from a right angle, and a strip one foot or fourteen inches wide in front would come to a point before it reached any considerable distance back. A little change in street lines would close up the whole premises. Moreover Bryce testified he never set up any claim beyond his own lot, and if so, there was no cause of action against him, if there was nothing to prevent plaintiff below from taking possession. The fact of possession was not admitted. And if there was possession it was open to the claim that it was a tenancy under a rightful entry by lease, which had never been terminated by notice.

It is enough that there were facts which the court could not decide instead of the jury.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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JOHN M. HOFFMAN ET AL. v. CHARLES F. HARRINGTON ET AL.

Order of proof—Map—Evidence as to boundary—Right to bring trespass.

The order of introducing proof is not subject to review on error unless the discretion, exercised by the trial judge in controlling it, is plainly abused.

It is not necessarily error for a trial court to permit questions to be asked before facts thereby assumed are in evidence.

A map can only be used in evidence in connection with the testimony of a witness to enable the jury to clearly understand the facts stated.

It is not necessary in an action of trespass to produce a map to enable a witness to point out the locality of the offense.

Testimony as to boundaries need not be that of a surveyor or expert; the want of accurate knowledge in the witness would only affect the weight of his testimony.

One in possession, under claim and color of title, can maintain an action for cutting timber and removing it from the land.

Plaintiff in trespass for cutting and removing timber claimed to have constructive possession under certain probate proceedings; and defendant asked a charge that to entitle him to recover he must show title. *Held*, that a charge that "plaintiff's title, or color of title and possession and occupation were sufficient to entitle him to maintain the action" did not take from the jury the question whether the title was valid or not.

Error to St. Clair. Submitted June 17. Decided June 23.

TROVER. Defendants bring error. Affirmed.

Whipple & Voorheis for plaintiffs in error. One cannot maintain trespass for cutting timber and removing it from the land without proving his title in fee simple: *Stephenson v. Little* 10 Mich. 433; *Salt Springs Nat. Bank v. Wheeler* 48 N. Y. 492; *Moyer v. Scott* 30 Mich. 345; Addison on Torts, 452.

O'Brien J. Atkinson and *Elliott G. Stevenson* for defendants in error. One who is in possession of land can maintain trespass for cutting timber on it: *Sampson v. Hammond* 4

Cal. 184; *Tyson v. McGuineas* 25 Wis. 660; Cooley on Torts 445; especially if he has done acts of ownership: 2 Waterman's Trespass 354; *Spear v. Ralph* 14 Vt. 404; *Chilson v. Buttolph* 12 Vt. 231; at all events, as against trespassers: *Ruggles v. Sands* 40 Mich. 561; *Hibbard v. Foster* 24 Vt. 542; *Woods v. Banks* 14 N. H. 101; *Hunt v. Taylor* 22 Vt. 556; *Fish v. Branamon* 2 B. Mon. 379; *Sawyer v. Newland* 9 Vt. 383; *Tyson v. Shueey* 5 Mo. 540; *Van Baalen v. Dean* 27 Mich. 104; *Bartlett v. Hoyt* 29 N. H. 317; *Magee v. Scott* 9 Cush. 149; *Hubbard v. Lyman* 8 Allen 520; *Burke v. Savage* 13 Allen 408.

MARSTON, C. J. Plaintiffs in error were sued in trover for cutting and removing certain timber from off the lands of Daniel B. Harrington. That they were mere naked trespassers was not seriously questioned. They insisted however that the plaintiffs below were bound to show a clear and undisputed title to the lands trespassed on in order to recover. It is sufficient to say that Harrington was in possession under claim and color of title, and this as against a trespasser was sufficient. The validity of the conveyances to him are hardly open to question in the present case, and we shall therefore express no opinion thereon.

Error is also alleged because the court permitted a witness to use a map of the lands and point out thereon the place where the trespass was committed. Objection was also made to the court's permitting certain questions to be asked which assumed the existence of facts not proved.

The order in which proofs are introduced cannot ordinarily be subject to review on error, and it cannot always be considered as erroneous for a court to permit questions to be asked, although facts not proven are therein assumed. Such matters in general may well be left to the discretion which a trial judge must exercise, and a court of review would only interfere when there clearly had been an abuse of such discretion to the prejudice of the party. No such claim could be made in this case.

It was not necessary that a map correct in every respect

should have been produced to enable a witness to point out thereon the location of the trespass. It could only be used in connection with the testimony of the witness for the purpose of enabling the jury to understand clearly the facts testified to. So a person in testifying to the lines and boundaries of certain lands, may do so from the knowledge he possesses, even although not a surveyor, or not even having assisted in making a survey or being present when one was made. His want of such accurate knowledge would but go to the weight, not the admissibility, of his testimony.

The court charged the jury that as a matter of law "plaintiff's title or color of title and possession and occupation is sufficient to enable him to maintain an action for the cause alleged in the declaration herein." To this an exception was taken, and it does not appear that the question as to whether the plaintiff was in the actual possession of the property was submitted to the jury.

We have carefully examined the record in this case, the testimony of the several witnesses, the requests to charge, and the entire charge as given, and fail to find that any question was raised as to the want of actual possession by the plaintiff. Evidence was introduced on the part of the plaintiff tending clearly to show possession and claim of ownership, by cutting timber thereon and in attempting to clear up a portion thereof.

The plaintiff claimed to have purchased the lands from an administrator, to have received a contract therefor, and afterwards an administrator's deed, dated in June, 1856.

The validity of plaintiff's title under the probate proceedings, contract and deed, was the controverted question, and also whether, under such a title, the fee not having passed, he could have constructive possession of the premises. Such being the controverted questions, the charge above quoted was given in view thereof. It was in answer to the defendant's position that to enable the plaintiff to recover he must show that he had the title to the lands. This the court refused, but said that color of title and possession thereunder would be sufficient to enable the plaintiff to recover. This

was correct as against a mere naked trespasser. The court did not intend thereby to withdraw from the jury the question as to whether the plaintiff in fact was in the actual possession, claiming title thereto at and previous to the time of the alleged trespass. And undoubtedly had the attention of the court been directed thereto, the jury would have been told that it was for them to find whether the plaintiff was in possession of the premises. The court did not take that fact from the jury, and they must have found that plaintiff was in possession before they could render a verdict in his favor under the charge.

It follows that the judgment must be affirmed with costs.

The other Justices concurred.

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EDWARD A. ELLIOTT v. JESSE H. FARWELL:

EDWARD A. ELLIOTT v. LUCIEN WELTON:

EDWARD A. ELLIOTT v. CATHARINE MILLER.

Jurisdiction of local courts in transitory actions—Default—Description of residence.

The constitutional authority to establish local courts in cities contemplates that in transitory actions they can exercise jurisdiction over persons not shown to be residents though served with process within the municipal limits.

Where suit is begun by declaration personally served with due notice of a rule to plead which has been entered, default for not pleading may be entered without proof of default because the record shows that no plea has been filed.

It is enough in giving the residence of parties in a declaration to describe them as "of the city of Detroit" or otherwise. And if it were not so, a judgment on default would not be affected by the defect, as it would be cured by the statute of amendments: Comp. L., § 6051, subd. 4.

Error to the Superior Court of Detroit. Submitted June 17. Decided June 23.

ASSUMPSIT. Defendant brings error. Affirmed.

Ed. E. Kane for plaintiff in error. The averment of defendants' residence, in a declaration, must be direct and positive and not by way of recital: *Coningsby's Case* 9 Mod. 95; *Hart v. Rose* 1 Hempst. 239; *Brown v. Keene* 8 Pet. 115; *Dred Scott v. Sandford* 19 How. 402; *Bingham v. Cabot* 3 Dal. 382; *Turner v. Enrille* 4 Dal. 7; *Abercrombie v. Dupuis* 1 Cr. 343; *Wood v. Wagnon* 2 Cr. 9; the jurisdiction of a municipal court is limited to cases in which the defendant is a resident of the municipality, and the fact of his residence must be shown: *Grand Rapids etc. R. R. v. Gray* 38 Mich. 468; *Platt v. Stewart* 10 Mich. 260; *Merrill v. Montgomery* 25 Mich. 75; *Denison v. Smith* 33 Mich. 157.

Griffin & Dickinson and *Geo. H. Lothrop* for defendants in error. Parties may submit to the jurisdiction of the court even though not properly brought in by the pleadings: *Gott v. Brigham* 41 Mich. 227; *Field v. Judge of Superior Court* 30 Mich. 10.

GRAVES, J. In these cases error is brought on judgments given by default in the Superior Court of Detroit. The proceedings were all had some time prior to the act of May 22d, 1879, amending the statute under which the court was organized, and the points raised refer to the original enactment.

First. The claim is made that the Legislature had no power to authorize the institution of suits in the Superior Court against any party not residing in the city, and as a consequence, that the court could exercise no jurisdiction over a party not shown to be a resident although found and served there. The proposition cannot be maintained. It must now be considered as settled that the meaning of the Constitution is different, and that no such restriction was intended to be

imposed. There is great force in the consideration that such a qualification of jurisdiction would have been justly open to many serious objections; that it would have created embarrassing discriminations, and to a great extent have derogated from the practical advantages intended to be accomplished. It is a matter of common knowledge that there are always classes of persons actively engaged in various branches of business in cities like Detroit, and who spend the most of their time there, but actually reside outside the corporate limits, and that very frequently they belong to city firms the other members of which reside in the city. For many purposes, these persons living outside belong in the city, and as matter of policy and propriety the reasons for making them suable in the city are every whit as strong as they would be if their residence was there. This remark, of course, will be understood as applying to causes of action which have no local character. The observation is entitled to weight that in conveying power to establish civil courts in cities the considerations mentioned and others of like nature were regarded.

Second. It is alleged as error in the first case that the default was entered without any proof that the defendant had not appeared to plead. The case was commenced by declaration which was personally served within the city. The usual rule to plead had been entered, and the proper notice of it appeared on the declaration which was served on the defendant, and due proof of service was on file. The failure to plead was evident to the court, because the records disclosed that no plea had been filed, and the default was for not pleading. This was regular. 1 Burrill's Pr. 370.

Third. The objection urged most strenuously is that in two of the cases the declaration fails to show that the plaintiff was a resident of Detroit. In the case of Farwell the declaration describes the plaintiff as "of the city of Detroit" and the defendant as "also of said city of Detroit," and in the case of Miller she is described as "of the city of Detroit." These expressions are claimed to be insufficient to denote the party's residence. There are two satisfactory answers to the

point. In the first place, the terms import with sufficient certainty the place of residence. R. 2 Cro. 167; 6 Comyn's Dig. "Pleader," (C. 17.) Even in case of indictments, where it was necessary to give the prisoner's addition of place of residence, it was always considered sufficient to say that he was "of" the town, hamlet, ward, parish, ville, or the like, without expressing in exact terms that he resided there. Archbold's Cr. Pl. 29, 30. Second, were it admitted that, in this respect, the declaration was deficient in legal certainty, no advantage could be taken of the defect now. The statute would apply which says that a judgment upon default shall not be reversed or in any way affected for any "misplead-ing" or "insufficient pleading." Comp. L. § 6051 subd. 4.

In each of these cases it appears from the record that the declaration by which the suit was commenced was served within the city.

The respective judgments will be affirmed with costs.

The other Justices concurred.

EDWARD A. ELLIOTT v. DAVID PRESTON AND JOHN L. HARPER.

Certificate of service of declaration in local court.

The sheriff's certificate of service in a suit begun in the Superior Court of Detroit, stated that he served the declaration "on Edward A. Elliott *in the city of Detroit*, the defendant named in said declaration, by delivering to him *in said county of Wayne*, a true copy thereof." *Held* sufficient, as the city is within the county. Judgment would not be reversed for the irregularity in form. Comp. L. § 6051, subd. 13.

Error to Superior Court of Detroit. Submitted June 17. Decided June 23.

ASSUMPSIT. Defendant brings error. Affirmed.

Ed. E. Kane for plaintiff in error.

Julian G. Dickinson for defendants in error.

GRAVES, J. This writ of error is taken to reverse a judgment by default in the Superior Court of Detroit, and the only question to be noticed is whether the evidence of service of the declaration, which was before the court, was such as would authorize the court to find that the service was effected in the city, and we think it was. The sheriff stated in his certificate that on the 10th day of August, 1878, he served the declaration "on Edward A. Elliott in the city of Detroit, the defendant named in said declaration, by delivering to him in said county of Wayne, a true copy thereof." The certificate is not very well expressed, and the probability is that a blank form, prepared for the service of papers issued by the circuit court, was made use of, and that the infelicity of style was brought about in that way. Still, the service in the city is stated positively, and the reference to the county in the passage in which the mode is explained, is perfectly consistent. If the delivery of the copy took place in the city, it was in the county. There is no contradiction, and there can be no intendment against the proceeding. So far as there was informality it was not prejudicial, and the judgment cannot be disturbed on writ of error. Comp. L. § 6051, subd. 13.

The judgment must be affirmed with costs.

The other Justices concurred.

EDWARD A. ELLIOTT v. ALBERT IVES, ALBERT IVES JR. AND BUTLER IVES.

Warrant of attorney—Judgment upon confession.

A warrant of attorney need not be proved to sustain a confession of judgment taken thereunder within a year and a day after its execution.

The Superior Court of Detroit has jurisdiction of proceedings to take judgment under warrant of attorney.

Error to Superior Court of Detroit. Submitted June 17. Decided June 23.

ASSUMPSIT. Defendant brings error. Affirmed.

Ed. E. Kane for plaintiff in error. An attorney's general authority does not extend to appearing and confessing judgment when process has not been served upon the party himself, *Bank v. Boyd* 3 Den. 258; and a written acceptance of service by the party himself, unsupported by proof of the actual execution of the acceptance, does not give jurisdiction to the court: *Johnson v. Delbridge* 35 Mich. 439.

Griffin & Dickinson and *Geo. H. Lothrop* for defendants in error.

GRAVES, J. Error is here alleged upon a judgment of the Superior Court of the city of Detroit, purporting to have been given on a confession by an attorney-at-law made under a warrant of attorney executed by the plaintiff in error. The cause of action was two notes made by Elliott, at Detroit, September 20, 1878, and the warrant of attorney was given at the same time. It authorized the entry of judgment at any time after the 24th of September, and the confession was executed and the judgment entered on the 25th. Hence the making of the notes, the execution of the warrant of attorney and the confession and judgment were all within five days. It is now contended that there is apparent error because the record does not show affirmatively that the warrant of attorney was proved before judgment was taken.

The statute calls for no such proof (Comp. L. § 6078), and it seems to be the established practice not to require it unless a year and a day shall have elapsed subsequent to the warrant: *Manufacturers' etc. Bank of Philadelphia v. St. John* 5 Hill 497 and cases; 2 Burrill's Pr. 241, *et seq.* It is probable the courts would use a wise discretion if they required it generally, but the failure to exact it where the time is not above a year and a day is not error. The warrant of attorney was sufficient to authorize proceeding in the Superior Court, and

we have no doubt of the competency of that court to entertain the proceeding, under the appeal made to its jurisdiction.

The judgment must be affirmed with costs.

The other Justices concurred.

44 192
109 349

SEXTUS N. WILCOX v. FREDERICK E. MATTHEWS.

Partnership—Lien of partner as against prior mortgage.

It seems that an agreement to carry on business and receive half the profits, does not make one a partner.

A partner has a lien on the firm property as against a chattel mortgage given before he joined the firm.

Evidence that an arrangement for carrying on business for a share of the profits was entered into under an advertisement for a partner, tends to show a partnership.

Error to Newaygo. Submitted June 17. Decided June 23.

REPLEVIN. Plaintiff brings error. Reversed.

William D. Fuller for plaintiff in error.

Smith, Nims, Hoyt & Erwin for defendant in error.

CAMPBELL, J. Wilcox, under title derived from a chattel mortgage executed to him by the Sextus N. Wilcox Lumbering Company, replevied certain goods from the defendant who was in possession under an agreement with the company whereby he was entitled to half the profits of carrying on the business. There was a dispute concerning the fact of partnership. The court charged the jury that defendant would have a lien on the property even though there was no partnership, and he recovered judgment for the amount of it.

There is no doubt if he was a partner he had a lien for his claim. On the testimony, which showed the arrangement

was made under an advertisement for a partner, the jury might have found that relation. But if he was not a partner he was in the position of any clerk or agent whose wages are measured by profits; and no authority has been cited showing that a lien exists in such cases. The case was put to the jury too strongly.

Judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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44 193
109 613

ALBERT D. NOBLE AND FRANK L. NOBLE v. RICHARD BOURKE, GARNISHEE OF MARCUS W. BATES.

Practice by motion—Affidavits—Discharge of garnishee.

Affidavits relating to a motion but not regarded by the court in deciding it, are not part of the record and will not be regarded on error from the order made.

A garnishee may properly be discharged with his lawful costs if there is undue delay in bringing the principal defendant, and if the maintenance of the proceeding against the garnishee appears to be an abuse of process.

Error to Superior Court of Detroit. Submitted June 17. Decided June 23.

GARNISHMENT. Plaintiffs brings error. Affirmed.

Miller & Clarke for plaintiffs in error.

Larned & Babcock and *Fraser & Gates* for defendants in error. A garnishee ought not to be indefinitely detained until process can be served on the principal defendant: *Washburn v. N. Y. etc. V. M. Co.* 41 Vt. 50; *Lovejoy v. Albee* 33 Me. 414; and the fact that he has made his disclosure will not prevent his discharge: Drake on Attachment 451, n. 4, 696; *Mathews v. Sands* 29 Ala., 136; *Flash v.*

Paul id. 141; *Desha v. Baker* 3 Ark. 509; *Berry v. Anderson* 2 How. (Miss.) 649; *Delafield v. Wright* 3 Sandf. 746.

GRAVES, J. January 7, 1880, the plaintiffs caused a summons to be issued from the Superior Court of Detroit in their favor against Bates. At the same time they obtained a garnishee summons against Bourke and caused it to be served immediately. February 2d the garnishee made disclosure and admitted an indebtedness to Bates of $100. The first summons expired without any service on Bates, and on the 15th of March an *alias* summons was sued out, returnable June 1st. March 25th the court ordered the plaintiffs to show cause on the 27th why Bourke should not be discharged and allowed his fees as a witness and $15 for counsel. The motion was regularly heard, and the court on the 6th of April ordered Bourke's discharge and that he be allowed his fees as a witness and an attorney fee of $15.

Bates, the principal defendant, has never been served or made amenable in any way to the action, and there is nothing to create an inference that his subjection to the jurisdiction is practicable. The plaintiffs have brought error on the order discharging Bourke. No exceptions have been settled, and the case presents the bare record only.

The affidavits relating to the motion are no part of the record, and cannot be regarded. The order complained of was a discretionary proceeding to relieve the garnishee for want of prosecution, and it is not possible to say, on what is legitimately before the court, that the discretion was abused; and were all the papers entitled to consideration, it is not perceived that a different conclusion would be authorized. It cannot be maintained that a party by literal adherence to the forms of law can keep the hands of a garnishee tied indefinitely, and such would be the case if he were allowed to perpetuate his hold by simply taking out process after process against the principal defendant without getting service upon him, or by some other means securing his subjection to the action. The court in which the proceedings are carried on

must certainly be empowered to conduct an inquiry in cases where extraordinary delay in bringing in the principal defendant is shown, and thereupon to discharge the garnishee with lawful costs if it is made to appear that the retention of the proceeding against him is unjust and in substance and effect an abuse of the process of the court.

No error is shown, and the judgment is affirmed with costs.

The other Justices concurred.

SAMUEL S. CASE v. ANDREW C. SEASS AND FREDERICK C. GLOCKE.

Discharge of joint debtor by acceptance of individual obligation.

Merchandise was ordered by the firm of S. & G. and was sent with drafts for acceptance by the purchasers. Meanwhile the firm dissolved and G., who continued in business, stated the fact and asked for new drafts. The vendor replied that he wanted the acceptances of both and asked an immediate return of the drafts, as he needed them. G. sent his own acceptance instead, and falsely stated that S. had gone east, but that if the drafts were not satisfactory he would obtain an indorser. The vendor replied that he needed the paper at once and retained it. S. knew of this correspondence and kept control of the merchandise until it was closed. *Held*, that as the paper of the only debtor supposed to be within reach was forced upon the vendor and no offer was made to return the merchandise and there was no apparent means of enforcing any such acceptance as the contract called for, there was no implication from the correspondence of a discharge of the other debtor, and that if there was, it was made nugatory by the fraud of the purchasers.

Error to Marquette. Submitted June 17. Decided June 23.

ASSUMPSIT. Plaintiff brings error. Reversed.

Dan. H. Ball for plaintiff in error.

E. J. Mapes for defendants in error.

CAMPBELL, J. Case sued defendants for the price of some tobacco ordered by them as partners and sent to them and received at Negaunee. The defense is that he accepted the individual paper of Glocke and discharged Seass thereby, and under the charge of the court this defense prevailed.

The facts, on which there is no serious dispute, show the ordering and forwarding of the goods, which were shipped at Chicago, March 5, 1875, and arrived in due course. The terms of the sale as agreed upon were that the defendants should give two acceptances at 60 and 90 days. Case sent drafts for acceptance in his letter of advice.

It is claimed, and for the purposes of this case is assumed, that on the 8th or 9th of March Seass & Glocke dissolved partnership, Glocke taking the property and assuming the debts. Seass also testified that this tobacco came the next day, and that he held on himself to the tobacco until after all the correspondence between Glocke and Case was closed, and that he saw it all as it was sent or received by Glocke. This correspondence was as follows:

On March 10, Glocke wrote that he had received the stock and Case's letter; that he had bought out Seass, and continued the business, and asked Case to send new drafts.

On the 15th Case replied that he ought to have the acceptances of Seass & Glocke, as he sold to them, and that he did not know Glocke's ability, and was unwilling to change the basis of the agreement, giving some reasons from past experience, and asking an immediate return as he needed them. On the 19th Glocke instead of sending firm or joint acceptances, sent on his own, and in his letter said Seass had only $500 in the business, being one-fourth; that he could have got the use of his name, but supposed it was not needed, and that Seass had gone east and would not return till the next fall. He then proposed if the drafts were not satisfactory that Case should return them and he would get his father to indorse them, who was a farmer in Weyauwega, Wisconsin,

and referred to Arentzberg & Schintz, German bankers in Oshkosh.

On receiving this letter Case at once replied, stating that as the account was a firm liability the firm acceptance should have been sent and would have saved trouble at the bank; that he needed the use of the paper at once and had no time to send it over the road, and closed by saying if Glocke wanted more credit an indorser might be desirable, but so far it had not been thought of and might not be asked in future business, unless on extra occasion.

The only question in the case is whether this with the other evidence tended to show an implied agreement to accept Glocke as the only debtor. The paper went to protest and never was paid.

Seass's testimony shows that Glocke's letters were untrue and that he knew it, and would not let Glocke have the tobacco until the last letter in reply to Glocke came to hand.

These letters, instead of implying a willingness to accept Glocke as sole debtor, show just the reverse, and that his acceptances were finally received only because the tobacco was supposed to have gone into his hands as successor to the firm, and Seass was supposed to be beyond reach within any reasonable time. There can be no implication of discharge when the paper of the only debtor supposed to be within reach was forced upon Case, with no offer to return the tobacco, and no apparent means of enforcing any such acceptance as the contract called for.

We are also of opinion that had there been room for any such implication, the barefaced and deliberate fraud of Seass & Glocke would have rendered it nugatory, and in this Seass himself made a clear case for plaintiff, which was conclusive evidence and open to no explanation.

We think the judgment should be reversed with costs and a new trial granted.

The other Justices concurred.

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75 111

ANDREW A. ANDERSON v. LEVI BRENNEMAN ET AL.

Waiver of claim to merchandise under contract—Symbolical delivery of mortgaged merchandise—Filing of mortgage.

A contract purchaser can waive his claim to a specific lot of merchandise by consenting that it be sold to some other person, or pledged or mortgaged to a creditor as the vendor's property, to revert to the vendor; and if he does so, his ownership ceases, and the merchandise must be regarded as the property of the vendor and liable to execution against him, subject to the rights of the later purchaser or pledgee.

Where heavy merchandise like pig iron is mortgaged and the mortgage is not placed on file, and there is no actual delivery or apparent change of possession, there must be a sufficiently clear and unequivocal designation of the property to serve as notice of the mortgage to creditors or subsequent purchasers; and it is for the jury to decide under proper instructions what is sufficient notice thereof.

Where only symbolical delivery of mortgaged chattels can be made and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors and against the mortgagee, since he could have protected himself fully by filing the mortgage.

Error to Marquette. Submitted June 17. Decided June 23.

TRESPASS on the case. Defendant brings error. Affirmed.

Dan H. Ball for plaintiff in error, as to delivery, cited *Elmore v. Stone* Langd. Sel. Cas. 111; *Beaumont v. Brenyer* id. 185; *Marvin v. Wallis* id. 228; *Castle v. Sworder* id. 257; *Colwell v. Keystone Iron Co.* 36 Mich. 51; *Fry v. Miller* 45 Penn. St. 441; *Smith v. Putney* 18 Me. 87; *Morse v. Powers* 17 N. H. 286; *Carpenter v. Snelling* 97 Mass. 452; *McPartland v. Read* 11 Allen 231; *Weld v. Cutler* 2 Gray 195; Herm. Chat. Mortgages 203–6; Schouler Pers. Prop. 504–6; *Pettitt v. Bank* 4 Bush 334; *Thoms v. Southard* 2 Dana 475; *Thayer v. Dwight* 104 Mass. 254; *Whitney v. Tibbits* 17 Wis. 359; Story on Bailments, § 297.

E. J. Mapes and *F. O. Clark* for defendants in error, as to delivery, cited *Gorham v. Fisher* 30 Vt. 428; *Prescott v. Locke* 51 N. H. 94; 12 Amer. 57; Blackburn on Sales 151–4; Benjamin on Sales 222; *Barrett v. Godard* 3 Mas. 111; *Rapelye v. Mackie* 6 Cow. 253; *Fuller v. Bean* 34 N. H. 300; *Warren v. Buckminster* 24 N. H. 342; 2 Kent's Com. 496; *Russell v. Carrington* 42 N. Y. 118; *Davis v. Hill* 3 N. H. 382; *Barnard v. Poor* 21 Pick. 378; *Hanson v. Meyer* 6 East 614. Where the goods sold are left with the vendor the sale is presumed fraudulent: *Hatch v. Fowler* 28 Mich. 210; *Jackson v. Dean* 1 Doug. (Mich.) 525; *O'Donnell v. Seger* 25 Mich. 378; *Watkins v. Wallace* 19 Mich. 77.

MARSTON, C. J. Some of the questions discussed we think do not fairly arise upon this record. The action is brought against the sheriff for releasing a quantity of iron levied upon by him by virtue of certain executions in favor of the plaintiffs against the Marquette & Pacific Rolling Mill Company.

The controversy is narrowed down to 30½ tons, which the sheriff claims was the property of Sylvester T. Everett under a contract with the company dated August 1st, 1877. Ten and a half tons of this iron was made previous to the date of the contract with Everett, and although sought to be applied thereon afterwards, yet it previously had been mortgaged to S. Coles as security for a debt of the company.

The record sets forth that "30½ tons had, by consent of said Everett, been pledged by said Rolling Mill Company to S. Coles of Marquette, to secure an indebtedness for supplies advanced by said Coles to employees of said company, to the amount of $521.97, and that said pledge had been made by giving to said Coles two receipts for said iron as it lay piled on the dock as aforesaid, and marking each pile with the initials 'S. C.'" These receipts were as follows:

"Received, Marquette, July 28, '77, on the Rolling Mill dock, twenty-five tons pig iron in piles Nos. 1, 2 and 3; 14½ tons of the above to be held by S. Coles as security for note

of the Marquette & Pacific Rolling Mill Co., due Aug. 18, '77—$300. The balance, 10½ tons, to be held by S. Coles as security for note of the M. & P. R. M. Co., due Sept. 2, '77—$221.97. When said notes are paid, the said iron is released and reverts to W. W. Wheaton, ag't.

"W. W. WHEATON, Tr. and Ag't."

"Rec'd check on 2nd National, Cleveland, $304.08, to take up note due Aug. 15, 1877."

"Received, Marquette, Sept. 19, '77, on the Rolling Mill dock, twenty (20) tons pig iron in piles Nos. 4 and 5, to be held by S. Coles as security for note of the Marquette & Pacific Rolling Mill Co., due Oct. 22, '77—$360. When said note is paid, the said iron is released and reverts to W. W. Wheaton, ag't.

"W. W. WHEATON, Ag't."

Wheaton was the "treasurer, general manager and agent" of the Rolling Mill Company.

The first levy was made October 3, 1877. After the levy was released, this iron was shipped to Everett, he having paid Coles the amount of his claims thereon. There was evidence tending to show that this iron was not marked with Coles' initials or in any way, at the time the first levy was made.

Without passing upon the title, if any, which Everett acquired or took under his contract before inspection, acceptance or any other act was done to designate it as his, or to show that it was of the quality specified in his contract, let us see if this iron does not stand upon a different footing.

This iron was, with the consent of Everett, pledged by the company as its own property to secure a company debt, and was to revert to the company upon payment of the debt. This constituted a clear waiver by Everett of his rights under the contract. Under his contract he was entitled to the first three thousand tons of No. 1 Bessemer iron manufactured by the company, and the company was not to manufacture any other iron until this quantity was made, and so fast as made it was to become the property of Everett.

As already said, whether Everett could or could not insist upon and claim the iron, as manufactured, to the amount

specified, it is clear that he could waive his right, and permit the company to sell or mortgage some of the iron as manufactured and in lieu thereof take iron subsequently manufactured. If he permitted or consented to a sale thereof no pretense could be made that he would not be bound thereby, and in case of a mortgage thereof he clearly would have lost all right as against the mortgagee. Would his waiver in case of a mortgage extend beyond this?

If the property was mortgaged to the full value thereof, as it is conceded this was, or even if not to the full value, it could hardly have been the intention of the parties that the iron so mortgaged could be considered as a part of the three thousand tons. If so, he might in addition to the contract price, be compelled to pay the mortgage debt, which was not his to pay, or if not paid, to lose the property on a sale thereof under the mortgage, and if sold under the mortgage to the mortgagee or a third party, none would claim that the iron so sold could be charged to Everett as a part of the three thousand tons which his contract called for. This also must have been the understanding of the parties. The security was given to Coles with Everett's consent, and when the debt secured thereby was paid, "the said iron is released, and reverts to W. W. Wheaton, ag't." Wheaton was the agent of the company and not of Everett. Had this iron been mortgaged to Coles without the knowledge of Everett, a very different question would have arisen, viz., the right of Everett to the iron under his contract. By his consent he permitted the company to treat the property as its own, to pledge it for the company's debts, and to provide for its return to them upon payment of the demand. This was utterly inconsistent with an absolute ownership in Everett. The iron being then the property of the company, the execution debtor was liable to levy, subject to the right of Coles.

It is not claimed that anything in the nature of a mortgage or notice, was placed on file in the proper office as required by our statute. By whatever name the arrangement with Coles may be termed, the object and only one was security for a debt. To be good as against the creditors of the Roll-

ing Mill Company, the proper instrument not having been placed on file, an "immediate delivery followed by an actual and continued change of possession" was absolutely essential. No such delivery and actual and continued change of possession of such bulky property could be expected or insisted upon. Yet there should be, even of bulky articles, such a clear and unequivocal designation thereof that creditors or subsequent purchasers could not be misled or be in doubt as to the nature of the transaction. What this should be, must be a question for the jury under proper instructions. It must also in this connection, be borne in mind that the creditor can protect himself by filing in the proper office his mortgage, or a copy thereof, where the articles are of that bulky nature that a symbolical delivery only can be made, and they are permitted to remain in a place where the possession may be equivocal or what could not be said to be an actual possession. Under such circumstances, where doubts exist, they must be solved in favor of the purchaser or creditor, and against the mortgagee, because he having power to protect himself fully and prevent others from being deceived, has not done so.

When we turn to the charge we find it even more favorable than the above would warrant, and that the plaintiff in error has no cause for complaint.

The judgment must be affirmed with costs.

The other Justices concurred.

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JOHN N. GLIDDEN ET AL. v. FREEMAN NORVELL.

General demurrer—Equitable jurisdiction for value—Verification of injunction bill.

Defects of form in a bill in equity cannot be taken advantage of by general demurrer.

The failure to allege that the demand in controversy does not exceed one hundred dollars, will be regarded as a matter of form, where it

appears the debtor has secured it by turning out 1500 tons of No. 1 iron ore.

The failure to verify an injunction bill is of no importance except on the motion for injunction.

A bill which shows, however imperfectly, that complainant has had turned out to him a quantity of No. 1 iron ore, and that an assignee of the debtor has possession of it, and is mixing it with ore of inferior quality and shipping it, makes out an equitable case to which a general demurrer will not lie.

A party in such a case cannot be turned over to a suit at law to recover damages from the wrong-doer, even though he may be solvent.

Appeal from Baraga. Submitted June 17. Decided June 23.

BILL to enforce a lien on ore, and to enjoin defendant from mingling other ores with that on which the lien was placed, and from selling it. Dismissed on demurrer. Complainants appeal. Reversed.

F. O. Clark for complainants. A mortgager of goods may be restrained from removing them beyond the mortgagee's reach, or from placing them where they cannot be taken in satisfaction of the debt: High on Inj. § 323; *Clagett v. Salmon* 5 Gill & J. 314. A general demurrer is good only when it appears on the face of the bill that the complainant has no equity: Story's Eq. Pl. § 455. Demurrer must be special for any cause but want of equity: Id.; Mitf. Pl. 213–4. A general demurrer for want of equity cannot be sustained unless no discovery or proof properly called for by the bill or founded on its allegations can bring the subject matter within equitable cognizance: *Clark v. Davis* Har. Ch. 235; *Bleeker v. Bingham* 3 Paige 246. General demurrer will not lie if any relief is warranted by the bill: *Hoffman v. Ross* 25 Mich. 175; *Hawkins v. Clermont* 15 Mich. 513.

John Q. Adams and *G. W. Hayden* for defendant.

COOLEY, J. In the court of chancery a general demurrer to the bill of complaint in this cause was sustained and the

bill dismissed. Whether equities are shown by the bill is therefore the only question here.

The complainants are partners in business at Cleveland, Ohio, under the firm name of Glidden & Eells. The bill alleges that during the year 1877 they made large advances to the Spur Mountain Iron Mining Company, a corporation doing business in the county of Baraga, and said company was on the 19th day of December, 1877, indebted to complainanants in

"the sum of $24,000, as near as may be; that for the purpose of further securing said indebtedness to your orators said Spur Mountain Iron Mining Company, through its general manager Freeman Norvell, gave a bill of sale or lien upon fifteen hundred tons of iron ore of standard quality, meaning by that number one ore—the product of the mine of said Spur Mountain Iron Mining Company; said ore being in stock pile at said mine in Baraga county, Michigan; and upon said 19th day of December said Spur Mountain Iron Mining Company gave to your orators an instrument in writing, as evidence of their lien upon said ore," "said writing being as follows:

'DETROIT, MICH., Dec. 19th, 1877.

'This certifies that we now hold in stock pile at Spur Mine, Lake Superior, Mich., subject to the order of Glidden & Eells fifteen hundred gross tons of iron ore of standard quality, the product of the mine of this company known as the Spur Mine. Delivery to be made on the order of Glidden & Eells indorsed hereon, and the return of this receipt.

'F. NORVELL, General Manager.'

"That together with said certificate of lien above was received a letter from the said Freeman Norvell," "as follows:

'SPUR MOUNTAIN IRON MINING COMPANY,
GENERAL MANAGER'S OFFICE,
92 GRISWOLD STREET, DETROIT, December 20, 1877.

Glidden & Eells, Cleveland, Ohio.

GENTS: Inclosed find certificate of fifteen hundred tons of ore in stock pile at the mine sent by you for me to sign to add to the security you hold for advances made to us this season. Said ore to be subject to your order to the extent of your lien. Very truly yours,

F. NORVELL, General Manager.'

"That said Spur Mountain Iron Company became insolvent, and upon the twenty-first day of February, 1878, made a general assignment to Freeman Norvell for the benefit of creditors.

"That soon after the making of said assignment said Freeman Norvell, acting as assignee under said assignment, took possession of all the property of said Mining Company at the mine in said Baraga county, together with the ore held by your orators as above stated, and continued to hold the same undisturbed until on or about the 12th day of May, 1879, when as your orators are informed and believe, said Freeman Norvell, who resides at Detroit, Michigan, directed James Wilson, who was left in charge of all of said property at said mine as the agent of said Freeman Norvell, assignee, to mix the standard number one ore, which had so been turned over to your orator as security, with number two ore, and to ship the said ore so mixed as inferior quality, and for the purpose of defrauding your orators and depriving them of their security."

The bill further alleges that said Wilson has proceeded to execute such directions of said Norvell; that the whole amount of the ore so turned out to complainants except about six hundred tons, has been already shipped from the mine; that a large amount of it is now in the hands of the Marquette, Houghton & Ontonagon Railroad Company; that if the same is delivered to said Norvell by said railroad company complainants will be defrauded of their security as they believe and that said Spur Mountain Iron Mining Company is bankrupt, and will pay little or nothing to its creditors as complainants believe.

The bill prays that Norvell be enjoined from mixing any more of the ores with others of an inferior quality, and from shipping any of the same without complainants' assent, and from removing any of them from the possession of the railroad company; that an account may be taken of the amount due to complainants, and the ores sold to satisfy the same, etc.

As all that is material in the bill is above given, it will readily be perceived that it is, as a pleading, exceedingly imperfect, indefinite and uncertain; and it is not surprising that it was made the subject of a demurrer. It gives no

account of the indebtedness of the mining company to complainants except as it states the amount, how it is evidenced, the time or times when it came due or will come due. It assumes that other securities exist, but it does not state what they are, or their amount, or value, and it does not even allege that anything is now owing to them, except indirectly as it asserts the danger of their being defrauded. No doubt a special demurrer pointing out these and some other defects must have been sustained; but the question now is whether a general demurrer will reach them. A general demurrer challenges the equity of the case made by the bill, and must be overruled if a case for equitable relief is set out, however imperfectly: *Clark v. Davis* Har. Ch. 227; *Hoffman v. Ross* 25 Mich. 175.

The specific objections pointed out on the hearing are:

1. That the bill does not show an indebtedness to any specified amount, at the time the bill is filed, and therefore does not show equitable jurisdiction; it does not show that previous securities have failed to satisfy the debt, or that the pretended security set out in the bill is still unsettled or in existence. So far as the bill is uncertain in these particulars it is susceptible of amendment. No doubt the bill should have shown an interest to an amount sufficient to give the court jurisdiction; but on general demurrer we will not assume that a debt to secure which the debtor turned out fifteen hundred tons of number one iron ore, was not over one hundred dollars.

2. That Norvell's authority to turn out the ore to complainants does not appear; that the instrument turning it out does not purport to give a lien; that as a chattel mortgage it would be void for uncertainty in description, and for want of filing or of a change of possession of the property. But the allegation that the company by Norvell its general agent, executed the paper is a sufficient allegation of his authority (*Regents of University v. Detroit Young Men's Society* 12 Mich. 138); and the paper writing does not purport to be a chattel mortgage, but a setting aside of certain property for complainants, to be subject to their order. The fact that it

was thus set aside as security appears by the contemporaneous letter. When any one questions its good faith, it will be time to inquire into it. There is no defect in the description of property, and nothing on the face of the papers indicates that there would be or could be difficulty in identification.

3. That complainants have an adequate remedy at law. There is no merit in this objection. A court of law could not enjoin the mixing of ores, or the transportation of the property beyond its jurisdiction. Even if all the parties were responsible, complainants could not be required to stand helplessly by while the property turned out to them is carried off, and trust to the chances of receiving its value.

4. That the bill is not verified. In fact it appears to have been sworn to in another State, and the official character of the person administering the oath is not shown. But a verification is only important for the purposes of a motion for an injunction, and any defect in the showing on oath may be remedied when that motion is made.

The decree dismissing the bill must be reversed and the cause remanded for further proceedings.

The other Justices concurred.

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JOHN MAYBEE v. LESTER MINER, DRAIN COMMISSIONER.

Certiorari—Motion to quash.

Questions touching the merits on *certiorari* must be brought up on the hearing of the cause, and will not be considered on notice to quash.

Motion to quash *certiorari* as improvidently issued. Submitted and decided June 15. Motion denied.

G. T. Gridley for the motion.

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CALVIN C. BURT v. GRAND LODGE OF FREE AND ACCEPTED MASONS.

Masonic lodge—Re-instatement of members.

A motion for an order to show cause why mandamus should not issue to compel the re-instatement of relator in a Masonic Lodge from which he had been expelled was *refused* where he had previously appealed for redress to the tribunal established by the society for hearing such complaints and the expulsion had been confirmed.

Motion for order to show cause. Submitted and denied June 15.

Calvin C. Burt in person for the motion.

OCTOBER TERM, 1880.

Salmon S. Mathews v. Paul H. Stewart.

Seizure in bankruptcy of goods under assignment.

An assignment preferring certain creditors, if made in good faith, more than two months before a petition in bankruptcy is filed against the debtor (Rev. Stat. § 5128) precludes the seizure of the goods under the warrant in bankruptcy.

A common law assignment preferring specific creditors is like a chattel mortgage securing a prior debt, as both are for the benefit of particular creditors and are based on a consideration of past indebtedness; and both fall within § 5128 of the U. S. Revised Statutes by which transfers based on past indebtedness are protected from the operation of the Bankrupt Law, if made in good faith more than two months before bankruptcy proceedings.

Submission to the seizure of goods under bankruptcy process cannot be construed as a voluntary surrender of them, precluding an action of trover against the officer making the seizure.

An assignee for the benefit of creditors, who has been in possession for the purpose of making sales and is shown to be acquainted with the goods and with the prices they brought, can give his opinion as to the value of a portion of the stock taken from him under process in bankruptcy, and for which an action of trover has been brought against the officer taking them.

Error to Wayne. Submitted April 13. Decided October 6.

Trover. Defendant brings error. Affirmed.

Wisner & Speed for plaintiff in error, as to the construction of §§ 5128–9 of the Revised Statutes of the United States, cited *Gibson v. Warden* 14 Wal. 244; common law assignments are classed among the conveyances specified in § 5129; *Barnewall v. Jones* 14 Nat. B. Reg. 278; *In re Temple* 17 id. 350; 4 Saw. 92; *Bean v. Brockmire* 4 Nat. B.

Reg. 106: 10 Am. L. Reg. 181; a common law assignee cannot recover against the United States Marshal for property taken on a provisional warrant in bankruptcy against the assignors and delivered to the assignee in bankruptcy: *Stevenson v. McLaren* 23 Minn. 111; *Bolander v. Gentry* 36 Cal. 105.

Don M. Dickinson for defendant in error. A provisional warrant in bankruptcy will not justify interference with the possession of a common law assignee: *In re* Manahan 19 Nat. B. Reg. 67; even though the assignment would be held invalid if properly attacked: *Platt v. Preston* id. 241; *Doyle v. Sharpe* 74 N. Y. 154; and the marshal will not be protected in seizing the property: *Smith v. Mason* 14 Wal. 419; *Marshall v. Knox* 16 Wal. 551. An assignment is never held void under the Bankrupt Act: Bump. on Bankruptcy 10th ed. § 84; and this assignment would be valid under *Reed v. McIntyre* 98 U. S. 507; *Mayer v. Hellman* 91 U. S. 496; *Langley v. Perry* 2 Nat. B. Reg. 596; *Sedgwick v. Place* 1 id. 1, 673; *Tiffany v. Lucas* 15 Wal. 410; *Haas v. O'Brien* 66 N. Y. 597; contra: *Globe Ins. Co. v. Cleveland Ins. Co.* 14 Nat. B. Reg. 311; an assignment is not invalid as to creditors of a bankrupt unless made within two months before the act of bankruptcy: *Bean v. Brockmire* 4 Nat. B. Reg. 200; and all preferences made beyond that period are beyond the reach of the assignee in bankruptcy: *In re Butler* id. 304; *Maurer v. Frantz* id. 433; *In re Silverman* id. 523; *Collins v. Gray* id. 631; *In re Wynne* id. 23; *Folsom v. Clemence* 111 Mass. 273; *Hislop v. Hoover* 68 N. C. 141; *Seaver v. Spink* 65 Ill. 441. The opinion of one who has seen goods and is acquainted with the value of similar goods is competent evidence as to their value: *Clark v. Baird* 5 Seld. 183; *Howland v. Davis* 40 Mich. 546; *Sisson v. C. & T. R. R.* 14 Mich. 489; *Smith v. Mitchell* 12 Mich. 180.

GRAVES, J. Stewart recovered in the circuit court in an action of trover, and Mathews urges that errors to his preju-

dice were committed on the trial. A brief reference to the material facts is requisite.

November 5, 1877, C. F. & A. Draper, being furniture dealers, made a common law assignment to Stewart for the benefit of their creditors. It provided that certain preferred creditors should be paid in full and the rest *pro rata* in case the fund should turn out insufficient for the entire payment of all. Stewart took possession and proceeded to carry out the trust by daily sales of the property.

February 2, 1878, and between two and three months after the assignment and possession under it, a petition was filed in bankruptcy against the Drapers, on which they were regularly adjudged bankrupts. Thereupon the usual warrant was issued to take possession of the estate, and Mathews in his capacity of marshal received it for execution. About July 5th, 1878, he proceeded with it to the place where Stewart was still engaged in selling under the assignment, and on explaining the purpose of his call as being to make seizure of the assigned property by virtue of his warrant, he obtained possession of the unsold portion and passed it shortly afterwards to the assignee in bankruptcy.

On the 27th of May, 1879, and about nine months later, Stewart demanded of Mathews a return of the property, which was refused, and on the next day this suit was begun.

It has not been claimed that Stewart's title has ever been passed on judicially. But the ground taken is that the assignment was void as against the warrant and that it may be so adjudged in defense of the marshal in this action. The general view indicated is that the Bankrupt Law, in being put in motion by the filing of the petition, reached back and divested the assignment of all force to shield the property from the process and consideration of the court of bankruptcy. The provision supposed to warrant this position in § 5129 of the Revised Statutes of the United States as amended by the act of June 22, 1874. No other part of the Bankrupt Law is cited in its favor. The counsel on the part of Stewart deny that this section applies, and insist that the assignment was exclusively subject to the one immediately

preceding, being § 5128 as amended by the act of June before mentioned, and to this the court below acceded.

By the amending act referred to, the retroaction of § 5129 was reduced from six to three months, and that of § 5128 from four to two months. Hence, if the assignment was subject to § 5128 instead of § 5129, it was not within reach of the retrospective operation of the Bankrupt Law at all, because more than two months occurred between the assignment and the filing of the petition. Judicial opinion has not been entirely harmonious in regard to the meaning and application of these provisions, some judges thinking that common law assignments for the benefit of creditors and with preferential conditions, were covered by § 5129. Still on examination it appears that the drift of authority in the State courts and in the inferior Federal courts has been distinctly in favor of regarding such dispositions as falling under § 5128.

It is not essential to comment on the disagreeing views which have appeared or to consume space in original discussion, because the question is deemed to have been, in effect, disposed of by the Supreme Court of the United States. Prior to the Congressional Revision the substance of these provisions appeared as two clauses of § 35 of the original act of 1867, and not in the shape of two separate sections, as arranged by the revisers.* The alterations made by amend-

* The sections of the Bankrupt Law referred to in the opinion are as follows:

SEC. 35. That if any person, being insolvent, or in contemplation of insolvency, within four [two] months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and [knowing] that such attachment, [sequestration, seizure,] payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six [three] months before the filing of the petition by or against him, make any payment, sale, assignment, transfer, conveyance,

ment and revision, however, produced no change in the sense as respects the question here. The construction which in this particular was due in 1868 was the proper one ten years later. The question as to which of the two regulations such an assignment as that to Stewart must be referred, was subject to the same answer when the law was repealed as when *Gibson v. Warden* 14 Wall. 244 and *Dutcher v. Wright* 94 U. S. 553 were decided.

Now, in the last of these cases one Peterson was adjudged bankrupt on a petition filed on the 8th of April, 1870, and Wright, the assignee in bankruptcy, claiming that the bankrupts on the 8th day of the preceding December had assigned certain of his property to his creditors Dutcher, Ball & Goodrich with a view to give them a preference over his other creditors, filed a bill to recover that property or its proceeds as assets of the bankrupt. The point chiefly contested was whether, as the assignment was made on the 8th of December and the filing of the petition was on the same day of the fourth month thereafter, the Bankrupt Law touched the transaction at all. At that time, as before stated, § 5128 reacted four months and § 5129 six months. Of course the assignment was within the time of retroaction given to § 5129. But no one regarded that section as applicable. The case was believed to turn on the point whether the transaction was or was not reached by § 5128. The court observed:

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or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and [knowing] that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every

"Both parties agree that the petition in bankruptcy was filed April 8, 1870; and it appears both by the bill of complaint and the plea filed by the respondents, that the notes, accounts and property were assigned by the bankrupt to the respondents the 8th of December of the preceding year. Undisputed as the facts are, the decision must turn upon the construction of the Bankrupt Act. 14 Stat. 534; Rev. St. § 5128." In entertaining and deciding the question whether the 8th of December, the date of the assignment, was within four months of April 8th, the date of filing the petition, according to the intent of the act, and in making the fate of the assignment turn on the result, the court virtually and effectively ruled that the assignment was one of the list of

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creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

The sections on the same subject in the Revised Statutes of the United States are as follows:

SEC. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section five thousand one hundred and twenty-eight [thirty-five] shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

SEC. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and knowing that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this title, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

transactions arrived at by § 5128 and not by § 5129. The case can be explained on no other hypothesis. If the assignment was within the description of § 5129, there was no occasion at all for discussing whether the 8th of December was not within four months of the 8th of April, and the court, in holding that the decision of the case hinged on that point, committed an absurdity.

In *Gibson v. Warden* the question was distinctly presented whether a chattel mortgage to secure *prior* indebtedness was within the *first* clause of § 35 of the act, which became § 5128 of the Revised Statutes, or was within the *second* clause, which became § 5129, and the court passed on it explicitly. The decision was necessary because certain material results depended on the question of time. The court observed: "Upon comparing the two clauses carefully together we are satisfied that the *first* clause was intended to refer to the past and the *second* to the present. The language employed in the first clause imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. It is only by this construction that the two clauses can be made to harmonize and full and distinct effect be given to each. Any other construction would make them cover the same ground and obliterate everything by which one is differenced from the other, except the limitation of time which they respectively prescribe. It is not to be supposed that such was the intention of the law-making power. This view of the subject was taken by the Circuit Court for the District of Missouri, and subsequently there by one of the justices of this court. We can see no answer to the conclusion at which they arrived." And further on the court refer to the mortgage given between four and six months preceding the filing of the peti-

tion, and observe that "being founded upon a past consideration, it falls within the first clause of the 35th section of the Bankrupt Law, which limits the right of attack upon such instruments to those executed within four months prior to the filing of the petition in bankruptcy."

Now, so far as the matter in hand is concerned, there can be no distinction between a chattel mortgage to secure past indebtedness and a common-law assignment like that given to Stewart. In each case particular creditors are given a preference by the debtor in respect to the assets, and in each case the real consideration is the past indebtedness. *Halsey v. Whitney* 4 Mason 206; *Lawrence v. Davis* 3 McLean 177; *Flanigan v. Lampman* 12 Mich. 58; 2 Kent's Com. 532; Burrill on Assignments, ch. 15. The circuit judge was therefore right in holding that the assignment fell under § 5128, and that the condemnatory provisions of the Bankrupt Law afforded no aid to the marshal, because the period between the petition in bankruptcy and the assignment exceeded two months.

It was made a question before the jury whether the marshal got control and possession of the property by force of his warrant or by the voluntary act and consent of Stewart, and the point has received much attention from counsel. The subject was not submitted to the jury in a very clear manner, but we cannot believe that the marshal was prejudiced. In going from Detroit in pursuit of the property, and in making inquiry of Stewart for it and in taking it into possession, he professed to act officially and under color of the warrant, and in no other way. He did not intend to be understood as soliciting something he thought himself not authorized or not able to enforce, and he was not so understood. His position and deportment menaced the exertion of whatever power should be necessary. He held himself out as prepared to seize the property by virtue of process from the Federal court and consequently by authority of the United States, and the reasonable construction of the facts is that Stewart, without forcibly contesting the claim and assumption involved in the doings of the marshal, peaceably and

quietly surrendered to the force displayed. He took notice of the fact that violent opposition would be futile and that he was not required to make a show of it for the purpose of being entitled to seek redress by an action at law. His attitude and conduct in respect to the alteration of possession were not that of one entirely at liberty to hold on or give up according to his own discretion. On the contrary, his will succumbed to the manifestation of irresistible authority, and it does not lie with the party who obtained what he sought by the holding out of that authority to now construe the peaceable submission to its demand as an act of free and positive assent.

In the course of Stewart's testimony the court was requested to strike out as incompetent all he had then sworn to in regard to the value of the property. This was properly refused. A portion, at least, of the testimony he had then given relative to the value was competent beyond all question. No objection had been made, and the witness had shown his acquaintance with the goods, and the fact of having made sales from the stock during several months, and the total amount of those sales. He had also given his judgment of the comparative value of the portion taken by the marshal. His evidence had a direct tendency to show the value of what had been sold, because he stated what it had actually brought. And from his own intimate knowledge of the goods it was reasonable to suppose he was qualified to estimate correctly what those taken were worth. It was for the jury to say what the testimony proved. Further evidence in regard to value was given afterwards. The request to charge that there was no evidence of value does not call for remark.

The plaintiff in error failing to establish any ground for reversing the judgment, it must be affirmed with costs.

The other Justices concurred.

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William Brownlee v. Henry Bolton and Donald McRae.

Right of re-sale—Measure of damages—Inspection.

A vendor's right of re-sale must be exercised in good faith and at such time, by such methods and under such circumstances as are most likely to produce the fair value of the property; and he has the burden of showing that it was so exercised.

A contract for delivery of timber "on the rail" of a vessel does not, in the absence of express provision, contemplate that it shall be inspected for acceptance at any later stage.

The usual measure of damages where merchandise has to be resold, on the failure of the contract purchaser to take it, is the difference between its contract price and its market value at the time and place fixed by the contract for delivery; but if the contract fixes the time for full payment, and the vendor elects to rest upon his right as an unpaid vendor and not to hold the merchandise for delivery as the purchaser may require it, the time of default in payment is the proper one for fixing the difference between the contract price and the market price.

Error to Alpena. Submitted June 8. Decided Oct. 6.

Assumpsit. Defendant brings error. Reversed.

James H. McDonald for plaintiff in error, as to the measure of damages, cited: Benj. on Sales, § 758; *Haskell v. Hunter* 23 Mich. 305; *Rider v. Kelly* 32 Vt. 268; *Mallory v. Lord* 29 Barb. 465.

Kelley & Clayberg for defendants in error.

Graves, J. The parties contracted as in the margin* con-

*This agreement, made this fourth day of August, 1871, by and between Bolton & McRae, of Alpena, Alpena county, Michigan, of the first part, and William Brownlee, of Detroit, Michigan, of the second part, witnesseth as follows, to wit: the said party of the first part agrees to deliver on rail of vessels furnished by the party of the second part one hundred thousand cedar posts at Nine-mile Point, and at other places suitable for loading, for the sum of eight cents each, the first cargo to be delivered within fifteen days after the opening of navigation, 1872, and the balance to be ready by the first of July, 1872. And the said party of the second

cerning the sale of cedar posts and telegraph poles and on occasion of the first shipments Bolton and McRae caused the posts to be inspected by a disinterested person as they were put on board. But Brownlee claimed that their agreement with the contract must be settled by inspection at the place or places of destination, and he threw out a large number as culls, and made a charge for their handling and dockage. Bolton and McRae asserted that the place of shipment was the place of acceptance, and that they would not submit to have the inspecting for acceptance transferred to whatever points Brownlee might select for their destination; and they proposed that if Brownlee would concur in the choice of an inspector at the point of shipment they would pay half the expense. But their offer was refused and Brownlee stopped sending vessels, and the contract was not carried out. After several years and in 1876 Bolton and McRae brought this action on the contract to recover damages for Brownlee's alleged refusal to provide vessels and accept and pay for the posts.

The substantial defense before the jury was that the further prosecution of the contract was given up and abandoned by mutual consent, but this was negatived by the finding. The court decided that the contract contemplated that all

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part agrees to furnish vessels, and to have them all shipped by the first day of July, 1872; and the said party agrees to pay for them on delivery; and if said party fails to furnish vessels before the first day of July, 1872, he will pay for those unshipped, said party of the first part to deliver them on the rail as aforesaid, and also agrees to give all vessels good dispatch. And the said posts are to be seven and one-half feet long and four and one-half inches and upwards at the small end in diameter, good, sound, merchantable timber. And the said party of the first part will get out what telegraph poles they can, twenty-five and thirty feet long (25 and 30 feet), and five inches through at the top end; to be sound, live timber, peeled and well trimmed and straight; and the said party of the second part agrees to pay for same telegraph poles the sum of forty-five cents each, to be one-half thirty feet long. And (if) the said party of the first part, if possible, shall cut all posts over eight inches through, four and one-half (4½) feet long, these to be perfectly sound, for the sum of eight (8) cents each; all of the above to be delivered on the rail of vessels as aforesaid.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

BOLTON & MCRAE.
WILLIAM BROWNLEE.

Witness: A. W. SMITH.

inspection for the purpose of complete acceptance should be at or before delivery and reception on board, and did not intend that it might be made at such distant or indefinite points as Brownlee might make the place or places of destination, and this is the right construction. There was no legitimate evidence of custom to influence the question, and if there had been it cannot be assumed that the terms of the contract would have authorized it; and so far as conduct and correspondence go, there is no implication, on any fair view of it, that Bolton and McRae understood the arrangement to be as claimed by Brownlee, or intended to waive the application of their construction to future deliveries.

The cause of action insisted on was exclusive of the telegraph poles and of the posts actually shipped. Bolton testified that in the fall of 1874 or 1875 they sold to Montgomery of Detroit the posts Brownlee had failed to take, and that the net proceeds were 4¾ cents each. No other witness testified concerning this sale, and whether it was public or private was not explained. There was no evidence of the actual condition the posts were in at that sale, nor any evidence of their condition then as compared with what it was in the summer of 1872. Bolton was asked on cross-examination what terms were made with Montgomery about the length, diameter and soundness, but the inquiry was excluded on objection. It was not shown that any notice of sale to Brownlee was given or attempted, or that the circumstances of the transaction were such as to create a probability that the price obtained was a fair one. Bolton was allowed to state the value of posts after the first of July in 1872, but Comstock, a witness produced by Brownlee, was for some reason which is not apparent, not allowed to do so. The jury were charged that in case of finding Bolton and McRae were entitled to recover, the measure of damage would be the difference between the contract price and the price obtained on the resale. The substantial effect of this instruction was to require the jury, in case of their being satisfied that Bolton and McRae ought to recover, to accept Bolton's account and regard the price so stated as having been obtained at the sale

made from two to three years after the transaction, as conclusive of the depreciation of the posts in value from the contract price, and as deciding how much Bolton and McRae might compel Brownlee to pay on account of his failure of performance in 1872.

The instruction was not authorized by the evidence. At the outset it was material to inquire whether the expedient of a resale, in view of the circumstances, was within a reasonable time. But apart from this the case was barren of facts to afford any ground for argument that the real condition and the steps taken were such that in justice the price could be held binding on the interest of Brownlee. The state of facts in the record did not permit the application of the doctrine of resale, and there is no occasion for a particular examination of it. It is now sufficient to say generally that the vendor's right of resale must be exercised in good faith and in such time and manner and under such circumstances and by such methods as will be best calculated to produce the fair value of the property, and that in case he seeks to avail himself of it before a jury it is incumbent on him to adduce the necessary facts to show that in exercising the right this manner was observed. Of course the plaintiff in error might have acquiesced in the rule given by the court, but he did not, and the question is what ruling should have been made.

The answer is plain. The law on the subject is well settled. In the first place, evidence should have been admitted to explain the condition of the property and its market value at the place or places of shipment on the first day of July, 1872, and the jury should have been told that the general measure of damage was the difference between the contract price and the price on board according to market value on the first of July, 1872, at the contract place or places where the posts were in readiness to be tendered. There was no room for any rule more favorable to defendants in error. *Cahen v. Platt* 69 N. Y. 348.

According to the agreement, in case Brownlee failed to provide vessels before July first he was bound to pay at that

time for whatever posts remained unshipped, and Bolton and McRae were still to put them on board. The time was hence fixed for full payment whether vessels were or were not provided by Brownlee, and as Bolton and McRae elected to hold the posts to preserve their right as unpaid sellers, and did not elect to hold them for delivery to Brownlee as he might require it, the time when default in payment occurred was the proper one for getting at the difference between the contract price and the market price on board. No further observations are necessary.

The judgment must be affirmed with costs and a new trial granted.

The other Justices concurred.

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MICHIGAN AIR LINE RAILWAY, PETITIONER v. WILLIAM H. BARNES, CYRUS BARNES, CHARLES O. BARNES, MARY A. PATON AND ISAAC LOUNSBURY.

Taking land for railway purposes—Damages.

Where a jury is required merely to determine the damages or compensation for taking property for a railroad company, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. And, unless there are indications to the contrary, the presumption is that all evident facts bearing on the amount of damages were taken into account.

Objections to the petition and award in proceedings for the condemnation of land must be clearly specified.

A description in an award condemning lands for railway purposes allowed a strip 30 feet wide on each side of a given line across the entire premises except that in crossing a specified parcel a strip only 25 feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former and by giving the courses and distances. *Held* sufficient.

An award of damages for land condemned for railway uses was sustained where it expressed the gross sum allowed to all joint claimants and

specified how much of it was for each of those interested as mortgagees.

Whether questions on appeal under the railroad law can be brought up by bill of exceptions—*Q.*

An inquest of damages for lands condemned for railway uses may be conducted by a jury without legal assistance, and liberal practice in the admission or rejection of testimony is allowable; and the conclusions of the jury thereon will not be disturbed except for rulings that were manifestly inaccurate and did substantial injustice.

It is not error in proceedings to condemn land to exclude on cross-examination of a witness a question as to his opinion upon facts the existence of which he has denied, especially when he has in effect answered the question in his direct examination.

The value of land for farm use is a proper subject of inquiry in proceedings to condemn it for railway purposes.

An objection that the award of a jury in proceedings to take land "is against the law and evidence in the case" cannot show what objections are deemed waived, and is insufficient to raise any question.

Appeal from Oakland. Submitted June 8. Decided October 6.

PETITION for proceedings to ascertain damages for taking land. Respondents Barnes appeal. Order below affirmed.

E. R. Wilcox, *Maynard & Swan*, and *E. W. Meddaugh* for petitioner, cited as to the description of the land to be condemned: *East Sag. etc. R. R. Co. v. Benham* 28 Mich. 460; *Grand Junction etc. R. R. Co. v. County Com'rs* 14 Gray 553; *Coster v. New Jersey R. R.* 23 N. J. L. 235; *Marion etc. R. R. v. Ward* 9 Ind. 123; as to evidence of the value of the property taken: *Wallace v. Finch* 24 Mich. 255; *East Penn. R. R. v. Hiester* 40 Penn. St. 53; *Central Pacific R. R. v. Pearson* 35 Cal. 261; *In re Furman St.* 17 Wend. 670; *Mississippi Bridge Co. v. Ring* 58 Mo. 496; *Burt v. Wigglesworth* 117 Mass. 306; *Somerville & Easton R. R. v. Doughty* 22 N. J. L. 501; *Haslam v. G. & S. W. R. R.* 64 Ill. 353; *Robertson v. Knapp* 35 N. Y. 91; *Squire v. Somerville* 120 Mass. 579; *Schuylkill Nav. Co. v. Farr* 4 W. & S. 376; *Whitman v. Boston etc. R. R.* 3 Allen 133; *Boston & Worcester Co. v. Old Colony R. R.* 12

Cush. 611; *Lawrence v. Boston* 119 Mass. 128; Cooley's Const. Lim. 567.

Henry M. Cheever, Charles E. Miller and *Edwin F. Conely* for appellants. Damages for taking land for railway purposes should include compensation for all the prospective loss or injury resulting from the proper construction or operation of the road: Sedgwick on Damages § 565; *Concord R. R. v. Greely* 23 N. H. 237; *Mt. Washington Road Co.* 35 N. H. 134; *East Penn. R. R. Co. v. Hottenstine* 47 Penn. St. 28; *Searle v. Lackawanna & Bloomsburg R. R.* 33 Penn. St. 57; *Hatch v. Vt. Cent. R. R.* 25 Vt. 49; *Dorlan v. East Brandywine etc. R. R.* 46 Penn. St. 520; *Robb v. M. & Mt. S. Turnpike Co.* 3 Met. (Ky.) 117; *Reg. v. Brown* L. R. 2 Q. B. 630.

Graves, J. This case comes up on appeal by respondents Barnes in a proceeding to condemn property under the Railroad Law approved May 1st, 1873. The jury who made the finding were attended by the circuit judge and their report was confirmed by the circuit court.

The first objection is that the taking includes premises fronting on a street, and that the jury allowed nothing for damages on that account. For aught that appears the objection is gratuitous. The conclusion is not a proper inference from the record. The jury were required "to ascertain and determine the damages or compensation which ought justly to be made," and they reported the result in general terms, and this was sufficient. It was not necessary to specify what damage was allowed for each separate cause. There is no implication from the award that the jury omitted any ground of allowance depending on street advantages. In the absence of circumstances indicating that facts evident to the jury and bearing on the amount of damage were not fairly taken into account, the presumption is that they were. The charge against the petition and award, of lack of due certainty in describing the property, contains the same defect it assumes to suggest.

The "objections" are required to be "specified," and the appellate court is confined to the specifications; all other objections are to be deemed waived. The obvious meaning is that the error and defects complained of shall be pointed out with such particularity that the attention of the appellee and of the court will be at once precisely directed to them. In case that is done there is no room for misapprehending the questions. The subjects of controversy are at once understood by all alike, and when they come to be decided the points ruled are certainly and clearly defined. The charge in question is general. It is called an objection, but there are no specifications. The petition and award are to be explored to find out, if practicable, the points aimed at by the objection. They are not "specified" or explained. But if we disregard this want of sufficiency in the notice of appeal, and resort to appellants' brief for a specification of their objections, no serious fault is disclosed. The jury made a personal inspection and seem to have had no difficulty, and we are not able to find the want of certainty imputed. The effect of the first description is to allow a strip thirty feet in width on each side of a given line, across the entire premises, except that in crossing the parcel thirty feet wide derived by Barnes from Fox, there is allowed on the south side of such given line, a strip twenty-five feet in width instead of thirty. The description of the adjoining piece on the north seems to be well enough. The exterior line is made to start at the east termination of the northerly outside line of the other parcel, and it is also made to close there. The courses and distances given determine the shape and quantity, and fix the position.

The second objections to the form of the award of damages and compensation are untenable. The amount allowed to appellants is evident. The nature of their interest has been admitted from the first. There has been no question about it. Their position is as owners. Mary A. Paton and Isaac Lounsbury were found to be interested as mortgagees, and the fact has not been disputed. The jury by their award first expressed the sum of their allowance to all, and then specified how much of that sum was for Mary A. Paton and

how much of it for Isaac Lounsbury; the necessary result being that what remained of the largest amount, after deducting the two smaller ones due to the mortgage interests, was found for appellants as holders of the equity of redemption. The means for getting at their quota are given without the possibility of error, and the process is too simple to be made a handle. *Smith v. Hartley* 10 C. B. 800: 5 E. L. & E. 383.

The point based on the omission of the jury to specify a particular amount for each of the appellants, is admitted to be overruled by *East Saginaw & St. Clair R. R. Co. v. Benham* 28 Mich. 459, and the objection that the finding gives more land than was called for in the petition is expressly abandoned.

The claim that a bill of exceptions is a fit expedient for bringing up questions on appeal under the Railroad Law has been seriously questioned, and the practice cannot be taken for granted. But as all the evidence, as the parties admit, has now been sent up, and the return is claimed to be a full one, the point does not call for a positive decision.

The remaining questions relate to evidence, and they suggest a few preliminary words in regard to practice.

When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It was not intended to leave the fate of the determination had in view to any fine-spun theories, or to the refinements which are not uncommon in trials at the circuit. They were not supposed to be necessary to the fundamental purpose or beneficial working of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. And were the niceties of *nisi prius* to be insisted on, the proceeding would speedily break

down under the perplexities and embarrassments due to its own methods. The conclusion to which these and other considerations lead is that a very large discretion in admitting and rejecting testimony is left to the jury, or the attending officer, whenever there is one, and that when the case is brought here by appeal the award cannot be disturbed on account of such decisions, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate, but was a cause of substantial injustice to the appellant in the matter of the result.

On referring to the particular objections as they are noticed in the brief, the first is that M. S. Hadley, when cross-examined, was not ruled to give his opinion on the assumption of a state of things which he denied. He had just stated that if the ability to run the paper mill to its full capacity was impaired, the damages would be greater than an amount he had named, and in reply to the question on which the point arises he observed that what had been done had not interfered at all with the business of the mill; and the complaint is that he was not compelled to swear whether the damages would not be increased if there was an interference sufficient to stop three machines in the winter. This inquiry was not important; still whatever there was of substance was elicited.

The point cannot prevail that it was incompetent to ask what the land in question was worth for farm use. The utility of the property for that purpose cannot be deemed a circumstance forbidden to the consideration of the jury. Its exclusion would have been a stretch of discretion. There is no occasion for an opinion relative to its weight. The claim that the inquiry about the artesian well, and the effect of cutting off the place for piling wood, was restricted to appellants' prejudice, is not well founded. The range given to the introduction of testimony on the part of appellants was extremely liberal. It would be a waste of time to comment at large upon the volume of evidence returned. The premises were examined by the jury, and the advantages needed and those cut off were explained by witnesses. The previous opportunity for piling wood and the opportunity

left were understood by the jury, and the appellants were allowed to state what they had expended on the partly-completed well. It was being sunk by a contractor pursuant to an agreement entitling him to a specific price on its completion, with a flow of water sufficient to supply the mill, and what still remained to bring it to a condition to supply the mill and answer the contract was uncertain and unknown. The appellants were allowed to give their opinion of the value of the premises before and after the change caused by the railroad, and the amount of injury received, having reference to the condition, character and uses of the property, and it is evident that the course the judge allowed the investigation to take, deprives the objection of all merit.

The last objection is that "the award of the jury is against the law and the evidence in the case." This is insufficient to raise any question. It does not comply with the statute. It points out nothing, and leaves it impossible for the court to say, on the face of the record, what objections "shall be deemed to have been waived." Were this held good, it would be the same as saying the others were not necessary, because the language is broad enough to include them. But, were the objection sufficient, the claim which the brief sets up under it has no force.

It is said that the allowance to appellants is larger now than at the former inquiry, and therefore they are entitled to costs. The premises are not true. The award to them is less now than before.

The objections failing, the order below will stand affirmed and costs be given against the appellants.

The other Justices concurred.

THE PEOPLE'S ICE COMPANY v. THE STEAMER "EXCELSIOR."

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Navigation—Riparian rights—Wanton destruction of ice-fields.

Highways whether by land or water must be used with due regard to their lawful and proper use by others.

The right of navigation, though paramount, is not exclusive, and cannot be so exercised as to wantonly destroy private rights or property that can be enjoyed consistently with it; such as the rights to maintain ice fields or stake-nets, or to run logs, or establish boom limits and dock lines.

A lessee of riparian rights may enclose and store ice for his own use and profit, within the limits embraced in his lease, if he does not thereby interfere with the right of navigation, or with the proper use of the stream by other people.

A steamer was run back and forth unnecessarily near a boom enclosing a field of ice that was to be stored for the market, and the ice field was thereby destroyed. *Held*, that an action for damages would lie therefor.

The measure of damages for the wanton destruction of immature property, such as a field of forming ice, is the value of so much as would probably have been saved for market, less the expense of storing it.

Where an action for damages for the destruction of immature property is brought when the full extent of the injury can be estimated with reasonable correctness in view of the uncertainty whether it would ever have reached maturity, *it seems* that damages may be estimated accordingly and need not be confined to the actual loss at the time the property was destroyed.

Appeal from Wayne. Submitted June 8. Decided October 6.

PROCEEDINGS under the Boat and Vessel Law. Both parties appeal. Damages increased.

George H. Lothrop and *George V. N. Lothrop* for complainant. There may be property rights in water subject only to the right of navigation: *McCready v. Virginia* 94 U. S. 395; the claim that a riparian owner has no rights beyond

the water line: (*R. R. Co. v. Schurmeir* 7 Wal. 272; *Atlee v. Packet Co.* 21 Wal. 389), does not prevail in Michigan: *Lorman v. Benson* 8 Mich. 18; *Rice v. Ruddiman* 10 Mich. 125; *Brig City of Erie v. Canfield* 27 Mich. 480; ice becomes property by becoming stationary on the freehold: *State v. Pottmyer* 33 Ind. 402; and in Michigan it is personal property: *Higgins v. Kusterer* 41 Mich. 318; torts upon waters utilized by riparian owners become local trespasses: *The Plymouth* 3 Wal. 33; *Rock Island Bridge Case* 6 Wal. 213; *The Ottawa* Brown's Adm. R. 356; *Neil Cochran* id. 163; damages should be adequate compensation for the injury: *Allison v. Chandler* 11 Mich. 542; *Warren v. Cole* 15 Mich. 265; *Gilbert v. Kennedy* 22 Mich. 129; *Clark v. Lake St. Clair Ice Co.* 24 Mich. 508; *Winchester v. Craig* 33 Mich. 210; but loss of time, profits and business have been allowed for, where they were caused by the injury, especially in cases of tort: *Freeman v. Clute* 3 Barb. 424; *Davis v. Tulcott* 14 Barb. 611; the natural and probable consequences of the injury should be taken into the account: *Lincoln v. S. & S. Ry. Co.* 23 Wend. 425; *Holyoke v. G. T. R. R.* 48 N. H. 541; the damages for willful conversion of the ice would be its value less the cost of putting it up: *Final v. Backus* 18 Mich. 232.

Wisner & Speed for respondent.

MARSTON, C. J. Some of the questions raised in this case are not only interesting, but of such importance as to demand great care in their examination and in the discussion and disposition thereof.

The following statement of the case is taken from the briefs of counsel for the respective parties: In January, 1878, the complainant was an ice company in Detroit doing a general ice business, and was lessee of a portion of Belle Isle in the Detroit river, consisting chiefly of water front. The respondent steamer was a ferry boat used and employed in ferrying between Windsor and Detroit. Occasionally she was used for towing upon the Detroit river and adjacent

waters. On the leased property, running along inside of the channel bank of the Detroit river, the complainant had constructed a boom 3600 feet long, containing 1,099,600 square feet, outside of a line fifteen feet from the shore.

On the shore, adjacent to this pond, complainant had fifteen ice houses, capable of holding about twenty thousand tons of ice. On January 11th, 1878, this pond was frozen over with hard, clear ice, six inches thick. On that day the Detroit river was entirely open, and the steamer was taken by her master from her dock below Belle Isle up beyond, then turned and run down part way, thence up, then down, up again, then down to Detroit. Complainant claimed that the steamer was run on these trips unusually near the boom, and that the swell caused by the steamer broke up the ice in the boom so that complainant was unable to harvest it. The width of the channel of the Detroit river opposite this boom, was upwards of eighteen hundred feet. This was the first crop of ice that had formed that winter, and the weather thereafter was so mild that no more ice fit to cut formed in the boom; consequently complainant failed to get a stock to fill its ice houses.

The case was heard in the court below without a jury, and judgment was rendered in favor of complainant for one thousand dollars damages. Both parties appealed.

The complainant appealed because the amount awarded was considered inadequate. The defendant presents several objections in this court: that the amount of the decree is larger than the evidence warranted; that the mildness of the winter of 1877–8 was the proximate cause of any injury suffered by complainant, and that the respondent is not liable for such an injury; that the court should have adopted as the correct rule of damages "the true value of the ice, or rather the privilege of taking it—what it would have been shown to be had the matter been settled or the case tried on the very day the ice was broken"; that conceding the respondent to be liable, which was not done, the value is to be determined as on the day the ice was broken, and upon the probabilities, based upon the ordinary course of events,

relating to such matters. It being alleged that the steamer did not keep in the channel of the river and away from the boom—which if she had done no damage would have been done the ice—the respondent, in answer thereto, claims that the right to navigate any portion of Detroit river, between its banks, is not subject to the rights of parties having property along the shore that may be injured by the swell occasioned by passing steamers, and that no such burthen can be attached to the right of navigation. The respondent farther claims that if the only object the master had in going up the river was to break the ice, he in so doing was acting entirely beyond the scope of his employment, for which neither the vessels nor the owner would be liable. It was also claimed that the steamer, having been bonded and released under the statute, a decree against the vessel was unwarranted. This complainant's counsel conceded, so no farther notice thereof need be taken.

There was very great difference in the opinion of witnesses as to the value of the ice. Complainant's witnesses, in view of the season and subsequent scarcity of ice, valued it at two dollars per ton; some, indeed, still higher. The quantity was fixed at about thirteen thousand tons. The defendant's witnesses, some of them, say that on January 11th, the time of the injury, the ice had no value, as it was not fit to cut; that six-inch ice could not profitably be cut, and that it was early in the season, when ice in its place might be expected to form. Others placed a value on the entire crop of from three to seven hundred dollars. That the ice was broken and destroyed for complainant's use by the swells caused by the steamer, we have no doubt; and owing to the width of the channel this could have been avoided without delay, danger or additional expense to the steamer. If we accept the evidence of the master as true, that his business in going up the river the first time was to ascertain the condition of the ice in Lake St. Clair in order to determine whether he could, with safety, on the next day go after and tow through a vessel; that in going up the second time he desired to ascertain whether the American channel was open, having omitted

so to do on the first trip; and that the occasion of his third trip up was that he might cross over and enable a party on board, who was interested in the ice business, to see whether there was ice in a bay across the channel—it would not avail the defendant. It would still appear that the injury was done through gross carelessness, while the steamer was otherwise lawfully engaged.

Was then the respondent's right to navigate the Detroit river subject to complainant's right of property in this case? Ordinarily it may be said that the entire width of the highway may be used, yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts and do such other acts as will add to his convenience or assist in beautifying his premises. He is encouraged in doing this by public sentiment; in the remission of taxes by the public authorities, for the planting of trees; and in the protection which the law gives him by the punishment of those who interfere with or destroy what he has done. Public convenience may in time in particular locations require the removal of some of these things, and whenever the necessity arises and the public authorities request their removal, then the private must give way to the public or paramount right. But while permitted to remain, no one traveling the highway could wilfully injure or destroy them, and should any one do so he would justly be held responsible notwithstanding his plea of a claim of right to travel over any part of the highway. If the law were otherwise, the streets in our cities and villages, and our public highways, would soon be stripped of their shade and ornament. *Clark v. Dasso* 34 Mich. 86.

So in cities the right to use the public streets whereon to deposit materials for building purposes is frequently granted and enjoyed. Has the traveler the right unnecessarily to wilfully or negligently drive over and break, mar or destroy such materials upon the plea of a right to use the highway? The law in this country requires the owners of vehicles, when meeting, each to bear to the right, yet it has never been supposed that a neglect so to do on the

part of one would justify the other in wilfully or carelessly injuring the person thus in the wrong. A teamster may temporarily encumber a part of the highway while loading or unloading; and while thus exercising his right, another cannot insist upon occupying the same place, or carelessly drive into and injure his team or vehicle. *Cary v. Daniels* 8 Met. 478; *Daniels v. Clegg* 28 Mich. 32.

The right of fishing in our public navigable waters is one largely and profitably enjoyed, and in order to carry on the business successfully it frequently becomes necessary to set nets extending into the river channels and the deep navigable waters of our lakes. This may, and to a limited extent does, cause vessels to change their course in order that the property of the fishermen may not be injured or destroyed. The master of the vessel would not be justified if he should unnecessarily or wantonly run his vessel upon the nets and destroy them. *Post v. Munn* 1 South. (N. J.) 61.

So in the rafting, running and towing of logs in our navigable waters, vessels are sometimes necessarily delayed or caused to change their course; yet in cases where the owners of the logs were exercising due care and reasonable diligence, the vessel must suffer the temporary delay or inconvenience caused. So in establishing dock lines and boom limits on our rivers and lakes, the channel is frequently encroached upon in order to reach deep water, that the right may be useful and valuable; and although the channel may thereby be narrowed, yet if ample room for the purposes of navigation remains, the owners of vessels cannot complain. Of course the right of navigation is paramount and no unreasonable or unnecessary obstruction can be permitted to interfere therewith; but while this is so, yet the riparian proprietor and the public do not thereby lose all right to use the stream for any other and legitimate purpose which will not unreasonably interfere with the right of navigation. The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed.

But in this case the vessel did not run into the boom, and therefore it may be said the case is not parallel with those we have been considering. The principle however is the same, which recognizes the superior right of the vessel, but punishes any abuse of that right. It is also clearly apparent that vessels have not an exclusive right to use the entire channel, which may be narrowed or used for purposes, some of which are but remotely if at all connected with the subject of navigation. It is well known, as this case proves, that there is a class of vessels navigating our lakes and rivers which cause, when running, very great commotion or swells in the water. It is also well known that on many of the rivers a class of lighters and barges are used for the lighterage or necessary transportation of the agricultural, manufacturing and mining products of the country. This class of vessels are often loaded to the water's edge, and in smooth waters are thus considered perfectly safe, and yet they could not venture out where the winds or waves could reach them. Would a steamer approaching such a tow, where it was clearly apparent the swell she created would endanger the lighter or cargo, be justified in recklessly pursuing her course at full speed, in case damage resulted? Upon some of our rivers and water highways artificial banks have been formed for the benefit of commerce, and to prevent a spread of the waters over the adjoining country. The swells caused by steamers of a certain class would, by washing such banks, and otherwise, weaken and injure them, and thus create danger of public and private damage. Such dangers are frequently guarded against by legislation or rules of the highway, but it may be questionable whether such regulations are not merely declaratory of the common law maxim that a man must enjoy his own property in such a manner as not to injure that of another person. So the right to boom logs is necessary to their profitable manufacture. The owners must therefore be protected in this right, else it would be of but little value. Vessels would have no right to destroy them, or wantonly run so close to them as to cause a loss of the property therein. A vessel has no right to wantonly run so close

to the shore, to a boom or to a dock as to cause damage which could easily be avoided by standing farther off.

In the case at bar the complainant had a right, under its lease, to enjoy the ice in its boom, and store it for use and profit. *Lorman v. Benson* 8 Mich. 18. The owners of the defendant boat had a right to navigate the Detroit river, but in doing this they were morally and legally bound to do no wanton injury to the property of others. It was clear to all that the agitation of the water caused by the boat was breaking and destroying the ice, and it was well known to those in charge that there was abundant room for the vessel to proceed on her course without deviation or delay, and at such a distance from complainant's boom that no injury whatever would have been done. For such an injury we are of opinion the vessel should be held liable.

"Though a man do a lawful thing, yet, if any damage thereby befalls another, he shall be answerable if he could have avoided it." The maxim *Sic utere etc.*—"So use your own property as not to injure the rights of another,"—is of very general application in cases of conflicting interests, and, it has been observed, will "generally serve as a clue to the labyrinth in such cases." Broom's Legal Maxims, 357 *et seq.*

As to the measure of damages. Defendant's position, if correct, must be of general application. Let us test it. Suppose a person goes upon the lands of his neighbor and wilfully destroys his growing crops while immature, what should be the measure of damages?—the value of the crop in its then condition? If so, what would be the value of a crop of potatoes when the tubers were just forming? of a crop of apples where the tree was destroyed while in full blossom? of a crop of corn when commencing to tassel, or of wheat where the heads were forming? In the two first there would be no value whatever, and in the second for fodder only. Would the value in each case at the time of the injury be the measure of damages? or would the injured party be permitted to show what the matured crop, in all probability, would have been, for the purpose of recovering the damages he had sustained? If the value at the time of the injury

only could be recovered, a way would thus be pointed out for parties to be avenged of their adversaries with impunity.

In the opinion of some of the witnesses six-inch ice was of but little if any value, owing to the difficulty of cutting and storing ice of that thickness; and some were of opinion that ice less than six inches had no present market value. If so, and the then value would be the measure of damages, then an ice company could with safety destroy the ice of its rivals, if only done at a time when the ice was not of sufficient thickness to cut and store. A daily breaking up of the ice would accomplish the desired result without danger of excessive damages or of any considerable liability. Such a rule would simply be one of gross injustice, and it is only necessary to thus carry out the position taken by counsel to show the injustice thereof.

The owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once, and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not, however, absolve the wrong-doer, and the dangers, if any, from such a rule, he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one; the yield per acre in that vicinity; the market price of the crop; the expense—all could be ascertained with tolerable certainty, and why should the law exclude such proofs? The law affords abundant instances of cases analogous to the present, where the extent of the injury cannot be ascertained immediately thereafter, and where evidence is permitted to be given to show the probable extent thereof, or if sufficient time has intervened before the trial, to show the actual result. In all such cases the extent of the injury can be ascertained with reasonable certainty.

It is said however that this is permitting the damages to be enhanced by particular seasons and circumstances over which the wrong-doer had no control, to which he in no way contributed and could not have anticipated. What the anticipations of the wrong-doer may be is important only when exemplary damages are demanded; the law measures the damages in other cases regardless of intentions. But why should not exceptionally favorable or unfavorable seasons be considered in this class of torts? In the ordinary case of the breach of contract the contractor may show that the season turned out a favorable one, and the effect thereof upon the profits he would have made. *Burrell v. New York etc. Salt Co.* 14 Mich. 38. So where there has been a breach of a contract, and the party not in fault has had to proceed and employ others in an action to recover the damages sustained he may show an advance in the price of materials and labor after the breach. So if a person should let his farm to another on shares, or his mill for the season for a portion of the profits, why should he not be permitted to prove, in view of the season, what his probable share of the crops would have been on his proportion of the profits of the mill had the contract been fully performed? Why should not the favorable or unfavorable season enter into the question? All look to the favorable times and seasons to make their profits, and to recover back the losses they sustained during the unfavorable ones, and it is not for the wrong-doer to say they shall not.

It is undoubtedly true that there are exceptions and limitations to be considered. Thus, for the breach of a contract, extraordinary or uncontemplated contingencies are considered as too remote to affect the damages. *Clark v. Moore* 3 Mich. 55; *Michigan Central R. R. Co. v. Burrows* 33 Mich. 6. Even in the case of a wrong-doer he may take or destroy personal property of a certain kind, such as live stock, which gave promise of, and in time might have been, of great value, but which, because of its immaturity, was of but little value comparatively. The future would be altogether too uncertain and dependent upon too many contin-

gencies to base any estimate or make any calculation thereon. The expense attending its growth, the risk of accidents or death, and the utter uncertainty of its development and value consequent thereon, necessitate an adherence to its value at the time of the wrong done. Even in such a case there are surrounding circumstances in the past history and present promise of the property which may be taken into account and fix the value far above what it otherwise would be.

It is somewhat difficult to say in which class this case belongs, or to lay down any distinct rule that should govern in all such cases. There are uncertainties surrounding a case like the present which should not be overlooked. Would all the ice in this boom, estimated at 13,000 tons, have been gathered and safely stored had not the injury been done? The question is not what could possibly have been done had the ice not been broken, and complainant, on the morning of that day, known that it must save that ice or obtain none that season. Such knowledge would undoubtedly have caused an extra effort to be made, and perhaps saved all of it; but in the absence thereof, and in view of the weather that might at such a season reasonably have been anticipated, would complainants have made such effort? They say they would—this, of course, in view of what afterwards took place—but of this we are not certain. There is not the same reasonable certainty in this case that the crop would be harvested that exists in reference to other crops. The condition of the weather would more easily affect a crop of ice. Would the complainants, in hopes of more favorable weather and better ice, have waited and thus lost the whole or the greater part thereof? These are proper questions to be considered; and although, in the light of what followed, complainants say they intended to and would have put on an extra force, and thus have saved it, yet it is not clear to our minds that they would have done so.

These are risks attending the business and which the complainants must have run even had the ice been uninjured by the boat, and for such risks the defendants should not be held responsible. In other words, while the short crop and scar-

city of ice the ensuing season, and value consequent thereon, should be considered in placing a value upon the ice destroyed, yet this can only be done upon the basis that complainants would have saved that ice, and for so much of it as they would in all probability have saved they should recover the full value, less the cost and expense of harvesting it. The defendants, while justly responsible to this extent, yet should not be held as insurers of its safe storage, as this was a risk the complainant, in any event, must have run. There is evidence in the case that ice under somewhat similar conditions about that time, owing to the unfavorable weather, was almost wholly lost.

In view therefore of all the circumstances of this case, of the preparations made by the plaintiff before the injury to harvest this ice, the weather thereafter and the uncertainty of gathering and storing it, of the season following and the price of ice, we are of opinion that the complainant should recover two thousand and five hundred dollars damages and costs.

The other Justices concurred.

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GEORGE W. A. SMITH AND WILLIAM F. FIELD v. SOPHIA J. WILLIAMS.

Estoppel by covenant—Omission to record deed.

Where a grantor assumes by his deed to convey a title, and by any form of assurance, whether it be by covenant of seizin and title or by that of quiet enjoyment, obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he is estopped from afterwards acquiring or asserting a title and leaving the grantee to sue upon the covenants for redress.

An unrecorded deed is made void by Comp. L. § 4231, as against a subsequent purchaser from the same grantor.

A tax purchaser took a decree by default quieting his title as against the claims of a certain person who had in fact previously conveyed the

land. His grantee, however, had not recorded the deed, and was not made a party. *Held*, that the neglect to record the deed did not make the decree binding upon the grantee, who was a stranger to the proceeding.

The conditions under which the neglect to record a deed avoids it are statutory and cannot be extended by judicial construction.

An unrecorded conveyance is valid as against a subsequent purchaser until the latter shows that he has paid the purchase price; the mere institution of suit by him to quiet his title does not make him a *bona fide* purchaser.

Case made from Mecosta. Submitted June 10. Decided October 18.

EJECTMENT. Plaintiff had judgment below. Affirmed.

Ellsworth & Sapp for plaintiff. Judgments and decrees are not binding as against persons who should have been made parties but had no notice of the proceedings: *Gale v. Clark* 4 Bibb 415; *Madden v. Fielding* 19 La. Ann. 505; and the record in such a case is inadmissible in evidence to affect the rights of such a person in another proceeding relating to the same subject matter: *Payne v. Hook* 7 Wal. 431; *Matter of Empire City Bank* 18 N. Y. 215; and he may prove the judgment void: Freeman on Judgments, § 337; *Vose v. Morton* 4 Cush. 27; *Leonard v. Bryant* 11 Met. 370; *Downs v. Fuller* 2 Met. 135; a grantee cannot be bound by a judgment rendered against his grantor after the grant: Freeman on Judgments, § 162; *Winslow v. Grindal* 2 Greenl. 64.

Wm. D. Fuller for defendants.

COOLEY, J. The defendant in error brought ejectment against Smith and Field to recover certain land in Mecosta county. To show title in herself she put in evidence the following conveyances: 1. A patent of the land from the United States to Byron F. Squires, bearing date August 10, 1859. 2. A deed from Byron F. Squires to John Squires, dated December 13, 1856. This was an ordinary deed of bargain and sale, with a covenant "that the premises thus

conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, he will forever warrant and defend against any person whomsoever lawfully claiming the same or any part thereof." 3. A like deed from John Squires to the plaintiff, dated December 13, 1856, containing a like covenant. The patent was not recorded; the deeds were recorded in December, 1877.

I. The deeds from the patentee and from John Squires were objected to as irrelevant and ineffective, for the reason that at their date the title to the lands had not passed out of the United States, and therefore they conveyed nothing. It is not disputed that a deed with covenants of seizin and title would be effectual to give the grantee the benefit of an after-acquired title under the doctrine of estoppel, but these covenants were absent from the deeds in question, and the covenant of quiet enjoyment, it is said, will not have the like effect. No reason is given for any such distinction, and it is not recognized by the authorities. Where one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants have given. *Long Island, etc., R. R. Co. v. Conklin* 29 N. Y. 572; *Doe v. Dowdall* 3 Houst. 369.

II. The defendants below, to show title in themselves, offered in evidence the enrolled record and proceedings in a cause commenced in the Mecosta circuit court in chancery, instituted by Sextus N. Wilcox as complainant against Byron F. Squires as defendant, by bill filed February 23, 1870, in which Wilcox claimed title to the land under certain alleged conveyances on sales thereof for delinquent taxes, and prayed the court of chancery to quiet his title as against the claims of Squires. It appeared from the enrollment that Squires

was proceeded against as a non-resident; that he was brought in by publication, and did not enter an appearance or file any pleading, and that a decree that the title of Wilcox to the premises be quieted as against any claim of Squires was entered May 28, 1870. The plaintiff objected to the introduction of this evidence as irrelevant, and the court excluded it.

It will be observed that Byron F. Squires alone was made defendant in the chancery suit, and that he had at the time no title to the land. The decree was that he be thereafter precluded from asserting title, and we are not informed that he does so. Obviously the claim of title which the complainant made was to Squires a matter of indifference, since it could not in any manner affect his interests. The tax titles had accrued after he conveyed, and enforcing them neither took from him anything, nor made him liable upon his covenant. Therefore if knowledge of the suit had come to him, he would probably have given it no attention, because the result of it could not concern him. The decree as to him might as well have been left unmade.

It is said, however, that this suit against a party who had no interest to be affected by it, and no occasion to defend it, has been effectual to cut off the right of the party actually concerned, and who probably never heard of it until the decree was presented which was to be conclusive against him. The only reason given for this position is that the plaintiff, by not recording her deed, and suffering Byron F. Squires to appear of record as apparent owner, "has allowed him to appear to the world as the owner of the land now sought to be recovered by her," so that "Squires' day in court was her day, and she must accept the consequences of her own acts." It is, then, upon her failure to place the evidence of her title upon record that this effect of the decree upon her rights is to depend.

The general rule that a judgment or decree binds those only who are parties to it is not disputed. There are a few well-understood exceptions, of persons who, subsequent to the institution of the suit have acquired interests or claims under

the parties; but the plaintiff was not one of these, for her title had accrued before. If she loses her title, then it must be by force of the recording laws; for independent of these there is no principle of law that could bind her by the judgment against one whose interest she had acquired long before the suit was instituted.

But the recording laws could not help the defendants. Those laws point out specifically the danger to which the party failing to record his title is exposed, and the courts cannot extend or add to it. *Columbia Bank v. Jacobs* 10 Mich. 349; *Millar v. Babcock* 29 Mich. 528. The danger is indicated by § 4231 of the Compiled Laws: "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." By "subsequent purchaser" in this section is meant a subsequent purchaser from the same grantor. Mr. Wilcox was not such a purchaser. He does not claim under Squires, but by conveyances from the State which, if valid, should cut off the Squires title altogether. Moreover if he were claiming under deed from Squires, the previous unrecorded conveyance would be valid as against him until he had shown the payment of the purchase price. *Shotwell v. Harrison* 22 Mich. 410. The mere institution of suit cannot make one a *bona fide* purchaser.

As the tax deeds were not put in evidence, the record presents no question arising upon them.

The court did not err in its ruling, and the judgment must be affirmed with costs.

The other Justices concurred.

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Enoch Egbert v. Adam Greenwalt.

Criminal conversation—Married parties cannot disprove intercourse.

The right to an action for damages for criminal conversation with plaintiff's wife is not barred by the fact that the act was done by violence, and that a criminal action will lie.

In an action for damages for criminal conversation the testimony of the husband and wife is inadmissible to disprove intercourse between themselves for the purpose of raising a presumption against the legitimacy of the wife's child.

A witness may be competent to testify to some facts, and nevertheless be disqualified from testifying in the same case to other facts equally within his knowledge and admissible in evidence.

Act 125 of 1861 does not abrogate the common law principle that the testimony of a wife is inadmissible to disprove intercourse with her husband for the purpose of imputing illegitimacy to her children.

Legitimacy is presumed, and where there has been opportunity for intercourse between husband and wife within such a period that a child born of the wife may be legitimate, there must be strong evidence to overcome the presumption and disprove the fact of their intercourse.

Error to Berrien. Submitted June 11. Decided Oct. 6.

Trespass on the case. Defendant brings error. Reversed.

Edward Bacon for plaintiff in error. Married persons cannot testify to non-intercourse for the purpose of proving the paternity of a child upon another person than the husband: *Van Aernam v. Van Aernam* 1 Barb. Ch. 375; *Cross v. Cross* 3 Paige 139; 1 Greenl. Ev. §§ 28, 344.

J. G. Turner for defendant in error.

Graves, J. Greenwalt recovered for alleged criminal conversation with his wife. The suit was in the common form of an action on the case and was commenced in August, 1878. The trial took place in February, 1879. The whole

testimony to prove the imputed intercourse and establish the cause of action was given by Greenwalt and his wife. The act was represented as one to which she was an involuntary party, and as having been accomplished against her will by actual force and over the stoutest resistance of which she was capable. It was referred to some day in December, 1877, earlier than the 27th.

Egbert testified for himself and positively denied having had intercourse with her at any time. It was claimed for Greenwalt that the injury inflicted by his wife's violation was aggravated by her being left pregnant; and the court overruled the defendant's objections and permitted her to testify that her husband, in consequence of having fever and ague, did not sleep with her for some time prior to defendant's connection with her, and had not slept with her since; that soon after the occurrence she discovered she was pregnant, and then informed her husband that the child was defendant's; that it was born the 23d of August, 1878. The plaintiff testified that he did not sleep with her for three months; that in the latter part of June, 1878, he noticed his wife's situation, and she then confessed to him. But he had continued since to live and cohabit with her.

The record contains a general exception to the court's refusal to consider the evidence sufficient to bar the action. It is too vague to deserve notice. But as counsel adverted to it a few words may not be amiss. The point of the objection is understood as being that the nature of the action excluded the idea of violence and contemplated that the wife's participation was voluntary and not forced, and that as the case made by the evidence negatived her consent and proved that she was debauched by violence, the action failed.

The position is not tenable. The common law, in giving this remedy, instead of making the husband's right of action depend on his wife's having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent but was overcome by force, and the action has been sustained just the same, whether as matter of fact her will concurred or she was outraged by actual violence.

Bac. Ab. Marriage and Div. 551–553; 3 Bl. Com. 139; 1 Chitty Pl. (7th Eng.: 16th Am. ed.) 140, 141, 150, 151, 188; Broom's Com. 847, 848; 2 Hilliard on Torts, 507; *Forsythe v. State* 6 Ohio 23. And there seems to be no basis in justice or policy for the position that if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is thereby either taken away or suspended. Cooley on Torts 86 to 90. It is not reasonable to convert the wife's innocence into a shield to save her assailant from prosecution for his private wrong to her husband. Lord Holt seems to have recognized the principle that both remedies were admissible in a case of actual violence; and alluding to an attempt to carve out cause for a third proceeding to be carried on in the Bishop's Court, he said: "If a man solicit a woman, and goes gently to work with her at first, and when he finds that will not do, he *proceeds to force*, it is all one continued act, beginning with insinuation and ending with force." *Rigaut v. Gallisard* 7 Mod. 78.

In view of the rulings made on admitting evidence and in charging the jury it is unquestionable that the verdict must have been much influenced, if not determined, by the statements tendered on the part of the plaintiff and his wife and received by the court for the purpose of causing the jury to believe that they had no sexual intercourse at the time the child was begotten, and that the wrongful act of the defendant must have been the occasion of her condition, and this evidence in my opinion was not admissible. The parties were living amicably under the same roof and there was no serious obstacle to intercourse. There was such access as gave opportunity. That is not denied, and as matter of fact it was not asserted that intercourse did not take place.

It is not perceived that the wife's being admitted as a witness was objected to; and assuming, for this case, that she was entitled to be called, it does not follow that her personal knowledge of whatever in itself might be pertinent to the issue, was rendered provable by her if objected to. The difference is wide between the competency of one to be a witness in a given case, and the right to use the witness to prove

certain facts in his or her knowledge, however proper such facts may be in their own nature. There may be no ground whatever for excluding the person from the stand; but there may be sound reasons for refusing to permit him or her to swear to certain things or on certain subjects. The system of legal evidence has afforded always, and affords still, many illustrations. The statute offers an example where it excludes certain communications unless their disclosure is mutually assented to.

According to an ancient rule of the common law the evidence of neither husband nor wife could be received to disprove the fact of sexual intercourse (*Rex v. Book* 1 Wils. 340); and Lord Mansfield declared that it was "founded in decency, morality, and policy" (*Goodright v. Moss* Cowper 591); and no judge or author has ever dissented from his strong approval. The reason of the rule has prescribed limits to its application, but there is no present occasion for special reference to any of the qualifications. That the Legislature intended to abrogate it is not to be assumed. No one will contend that the course of the legislation of 1861 was unfriendly to it, nor can it be fairly argued that the terms or spirit of the amendments then made have supplanted it. The general purpose the Legislature had in view was to sweep away a number of objections against the competency of witnesses, but not to break down any rule "founded in decency, morality, and policy;" and so far as ascertained, the courts, wherever these general changes have taken place, have considered this rule of the common law as untouched. *Tioga County v. South Creek Township* 75 Penn. St. 436; *Boykin v. Boykin* 70 N. C. 262; *Chamberlain v. People* 23 N. Y. 88; *People v. Overseers of Ontario* 15 Barb. 286; *Hemmenway v. Towner* 1 Allen 209; Stephens' Ev. art. 98. The effect of the statute upon the capability of the wife as a witness for the people in a prosecution against a person for having committed adultery with her, was fully discussed in *Parsons v. People* 21 Mich. 509; but it was not found necessary to consider the present questions. I think the evidence of the plaintiff and his wife which was adduced to show non-inter-

course between them, was not admissible. Whether some items might not have gone in for some other purpose need not be considered. They were offered and allowed to disprove sexual connection between the husband and wife, and establish as a necessary alternative that the defendant begot the child.

But let it be assumed that the evidence was lawfully before the court and jury, and then I think it was destitute of all force to prove non-intercourse, and that the court should have charged the jury to that effect. It was a maxim of the Roman law, and one which the common law copied, that the presumption is always in favor of legitimacy (Co. Litt. 126*a*) and that he is the father whom the marriage indicates (Co. Litt. 123; Domat pt. 1 b. 3, t. 6, § 5; and Montesquieu, alluding to it, observed that "the wickedness of mankind makes it necessary for the laws to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself." Spirit of the Laws, B. 6, c. 17; and D'Aguesseau laid it down that "whilst the birth of children can be ascribed to a legitimate source, the law will not suppose criminality." Greenleaf says that where the husband and wife cohabit together as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity. 1 Ev. § 28. The current of authority is in favor of qualifying this statement, and instead of regarding the presumption as conclusive, to require it to apply with great force but subject to be overcome by admissible facts and circumstances of such cogency as to render belief necessary. *Morris v. Davis* 5 Cl. & Fin. 163; Wharton's Ev. §§ 1298, 1299, 1300; Best's Ev. (Wood's ed.) 426, 464, 465; Stephen's Ev. art. 98.

In the case of the *Banbury Peerage* the House of Lords dealt with the presumption and the degree of evidence necessary to overcome it, in this language: "In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual

intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child." 1 Sim. & S. 155. And in *Bury v. Phillpot*, the Master of the Rolls, afterwards Lord Cottenham, ruled that when opportunity existed for sexual intercourse within such period that the child in question might have been begotten by the husband, mere probabilities can have no weight against the legal inference: 2 Myl. & K. 349; and see *Kleinert v. Ehlers* 38 Penn. St. 439; *Dennison v. Page* 29 Penn. St. 426; *Hargrave v. Hargrave* 9 Beav. 552.

To overcome the presumption and disprove intercourse there must be cogent facts and circumstances: *Head v. Head* 1 Sim. & S. 150; *Patterson v. Gaines* 6 How. 550; in *Stegall v. Stegall* Chief Justice Marshall held that whilst it was not necessary to make out that connection was not possible, it was proper that the evidence should establish its non-occurrence beyond all reasonable doubt (2 Brock. 256); and the Supreme Court of Massachusetts applied the same rule in *Sullivan v. Kelly* 3 Allen 148. See also *Phillips v. Allen* 2 Allen 453; *Hemmenway v. Towner* supra.; *Cross v. Cross* 3 Paige 139.

Here, as already noticed, there was neither proof of inability nor of the certain want of opportunity, or even the faintest approach to a denial of the fact, and the child was born only eight months after the alleged violence. The circumstances permitted the assignment of the paternity of the child to the plaintiff without any infringement of the statements sworn to, and the court should have told the jury, as I think, that there was no legal evidence that the plaintiff was not father of the child, and that it was their duty to consider that he was. Some other matters have been referred to, but as the hearing has been *ex parte*, no one having appeared to support the judgment, it is deemed best to dispose of the case without going further.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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ALLAN SHELDEN ET AL. v. HENRY WALBRIDGE, ADMINISTRATOR ET AL.

Bill of discovery by creditors of an estate.

A bill of discovery cannot be filed in Michigan.

A court of equity cannot examine into the question of the rights of an estate against the widow or of her claims against the estate, where it has already been passed upon by commissioners on the estate and is still in litigation on an appeal.

The creditors of an estate have a legal remedy, as for money had and received, against the widow on claims held by the estate against her or for chattels wrongfully held by her; and the remedy in the probate and circuit courts for investigating the accounts and settling claims and set-offs is not only sufficient, but is imperative after the controversy has begun and the creditors have actively entered into the litigation; and where the rights are fixed there is a remedy on the probate bond.

Appeal from Clinton. Submitted June 18. Decided October 6.

BILL of discovery. Defendants appeal. Reversed; bill dismissed.

O. W. Barker for complainants.

H. & H. E. Walbridge for defendants.

CAMPBELL, J. The bill in this case is filed by complainants as creditors who have proved a claim against the estate of Lafayette Brown, deceased, which is under settlement in the probate court of Clinton county. The bill, which is

sworn to merely on information and belief, and contains no important facts verified on the merits, avers that Walbridge as administrator took possession of some chattels and collected some debts, and that decedent had a stock of goods worth about one thousand dollars, on which his widow, who is a co-defendant, claimed to hold a mortgage under which she sold the goods by Walbridge's advice, and did not prove the debt before the commissioners. Complainants claim on information and belief that she was indebted to her husband, and that he held notes of $6000 and $300 against her, which were destroyed by her with the assent of Walbridge.

The bill further claimed that Walbridge had suppressed and not filed the report of claims, amounting to over $10,000, of which complainants were allowed $808.12, and had failed to account though cited. The bill claims that the mortgage was fraudulent, and that Walbridge had been offered an indemnity to sue the widow. The bill prayed an account and an application of assets, and for the filing of the report.

It appears, however, that the report has been filed, and that claims of the widow against the estate were allowed by the commissioners, and that complainants have appealed from the allowance to the circuit court. The question of the rights of the estate against her, or of her claim against the estate, having already been passed upon by the commissioners, and still being in course of litigation on the appeal, there can be no power in a court of equity to examine into the subject. Whatever remedy exists against her is a legal remedy for money had and received or for the value of the chattels sold, in the one case, and on the notes in the other. The remedy in the probate and circuit courts, both for investigating the accounts and settling claims and set-offs, is not only sufficient, as held in *Rathbone's Estate*, ante, p. 57, but is also imperative when once the controversy has been opened. *Green v. Probate Judge* 40 Mich. 244. And complainants themselves have become active participants in that litigation. Nothing can be done in equity which could not be as well or better done in the other tribunals where the

case was already under jurisdiction. And when the rights are fixed, there is a remedy on the probate bond.

We have already decided that a bill of discovery can no longer be filed in this State. *Riopelle v. Doellner* 26 Mich. 102. This bill was not filed as such, but mainly to enforce an alleged liability which could be enforced at law, and which was already in a position to be investigated under the usual course of probate. An answer under oath was waived by complainants. We think, therefore, that the case was improperly brought, and that it was not competent to grant the decree which was entered below, but that the case belongs elsewhere. We refrain from discussing the facts, because they are beyond our reach in the present suit, and will be considered in the proper tribunal.

The decree must be reversed and the bill dismissed with costs of both courts.

The other Justices concurred.

James L. Edson et al. v. Samuel G. M. Gates and William L. Fay.

Rights of assignees of contracts—Partnership—Constructive parties to contract—Recoupment of claims under contract—Log-running.

Assignees of a contract take it subject to all the rights and equities existing between the original parties.

A joint and equal interest in an enterprise does not make the holder a partner.

Two firms orally agreed to buy and lumber certain lands, one to furnish cash and the other labor. The former, without the latter's knowledge, took the land contract in their own name, while the latter acted under their oral agreement in the belief that they were partners to the contract. *Held*, that on a settlement of mutual claims they should be treated as if they were such parties, and that their rights as such would be enforceable in equity.

Parties jointly interested with others in the purchase and lumbering of lands, sold to the others their joint interest before the undertaking

was completed, and the latter agreed to pay them certain sums at fixed times, provided these sums did not exceed the investment made by the vendors in the first purchase, the amount of which was unknown at the time of the sale. *Held*, in an action by the vendors against the purchasers, that the latter were entitled to retain what they had paid beyond their own proportion, and also what the vendors would have been liable for in the joint dealings of the two with third parties, and the purchasers continued liable for after the dissolution of their relations.

There can be no presumption that a party will hesitate in the prompt performance of a legal duty.

The cost of running the logs of outsiders which have become mingled with a drive cannot be charged against the owners of the logs constituting the original drive; the drivers must look to the owners of the intermingled logs to satisfy their claim therefor.

Error to Bay. Submitted June 18. Decided October 6.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

Wheeler & McKnight and *Hatch & Cooley* for plaintiffs in error. The assignee of a chose in action is not authorized to sue upon it in his own name unless the claim arose before notice of assignment and accrued prior to the action: *Martin v. Kuntzmuller* 37 N. Y. 396; *Houghton v. Houghton* 37 Me. 74; *Kull v. Thompson* 38 Mich. 685; *Weaver v. Rogers* 44 N. H. 112; *Henry v. Butler* 32 Conn. 140; *Ryan v. Barger* 16 Ill. 28; *Robinson v. Sufford* 57 Me. 163; *Houston v. Fellows* 27 Vt. 634; the contract in this case constituted the parties thereto partners: 3 Kent's Com. ch. 43 (3); 1 Coll. Part., § 2; *Pattison v. Blanchard* 5 N. Y. 189; *Champion v. Bostwick* 18 Wend. 175; *Green v. Beesley* 2 Bing. N. C. 108.

Holmes, Collins & Stoddard and *Benton Hanchett* for defendants in error. An assignee of a contract takes it subject to existing equities in favor of the other party: *Bush v. Lathrop* 22 N. Y. 535; the right of recoupment is not confined to damages arising before action, but may include anything for which a cross-action would lie at the time of pleading: *Platt v. Brand* 26 Mich. 173.

MARSTON, C. J. The questions raised in this case must be determined principally on a construction of the written agreements in the light of what preceded and what was done under them. The referee found that in the summer of 1876 the assignees of the plaintiffs, Amos and Gilbert Johnson, were copartners under the firm name of Johnson Bros.; that defendants were partners under the firm name of Gates & Fay; that in the summer of 1876 these two firms agreed to purchase a certain lot of pine lands then owned by Evans, Kilmaster & Co., and that Gates & Fay should negotiate such purchase; that, in the event of such purchase being made, Johnson Bros. and Gates & Fay should jointly cut and lumber the pine thereon, and should be joint owners of the logs; that Gates & Fay should advance the money necessary to make the payments on the lands, and cut, run and drive the logs to a place of manufacture or market; that Johnsons should advance certain materials and supplies to aid in the cutting; that the sum of $318.03, owing by Gates & Fay to Amos Johnson, should be transferred to the joint account of both firms and to the credit of the Johnsons. Each firm was to furnish certain teams, and the Johnsons were to personally attend to the lumbering, and their services should offset the use of the means furnished by Gates & Fay in excess of the amount furnished by the Johnsons; and that Gates & Fay should be reimbursed for the principal of such excess out of the proceeds of the business.

Gates & Fay did negotiate a purchase, and took the contract in their firm name, and Johnson Bros. did not know that their names were not in the contract until April, 1877, but until then were of the belief that they were parties thereto, and made expenditures and performed labor upon the lands in that belief. The consideration set forth in the contract for the lands was $8500. The first payment was $2125, for which Gates & Fay gave their notes at two and four months, which were paid. The balance was to be paid in one, two and three years from the date of the contract, July 31st, 1876, with interest at 7 per cent. on all sums unpaid. The vendees were restricted in the cutting of the

timber to not exceeding one-third in any one year, but might cut more on making a proportionate part of the next payment, equal to the timber cut. The contract provided how the logs should be marked, and the vendors were to have a lien thereon for payments not made when due.

In the fall of 1876 Johnson Bros. commenced lumbering upon these lands, a large quantity of logs were cut, marked and banked, and in April, 1877, Johnson Bros. commenced the work of running and driving these logs. All this was done with the full knowledge and consent of Gates & Fay, in pursuance of the oral agreement first referred to, each furnishing teams, etc., as agreed. The amount paid for such purposes need not be referred to in this statement.

There were more logs thus cut than the parties had a right to under the contract with Evans, Kilmaster & Co., without making farther payment, but the excess thus cut does not seem to have been accurately known until the summer or fall of 1877.

There were also other logs, which the Johnsons had purchased on joint account of themselves and Gates & Fay, banked with these, also marked J. G. F., the same as were those cut upon the joint lands.

On the 5th of April, 1877, Johnson Bros. by a written agreement, sold to Gates & Fay, and agreed to deliver in the main stream of the Chippewa river, "their undivided one-half interest in all the logs put in by them in said stream and its tributaries marked J. G. F., supposed to be 3,500,000 feet, more or less, according to the scale made by Ira Elliott on the bank of the said stream, said scale to be basis of settlement of this contract." The terms of payment were $1000 June 1st, 1877; $2500 September 1st, 1877; provided that these two amounts shall not exceed the investment made by the said Johnsons in the joint purchase, to them at this time unkown; the balance December 1st, 1877." It was also provided that if the boom scale showed a shortage of a certain quantity from Elliott's, then a different price per thousand was to be paid for the logs. The payments of $1000 and $2500 were made.

On November 19th, 1877, Gates & Fay agreed to pay Evans, Kilmaster & Co. $2000 on account of the excess of logs cut. In March, 1878, they accepted a draft for this amount, and paid it in May following. The Johnsons, October 19th, 1877, assigned their interest in the contract to plaintiffs, and this suit was commenced December 24th, 1877; and the commencement of suit was the first notice Gates & Fay had of the assignment.

This case must be disposed of in the same manner as though no assignment had been made, and Johnson Bros. had brought this action. The assignees take it subject to all the rights and equities existing between the original parties. The case must also be treated as though Johnson Bros. were in law and fact, as in equity they were, parties to the contract made between Gates & Fay and Evans, Kilmaster & Co. Under the facts found by the referee, there could be no question of doubt as to their rights, or the enforcement thereof, in a court of equity. The original agreement, the subsequent one for the sale of the logs, and the acts of the parties under the Evans, Kilmaster & Co. contract, in lumbering pursuant to the original agreement, all recognize the right of Johnson Bros.

On turning to the original, the oral agreement made in the summer of 1876 between Johnson Bros. and Gates & Fay, which was the basis of all that followed, and under which the lands were purchased and lumbered, we find the land was to be purchased for the two firms; that Gates & Fay were to advance money to make the payments, and cut and run the timber to market; that the services of the Johnsons in lumbering were to offset the interest which Gates & Fay otherwise would have been entitled to on such advances, over and above their share, and that Gates & Fay "*should be reimbursed for the principal of such excess out of the proceeds of the business.*" There is nothing in the finding of the referee which tends to show that this agreement in this respect was ever changed, unless it may be by the clause in the contract of the sale of Johnson Bros'. interest in the logs to Gates &

Fay, when certain payments were to be made provided they did "*not exceed the investment made by the said Johnsons in the joint purchase, to them at this time unknown.*" It is not claimed by either party that this clause does change the original agreement, while defendants claim it to be in accordance therewith. Had Johnson Bros. and Gates & Fay united on the 5th day of April, 1877, in selling all the logs then cut upon the lands jointly purchased, we think there could be no doubt but that Gates & Fay, out of the proceeds of such sale, would have been entitled to be re-imbursed for the excess of principal paid by them, or for which they were then legally obligated under their contract with Evans, Kilmaster & Co. for any excess of logs then cut.

The parties evidently intended annual cuttings, payments and settlements. If, instead of both parties uniting in a sale to third parties, Johnson Bros. sold their interest to Gates & Fay, they, Johnson Bros. had thereafter no farther interest in such logs. And if Gates & Fay were to be re-imbursed out of the proceeds, it could only, under such a state of facts, be out of the contract price they had agreed to pay for such logs. This evidently was what the parties understood when they provided that the $1000 payment of June 1st and the $2500 of September should be made, provided such amounts did not exceed the investment made by the Johnsons in the joint purchase. The wording of this proviso is somewhat peculiar, but it could only mean that those two payments should not be made unless that amount would be going to Johnson Bros. after deducting from the proceeds of their interest in the logs sold the amount advanced for them by Gates & Fay on the contracts previously made. And in this view it would make no difference whether Gates & Fay had, at the time this action was commenced, made the payments or not, if they previously were under legal obligation to pay the same, to protect their title to the logs purchased from Johnson Bros. This payment was to apply on those logs. It was because of an excess of logs cut, which formed a part of those sold, it had to be paid, and in an action brought to recover their share of the proceeds of any lot of logs, all pay-

ments made up to the time of the trial, on account thereof, should be taken into consideration. Had these logs been manufactured and sold on joint account, in an action brought to cover their share of the proceeds, sums paid by defendants after suit brought, because of defects or deficiency in the quantity of lumber sold, would enter into the computation. To test this farther, suppose Johnson Bros. and Gates & Fay had, during the first winter, stripped the lands of the timber thereon, and Johnson Bros. had thereupon sold their undivided half of the logs to Gates & Fay, who, under their contract, were obliged to pay Evans, Kilmaster & Co., and for the payment of which the logs thus cut and sold were subject to seizure by Evans, Kilmaster & Co. Could Johnson Bros. sue for and recover their contract price without deducting therefrom the sum paid subsequent to the commencement of the action for the release of such logs? We think not. All sums paid by Gates & Fay over and above their share, they would be legally and equitably entitled to have from Johnson Bros., and such sums they could retain in their hands, out of the proceeds of any of the logs cut upon such lands.

It would not be necessary, and would be but an idle ceremony, for Gates & Fay to pay over to Johnson Bros. the price of the logs purchased, and for the latter to then pay the money back as due Gates & Fay under a part of the same transaction. It would clearly have been the legal duty of Johnson Bros. to pay back money so received, and we cannot assume that they would have hesitated in the prompt performance of their duty. *Connecticut etc. Ins. Co. v. State Treasurer* 31 Mich. 6.

The referee, we think, was right in taking an account of the entire transaction thus far between these parties, and to credit Gates & Fay with all sums paid by them on the land or lumbering contracts over and above their proportion.

As to the expense of driving the logs, the finding of the referee is that third parties put into the river a large quantity of logs which became mingled with the J. G. F. logs, and were run and driven down the stream by the Johnsons with the J. G. F. logs, and that the logs of third parties constituted

about six-thirteenths of the whole drive. Six-thirteenths of the entire expense of the drive was, therefore, rejected by the referee. This was correct. There is nothing in the finding that could in any way justify a charge against Gates & Fay of any portion of the expense of driving third parties' logs. The Johnsons must look to the owners of such logs for their claim. The referee does not find that Johnson Bros. and Gates & Fay were copartners in the purchase and lumbering of these lands, nor does such a legal conclusion follow from the facts found. The fact that they were jointly and equally interested would not make them partners. We need not, therefore, attempt to determine the respective rights and remedies of copartners in such a case.

As we discover no error the judgment must be affirmed with costs.

The other Justices concurred

The Equitable Life Assurance Society of the United States v. James G. Coats et al.

Liability of sureties on insurance agent's bond.

An insurance agent's bond was made to cover all liabilities and delinquencies of the agent under his existing or any future appointment, and whether as sole agent or a joint agent with others, and notwithstanding changes in the tenor of the agreement or agreements under which he should act. *Held*, that the sureties were not bound by this for the acts of a cashier appointed by the company to assist the agent, but would be liable for such moneys as came under the control of the agent or of subordinates for whose selection he himself was answerable.

Error to Saginaw. Submitted June 18. Decided Oct. 6.

Assumpsit on bond. Plaintiff brings error. Affirmed.

Wheeler & McKnight and *Alfred Russell* for plaintiff in error.

Benton Hanchett, H. H. Hoyt and *C. H. Gage* for defendants in error.

COOLEY, J. This action was instituted against defendant Coats as principal and the other defendants as sureties upon a bond in the penal sum of ten thousand dollars, dated November 28, 1874, with the following condition:

"Whereas, the said Jas. G. Coats has been appointed by agreement, or agreements, agent of said Equitable Life Assurance Society of the United States for the State of Michigan:

Now the condition of the above obligation is such, that if the said Jas. G. Coats shall well and truly perform all the duties of his office as agent of said society, and shall faithfully account for all moneys of said society by him received, and shall promptly and faithfully account for and pay over to said society all moneys due on policies or renewals passed through the agency of said Jas. G. Coats, or return the policies or renewals in due time to said society, and shall properly preserve and deliver up, when requested, all books, papers and property of every kind belonging to said society, and shall otherwise fully do and perform all that is required by the said agreement or agreements, then this obligation shall become null and void, otherwise it shall remain in full force and virtue.

It is understood between said obligors and obligee that this bond shall continue and remain in force until another bond or bonds, approved by the president of said society, shall be substituted in its place, and shall cover all liabilities and delinquencies of the said agent or agents, to the said obligee, whether the same shall arise under this present appointment, or under any future appointment of the said obligee, whether as sole agent or as joint agent with any other person or persons. The sureties hereto hereby expressly waiving notice of any change in the terms of the agreement or agreements, appointing such agent or agents, or change of district occupied by him or them, or otherwise, and obligee being at liberty to vary the same from time to time, as may be agreed on between the said agent or agents and obligee."

Breaches were alleged on the failure of Coats to pay over moneys received as premiums on policies and renewals, the defaults beginning with the month of October, 1876. On the trial evidence was given by one Scott, superintendent of agencies for the plaintiff, that in September, 1876, deeming it necessary to have a cashier at the agency in Detroit where Coats was operating for the company, he went there and agreed with Coats upon an appointment, and on Coats' recommendation appointed William H. Harrington as such cashier; that the appointment was evidenced by an agreement signed by himself for the society, and by Harrington and Coats, the material points in which were the following:

"1st. That said Harrington, cashier, shall upon receipt of all vouchers from said society or elsewhere, make proper entry of the same upon the agency books of account, and make proper distribution of said vouchers for collection.

2d. All remittances of money received on account of collections or otherwise by said cashier shall be by him deposited in the Merchants' & Manufacturers' National Bank, Detroit, to the credit of the said Equitable Life Assurance Society.

3d. All collections made by the said Coats or received by him from subordinate agents, shall be promptly turned over and accounted for to the said cashier.

4th. All checks or drafts for the withdrawal of money from said Bank of Detroit shall be signed by the said Coats as manager, and also by the said Harrington as cashier.

5th. No funds shall be withdrawn or paid out except for the purpose of remitting the same to the said society, or in payment of commissions as the same may from time to time accrue and expenditures authorized by the said society.

6th. The reports of the monthly business shall as heretofore be rendered in the name of the said Coats, and countersigned by the said Harrington as cashier.

7th. The said cashier shall have charge of the books of account, and all vouchers, and perform all the clerical work required by the necessities of the business, and carry out instructions of said Coats, except when the same may conflict with the rules of the said society."

The society also agreed to pay Harrington a stipulated compensation for his services, and Coats relinquished a certain percentage of the commissions previously allowed him.

Scott further testified that in November, 1876, Coats applied to him and to J. W. Alexander, vice-president of the society, for a loan of $1000, from the money collected at the Detroit agency, but this was declined until the agency could be visited; that witness went to Detroit soon afterwards, where he found that Coats had already appropriated not only the $1000 he had requested the loan of, but also $1000 taken the preceding month; that witness declined to sanction these transactions and reported them to the vice-president, while Coats in his monthly statements reported them as "advances." Subsequent correspondence between Coats and the vice-president was put in evidence, from which it was plain that with much fault-finding the sums above mentioned were suffered to stand for the time as advances or loans.

The plaintiff further gave evidence that on or about March 7, 1877, an accountant of the society was sent to examine the Detroit agency, and that on the examination being made, a deficiency was discovered, in addition to the two sums standing as advances, of $2569.11. Thereupon a paper was obtained from Coats, addressed to Scott, acknowledging the deficiency as his own, stating that the sum was made up of new premiums which had accrued since January 1st preceding, asking for time to fix up the amount, and that his sureties be not notified, and making pledges of future correct conduct if he was permitted to retain his agency. In addition to this the plaintiff gave evidence tending to show that Harrington had accounted fully. On behalf of the defendants Coats testified that the letter admitting the defalcation was extorted from him by Scott, and given under a fear of losing his agency, and on the promise of Scott that he should be permitted to retain the amount of the deficiency as an advance.

There was considerable further evidence in the case, but the above is all that need be stated here. The plaintiff in the circuit court insisted that Coats and his sureties were liable for all the deficiency that was proved to exist at the agency, whether attributable to the agent or to the cashier; but the circuit judge restricted the liability to such moneys as should appear to have been collected by or paid over to

Coats, or deposited to his credit so as to come under his personal control. The jury returned a verdict for defendants.

It was not disputed that there was a deficiency at the agency, and that either Coats or Harrington was responsible for it. As the money was not distinctly traced to Coats, except by his admissions, which were retracted on the trial, the plaintiff contended that this was unnecessary, since the defendants, by their bond, had expressly made themselves responsible, not only for the conduct of Coats, but also for that of any other person who should be appointed to assist him. We find nothing in the bond which favors this view. The bond was to cover all liabilities and delinquencies of Coats under his existing or any future appointment, and whether as sole agent or joint agent with others, and notwithstanding changes in the terms of the agreement or agreements under which he should act. The appointment of a cashier, therefore, and the transfer to him of a portion of the agent's duties, would not affect the liability on the bond. But the bond contains no undertaking on the part of the sureties to hold themselves responsible for any third person whom the society might see fit to employ in their service, however closely he might be associated with Coats in his duties, or however willing or even anxious Coats might be for his appointment. The sureties undertake for Coats, but not for any unknown person or persons whom the society may deem proper to engage at the same agency, even though engaging his services may seem for the benefit and protection of the sureties as well as of the society. The sureties stand upon the exact terms of their contract.

But it is said the defendants agree to account for all moneys "due on policies and renewals passed through the agency of said Jas. G. Coats"; and Harrington was but the cashier at that agency. No doubt these words were intended to bind the defendants for the conduct of the subordinates of Coats in collecting and accounting for moneys, but we cannot suppose they contemplated anything further. For the selection of such subordinates Coats would be

responsible, and he and his sureties ought justly to undertake for their integrity and care. But when a new office was created the case was different. The incumbent of such an office might or might not be selected with Coats' assent, and his duties might or might not be prescribed to suit Coats. The wishes of Coats were consulted in this instance, and he was made a party to the instrument whereby the cashier was appointed; but this was probably because Coats was to remit some portion of his compensation; it was certainly not because Coats had a legal right to be consulted, or because he could veto any appointment the society might see fit to make, and which to him might seem unfit.

As the duties were apportioned between Coats and Harrington, it was possible for the latter to receive moneys for the society without the knowledge of Coats, and to appropriate them to his own use without depositing them. In such a case they would never come under Coats' control. It seems from the record unlikely that such was the case with the deficiency complained of, but if the plaintiff is wronged by the judgment the fault lies with the jury, not the court.

The judgment must be affirmed with costs.

The other Justices concurred.

GEORGE WESTINGHAUSEN v. THE PEOPLE.

Liquor tax law—contingent fund—"general election."

The Constitution (Art. xiv. § 14) requires every tax-law to distinctly state the tax and the object to which it should be applied, and declares that it shall not be sufficient to refer to any other law to fix such tax or object. *Held* that Act 268 of 1879 to "provide for the taxation of the business of manufacturing and selling spirituous and intoxicating, malt, brewed, or fermented liquors" and to repeal Act 228 of 1875 as amended by Act 197 of 1877, in directing the tax to be placed to the credit of the contingent fund of the township, city or village

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from which it is collected, and paid over to the proper local officer to be used for the purposes of that fund, is sufficiently specific.

The requirement that constitutional amendments must be submitted at the "next general election" after they were proposed, meant the biennial November election for State officers, until 1876 when the requirement was changed to permit submission at both Spring and Fall elections.

The Legislature can make its own definitions for statutory purposes, but cannot thereby change a constitutional definition.

Error to Saginaw. Submitted June 22. Decided October 6.

COMPLAINT under Act 268 of 1879 for selling liquor without paying the liquor tax. Respondent was convicted. Affirmed.

Tarsney, Tennant & Weadock for plaintiff in error.

Attorney-General *Otto Kirchner* for the people.

CAMPBELL, J. Plaintiff was convicted under the Liquor Law of 1879 of selling liquor without having paid the required tax.

The case comes up on two specified objections to the constitutionality of the law — *First*, that the amendment whereby the anti-license clause in the original constitution was repealed, was not lawfully submitted to the people; and *second*, that the law does not indicate the object to which the tax is to be applied.

This last point refers to article 14, § 14, of the Constitution, which declares that "Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and 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."

This section, which does not seem to have been discussed at all in the Constitutional Convention, was evidently borrowed from an amendment to the Constitution of 1835, proposed in 1842, and ratified in 1843, which provided in substance that every law creating a State debt should specify the object for which the money was to be appropriated, and be

confined to a single object, and all money raised under it should be applied to the specific object stated in the law, and to no other purpose. Sess. Laws 1842, p. 157; Sess. Laws 1843 p. 231. Its intent is manifest, to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature. Inasmuch as the Constitution in another place confines all statutes to single objects, the restriction is less important than under the old Constitution. It must receive a reasonable construction to carry out its design. The statute in question does not, we think, violate that design. The tax, it is admitted, is definite enough. It is to be received by the county treasurer of each county and placed by him to the credit of the contingent fund of the township, city or village from which it is collected, and paid over to the proper local officer to be used for the purposes of that fund. Pub. Acts 1879, p. 297.

We can see no reason why the increase of the contingent fund of a corporation is not a specific object. The Constitution certainly does not contemplate, but rather forbids, any reference to a city or village charter in terms; and it would be a gross abuse to insert in such a statute as this a copy of the multifarious purposes of a contingent fund, mentioned in any or all of the local charters at length. There is no uncertainty in a provision which names the classes of beneficiaries, and devotes the taxes to their use in a fund which is perfectly understood by every one as devoted to non-specified purposes, some of which could not be readily foreseen. If this objection is good it would be difficult to understand why a city charter allowing money to be paid into a contingent fund, would not come within similar difficulties. A nice objector might say that paying money over to a city or township for general purposes would be uncertain. We must treat these provisions sensibly, and not hypercritically; and when the purpose is named and unmistakable, and it is impossible for the Legislature to be misled concerning it, no other practical requirement can be found.

As the other objection applies to several amendments, and is of general importance, it requires a comparison of the Constitution in its various parts, and some reference to its antecedents, to determine it. The resolution proposing the amendment in question was filed in the Executive Office March 30, 1875, and provided that it should be submitted to the people "at the next general election, to be held on the first Tuesday succeeding the first Monday in November, in the year 1876." Pub. Acts 1875, p. 305. Plaintiff claims that a general election was held in April, 1875, at which this amendment should have been submitted.

By article 20 of the Constitution, relating to the subject of amendments and revisions of the Constitution, it was provided that when amendments had been agreed to in proper manner by the Legislature "the same shall be submitted to the electors at the next general election thereafter, and if a majority of electors qualified to vote for members of the Legislature, voting thereon, shall ratify and approve such amendment or amendments, the same shall become part of the Constitution."

The question presented is what is meant by the term "general election." The only way to determine this is to see whether there is anything in the Constitution itself bearing on the subject, and how far light can be had in case of doubt from other sources.

The first thing to be looked at is the provision in the schedule whereby this Constitution itself was to be submitted to a popular vote. By § 16 of the schedule it was ordered that "this Constitution shall be submitted to the people for their adoption or rejection, at the general election to be held on the first Tuesday of November, eighteen hundred and fifty; and there shall also be submitted for adoption or rejection, at the same time, the separate resolution in relation to the elective franchise; and it shall be the duty of the secretary of state, and all other officers required to give or publish any notice in regard to the said general election, to give notice, as provided by law in case of an election of

governor, that this Constitution has been duly submitted to the electors at said election." A subsequent election authorized all persons to vote on it who were qualified to vote for members of the Legislature, and for a canvas of votes as for governor. By section 2 of article 20 the amendments were made to take effect at the beginning of the next year.

The resolution which was voted on with the Constitution, referred to the "next general election" as the time of voting.

By § 34 of article 4 it was declared that "the election of senators and representatives, pursuant to the provisions of this Constitution, shall be held on the Tuesday succeeding the first Monday of November, in the year eighteen hundred and fifty-two, and on the Tuesday succeeding the first Monday of November of every second year thereafter." By article 5 the governor and lieutenant-governor were required to be elected at the same time with members of the Legislature.

By § 20 of article 6, the election of circuit judges was to be held on the first Monday of April, 1851, and every sixth year thereafter; and whenever new circuits were created, the successors of the additional judges were to be chosen "at the regular election herein provided."

By article 8 the state officers were to be chosen "at each general biennial election."

By article 11 township officers were to be elected annually on the first Monday of April. By article 13, § 6, regents of the University were to be elected in each judicial circuit "at the time of the election of the judge of such circuit." By section 9 of the same article it was provided that "there shall be elected at the general election in 1852" three members of a State board of education, "and at each succeeding biennial election" one member, to hold office for six years.

By article 15 any banking law was to be submitted at "a general election."

It will be seen from all this that under the Constitution there was only one election which was ever referred to as a general election, and that the term was used as identical with the November election, which was previously annual, and thereby made biennial. That was the only election held sim-

ultaneously throughout all the State for officers to represent the whole State. At that election the governor and all the State officers throughout all the State, and the senators and representatives in the State Legislature, except in the Upper Peninsula, were chosen. The only other elections referred to were the annual town meetings, and the sexennial circuit elections for circuit judges and regents, in which the Upper Peninsula was separated from the rest of the State for judicial purposes, and attached to Wayne county for the election of a regent for the third circuit. It is also worthy of remark that under the old Constitution (article 13) amendments might be submitted to vote at any time and in any manner determined by the Legislature. The change, therefore, cannot be regarded as accidental or without meaning, and the general election contemplated was regarded as important. And it appears from the Convention Debates not only that an attempt was made to leave the time and manner of voting for the Legislature to fix, but also that it was understood no amendment could be voted on under the Constitution as it stands except at the November election to be held biennially. Convention Debates, 466, 467. No amendment of the Constitution has been made which denominates any other election in the same way. We have no means of knowing what were the reasons which led the several members of the Constitutional Convention to prefer a submission at the fall election. It may be presumed it was an idea, which facts have always warranted, that more votes are cast at that election than at other times. And when the Constitution went into operation there was no other election held annually or biennially in all of the cities.

It is hardly necessary to say that subsequent legislation could not change the meaning or effect of any part of the Constitution. That instrument can only be changed by the combined action of the Legislature and the people. If the Legislature could, by merely calling things by particular names, alter constitutional provisions, it would be quite unnecessary to consult the people on the subject of amendments. The only foundation for any notion that the spring elections

can serve the purpose of the general election mentioned in the Constitution is that in organizing the present Supreme Court in 1857 the statute declared that a "general election" should be held on the first Monday in April every second year for the election of judges. Sess. Laws 1857, p. 390. Of course, the Legislature can make their own definitions for statutory purposes, but this would not change the constitutional definition, or make it apply to any election not within the constitutional contemplation.

It is also important to consider that while under the Constitution of 1835 the Legislature could appoint elections to be held at any time to vote on amendments, which in a certain sense would be general in the same way with the judicial election under the law of 1857, yet the statutes always distinguished the general election in the fall from all the rest. In the chapter on construction of statutes, found in the Revision of 1838, it is declared that the words "general election" shall be construed to mean the election in November. Rev. Stat. 1838, p. 3. The same idea is expressed in the Revision of 1846, which was in force when the Constitution of 1850 was adopted. Rev. Stat. 1846, p. 37. The Legislature of 1851, whose duty it was made to adapt the laws to the new Constitution, passed two separate laws on elections. The first (Sess. Laws 1851, p. 20) is entitled "An act to provide for the election of circuit judges and regents of the University," and provides for the canvassing of the votes by the State canvassers, as well as for the general and special methods of election. The second (p. 281) is entitled "An act to provide for holding general and special elections," and covers the whole subject of elections. In that act the November election is spoken of throughout as the general election, and vacancies in the offices of circuit judge and regents as well as others were to be filled at that election, and since 1857 it has been amended so as to include vacancies in the Supreme Court. Pub. Acts 1875, p. 22.

The first amendments adopted under the Constitution of 1850 were adopted by the Legislature of 1859, two years after the statute of 1857. Sess. Laws 1859, pp. 1100, 1102,

1105. All of these were expressly required to be submitted to vote at the next general biennial election, which was not held till 1860, and all of them were then ratified by popular vote, and have since been regarded and acted on as part of the Constitution. A question arose in the Legislature of 1859 whether the election for Supreme Court judges was not the next general election. The opinion of Mr. Howard, as attorney-general, was asked, and he reported his views at length, holding that the November election was the only one at which amendments could be voted on. House Journal 1859, p. 123. After a full consideration of the matter, this view was accepted as correct, and all the amendments which have since been acted on have been submitted in the same way, until in 1875 the Legislature adopted and submitted for action in 1876, when it was ratified, a change which allowed submission to the people either in the spring or fall, as should be determined. Pub. Acts 1875, p. 310. In the meantime amendments have been proposed and voted on continuously upon the construction put upon the Constitution in 1859. See Sess. Laws 1861, pp. 588, 589, 590, 591; Sess. Laws 1865, pp. 779, 794; Sess. Laws 1869, pp. 424, 425, 426, 427, 428, 431; Sess. Laws 1870, p. 13; Sess. Laws 1871, pp. 398, 404; Sess Laws 1874, pp. 11–35.

Many of these amendments have been confirmed and legislation has been had under them, and no one has hitherto doubted their validity.

We think the language of article 20 of the Constitution, taken with all the various other provisions which refer to general elections, very plainly refers to the fall election, and that the practical construction put upon it is correct and binding.

We therefore are of opinion that the amendment of 1875 was properly submitted and became a part of the Constitution by the vote of the people in 1876.

The judgment of conviction must be affirmed.

The other Justices concurred.

East Saginaw v. Saginaw County Treasurer.

William M. Green, relator v. Bay County Treasurer.

Mandamus to account for liquor taxes.

Mandamus lies to compel a county treasurer to pay over to the proper local officers the amount of liquor taxes to which they are entitled by the law.

Mandamus. Submitted June 22. Granted Oct. 6.

O. F. Wisner and *T. F. Shepard* for relators.

Campbell, J. In each of these cases the county treasurer holds and refuses to pay over to relator money received under protest from parties paying taxes under the Liquor Law of 1879, and the ground of protest in each case is the supposed invalidity of the constitutional amendment of 1875, removing the prohibition against licenses.

These causes were submitted with that of *Westinghausen v. People*, ante p. 265, in which we have determined that the amendment was lawfully submitted and adopted, and has become a part of the Constitution. It follows that the money in each case is lawfully in the treasurer's hands, and that he cannot withhold it from the municipalities, on whose behalf these applications are made.

A mandamus must issue in each case, but without costs, although we think the course of the officer in withholding the money is not proper.

The other Justices concurred.

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JOSEPHUS M. ROBERTSON, RELATOR v. COMMISSIONER OF STATE LAND OFFICE.

Certificate of purchase of State swamp lands—Taxation.

The interest acquired under a certificate of purchase of State swamp lands is part of the purchaser's individual property, and is subject to the State's taxing power.

No property is beyond the reach of the taxing power of the State unless designedly put beyond it by an unequivocal act of the sovereign power.

The mere omission to exercise the taxing power in particular instances does not establish an exemption therefrom, but is a mere favor which may be recalled at any time without violating the public faith.

The tax laws of Michigan contemplate that the interest held by a purchaser of primary school or swamp lands shall be assessed as personalty, but that the assessment is to be separate from the general valuation of his personal property and must be made in the township where the land lies, irrespective of the owner's residence, and that if the tax cannot be collected by the customary process, his interest in the land shall be forfeited to the State.

A contract made by the State cannot be altered by the State except with the consent of the other party; but the State as a sovereign may subject the interest acquired thereby to the taxing and police power, but only as it might so subject to these powers the interest in any contract between individuals.

The State has power to provide methods for collecting its revenues, and so long as they are general and impartial the courts will not be disposed to limit the exercise of the power merely because they seem harsh, unreasonable and arbitrary.

A purchaser of State swamp lands bought when the conditions entitling him to a deed were that he should pay one-fourth down, and the rest with interest, at any time thereafter. A subsequent statute added the condition to such sales that the taxes should also be paid. The purchaser afterward assigned his certificates of purchase, and the assignee, after paying the rest of the purchase price and the interest, demanded from the Commissioner of the Land Office a certificate entitling him to his deed. The commissioner refused because the taxes had not been paid. Mandamus was granted to compel him to issue the certificate, but it was also *held* that the State did not release any tax lien on the land by giving a deed, and that this would not govern a case where the certificate of purchase had been issued after the passage of the statute.

MANDAMUS. Submitted June 22. Granted Oct. 6.

W. A. Underwood for relator. The contracts of States cannot be impaired by legislation: *Fletcher v. Peck* 6 Cr. 133; Cooley's Const. Lim. 275; a law may amount to a proposition on the part of a State, which if accepted by individuals will become a binding contract: Id. 284–5; *People v. State Auditors* 9 Mich. 327.

Attorney-General *Otto Kirchner* for the people.

COOLEY, J. The relator is assignee of Addison P. Cook in the ownership of certain certificates of purchase of State swamp lands in the county of Lenawee, which were issued in the year 1853, and by the terms of which said Cook was to pay one-fourth the purchase price down, and the balance, with interest, at any time thereafter, at the option of the purchaser. The one-fourth was paid when the certificates were issued, and the remainder June 10, 1879. The certificates were assigned to the relator in 1878, and the final payments were made by him. At that time he demanded of the respondent a certificate that the whole of the principal and interest had been paid, and that he was entitled to a deed from the State; but the commissioner refused to give one, because the taxes levied in respect to said land from the time of their purchase remained unpaid, but offered to give one when payment was made. The only question the record presents is whether the land commissioner was entitled by law to require the payment of taxes as a condition precedent to the issue of the certificate demanded of him.

I. In 1853, when the lands were sold by the State, there was no provision of law for the taxation of State lands which had been sold and partly paid for but not conveyed. It is, therefore, claimed that it was not competent for the State to tax such lands; that the sale was a contract between the State and the purchaser that the lands should be conveyed to him on the sole condition of the purchase price being paid; and that any provision of statute imposing the new condition

that taxes should be first paid, was a provision impairing the obligation of contracts and therefore void.

It is to be observed, however, that the certificate of sale by the State contains no stipulation or promise that the land, or the interest of the purchaser therein, shall not be taxed. Neither does the land under which the certificate was issued contain or imply such a promise; it is merely silent on the subject. But the interest acquired by the purchaser becomes thereby a part of the individual property of the purchaser, and is as much subject to the taxing power of the State as any other item of individual property within its limits. No property is beyond the reach of that power unless put beyond it designedly and by an unequivocal act of the sovereign power. *Christ Church v. Philadelphia* 24 How. 302; *Gilman v. Sheboygan* 2 Black 513. Merely refraining from the exercise of the power, though it may raise well-founded expectations that the exemption will be permanent, is not sufficient; for this is a mere favor which may be recalled at any time without any violation of the public faith. *East Saginaw etc. Co. v. East Saginaw* 19 Mich. 259; s. c. in error 13 Wall. 373. And if the revenue law in force at the time is not sufficient to reach the case, it may be made so whenever the State shall choose. The power is undoubted and is ample.

II. Is the legislation which has been passed for the taxing of these lands sufficient to accomplish the purpose?

Provisions for this purpose were introduced in the general tax law of 1853. The eleventh section of that act provided that "Any person holding a certificate of purchase of university or primary school lands, or occupying the same, shall be liable to be assessed therefor as if he were the actual owner thereof: *Provided, however*, that the same shall be assessed as personal property, and not as real estate, and the tax thereon shall be collected in the manner hereinafter prescribed." Comp. L. 1857, § 792. This section was extended so as to include swamp lands in 1858. Sess. Laws 1858, p. 193.

Making these interests taxable as personal property brings some incongruities into the law, for the State apparently con-

templates that each tax payer personally assessed shall be charged at the place of his residence with one aggregate sum which shall be collected of his goods and chattels. Comp. L. 1857, §§ 802, 821, 822. If such interests were taxed under these general provisions, they could only be taxed where the owner resided, and the general valuation of his personalty in one gross sum must be held presumptively to include them. But the subsequent provisions of the tax law of 1853 show that this was not the method in the legislative mind.

The supervisor of any township in which such an interest might be assessed was required, on or before the first day of November, to transmit to the county treasurer a list of the lands with the names of the persons to whom the same were assessed. The county treasurer was to return a like list to the Auditor-General when the taxes failed of collection, and the purchaser must, under pain of forfeiting his interest in such lands and in the certificate of sale thereof, within the time in which the annual interest was required to be paid on the purchase money, pay to the State Treasurer the amount of the taxes, with fifteen per centum interest, from the first day of February, and twenty-five cents for expenses. The lands forfeited were then subject to sale in the same manner that other forfeited and unsold university and primary school lands are. Comp. L. 1857, §§ 935–939.

Taking these sections together they evidently contemplate that though the interests of the purchasers of part-paid State lands are to be assessed as personalty, yet that the assessment is to be made separate from the general valuation of personal property, and in the township where the land shall lie, irrespective of the owner's residence; and that failing to collect from the owner by the customary process, his interest in the land is to be forfeited to the State. There is nothing to preclude the State from providing for the taxation of tangible personalty of any description in this method, if it shall be deemed advisable; and as no defect in the law was pointed out on the argument, we assume that it was sufficient for the assessment and taxation of these lands. Whether the method provided for the collection of the taxes

was a competent and suitable one, will be referred to hereafter.

The fact, however, that peculiar provisions were made for the assessment of these interests has been sufficient to bring confusion into the tax rolls; for we find by reference to these that from the year 1862 to 1877, both inclusive, the assessment was made of the interests as personalty in three years only, and that only in one year, and then only as to the interest under one certificate, was the assessment made to any one as the owner. In other words, the law prescribing the methods of assessment has in most instances been disregarded, so far as relates to the classification of the property, and in every instance has been disregarded in some particulars. Whether the failure to follow the law shall be held fatal to the tax, or whether the provisions not obeyed shall be treated as directory merely, are interesting and important questions, but we are of opinion they do not arise in this case.

III. The State in respect to these lands has been acting in two distinct and quite dissimilar capacities; that is to say, as proprietor in selling them, and as sovereign in taxing them. In the first capacity it treats with a purchaser precisely as any other proprietor might, offering, agreeing upon and accepting terms, and entering into stipulations from which it is not at liberty to depart, and to which it cannot add in the smallest particular except with the assent of the person with whom it is dealing. *New Jersey v. Wilson* 7 Cranch 164; *Piqua Branch Bk. v. Knoof* 16 How. 369. The contract it makes must stand, and the other contracting party is entitled to all suitable remedies upon it. The State as a sovereign cannot deal with it otherwise than as it might with a contract between two private citizens. But the State as a sovereign may subject the interest acquired by the contract to the taxing power and the police power, precisely as it might the interest acquired under any contract between two individuals, and not otherwise.

Now by the original contract of purchase issued under and construed by the statute in force at the time, the purchaser had the assurance of a deed from the State when the pur-

chase price with interest was paid. The subsequent law declares that he shall have this deed only on his presenting a certificate from the commissioner of the State land office showing not only that the purchase price with interest has been paid, but also the taxes, charges and interest levied upon the land. Comp. L. 1871, §§ 3824, 3952. This requirement, it is said, is merely a proceeding for the collection of the tax, and as every sovereignty must select its own means for the collection of its revenues, the method of compelling payment by withholding a deed, is said to be as legitimate as any other.

It must no doubt be admitted that the State may provide modes for collecting its revenues that will seem harsh, unreasonable and arbitrary. Some such are to be found in the laws of Congress, as well as in the legislation of the States. The judiciary would not venture to indicate limits to the power of the sovereign in this regard, so long as its laws were general and impartial. *Sears v. Cottrell* 5 Mich. 251; *Cowles v. Brittain* 2 Hawks 204; *State v. Allen* 2 McCord 55; *McGregor v. Montgomery* 4 Penn. St. 237; *Henry v. Horstick* 9 Watts 412. But there must be many things which are inadmissible, because in their very nature they are arbitrary, and partake of tyranny. Would it be competent, for example, to provide by law that while one's taxes remained unpaid he should not be suffered to purchase provisions in the open market? No one, we think, would pretend this. But if this might not be done, how could a law be defended that should forbid one's cultivating his land, or entering into the possession of it until his tax was paid, or that should require him to furnish a tax receipt to his debtor before the latter should pay him, or to the vender of lands before the latter should perform his contract by conveying to him? In either case the delinquent tax payer is in some one or more important particulars put out of the protection of the laws.

We raise no question here of the right of the State to impose, as a condition to the use of its process, the payment of the tax levied in respect of such process. *Harrison*

v. Willis 7 Heisk. 35. The case before us is not one of that sort. It is a case in which the State declares that one party to a contract shall not perform it until the other presents evidence that he has paid his taxes. True the party restrained is the State itself, but that can make no difference. What it can do in respect to the State contracts, it can do with equal competency in respect to any other. The State as sovereign cannot take to itself additional powers or privileges or exemptions as a contractor beyond those to which it was entitled under the contract as given.

We are for the reasons stated clearly of opinion that the State could not impose the condition which it now relies upon. The purchaser or his assignee is therefore entitled to his deed. But the State does not release any tax lien by giving the deed, and there can be no objection to the deed containing a recital to that effect if the State authorities shall deem it prudent to insert one.

Nothing in this opinion must be understood as authority for a case in which the certificate was issued after the act for taxing these interests and forfeiting them for the non-payment of the taxes was passed.

The writ of mandamus must issue.

The other Justices concurred.

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111	333
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115	70
44	280
152	424

JACOB REITHMILLER v. THE PEOPLE.

Construction of statutes—"Legal holidays"—Liquor tax-law.

Acts relating to the same subject and *in pari materia* are to be construed together, and, as the title of an act must express its purpose, the act may be construed in the light of its title if they are not incompatible.

Christmas is a "legal holiday" within the meaning of Act 267 of 1879 which directs saloons to be closed on legal holidays, Sundays and election days.

Payment of a liquor tax for the coming year does not exempt the dealer from the operation of a subsequent law passed during the year forbidding the sale of liquor on specified days.

The enactment of a statute taxing the liquor traffic does not prevent the State, in the exercise of its sovereign powers of taxation and police, from passing farther laws affecting the traffic.

The sovereign powers of taxation and police may constitutionally be combined in the same statute.

The wisdom or policy of a statute is not a question for the courts so long as it is valid.

Error to Jackson. Submitted June 22. Decided October 6.

COMPLAINT under Act 267 of 1879 for selling liquors on a legal holiday. Respondent was convicted. Affirmed.

Frank Hewlett and *Gibson & Parkinson* for plaintiff in error.

Attorney-General *Otto Kirchner* for the people.

GRAVES, J. The defendant having sold liquor on Christmas, the 25th of December of last year, was prosecuted for it as for an illegal sale, it being alleged that the day was a legal holiday on which such sales are forbidden. The jury having brought him in guilty under the charge given by the court, he alleged exceptions. The first is that Christmas is not a "legal holiday" within the meaning of the statute. Pub. Acts 1879, act 267, p. 289.

No one doubts the ability of the Legislature to privilege a small number of designated days from such activities as are not essentially needful thereon, and in particular from traffic in spirituous and intoxicating liquors, and it must be admitted that by the act of 1879, just cited, they meant to apply this rule not only to Sundays and election days but to certain other days as well under the appellation of "legal holidays." Was Christmas day intended to be included in this expression? The counsel for defendant answer in the negative, and the reason advanced is that the statute nowhere in terms makes Christmas a legal holiday, but simply declares that for

certain purposes it shall be treated as the first day of the week.

It is true that the statute does not enact in so many words that any specific day shall be a holiday. But that is not important. The past and present provisions concerning privileged days, including this act of 1879, are to our present purpose *in pari materia*, and are to be considered together, and the identical days contemplated by the Legislature may be ascertained by such examination.

The first act for investing other days than Sunday with an exceptional character was passed in 1859. Sess. Laws 1859, p. 149. It was entitled "An act to designate the holidays to be observed in the acceptance and payment of bills of exchange and promissory notes, and in the holding of courts;" and it provided that "the first of January, commonly called New Year's day, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day, and any day appointed or recommended by the governor of this State, or the president of the United States, as a day of fasting and prayer, or thanksgiving, shall for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the passage of this act, also for the holding of courts, be treated and considered as is the first day of the week, commonly called Sunday." In 1865 the Legislature passed a new act covering the same subject, but containing a provision for keeping alive and postponing legal proceedings coming up on any such day, and the title was the same as that of the former statute, except an addition expressing the object of the proviso. Sess. Laws 1865, p. 213. In 1875 this statute was enlarged and qualified in certain respects. The list of days was increased by the addition of "the twenty-second day of February, commonly called Washington's birthday," and the "thirtieth day of May, commonly called Decoration day." Provision was made also to guard against any inconvenience which might otherwise happen from the fall on any such day of the time appointed by a circuit judge

for the beginning of a term. There was likewise a regulation to save proceedings taken "on any such holiday other than Sunday" to fix the liability of parties to commercial paper, from the invalidating operation of the statute, in certain cases.

But the remaining amendment is worthy of some notice in connection with the present question. It provides that in case "any of the holidays shall fall upon a Sunday, then the following Monday shall be considered as the said holiday." The title expressed the object as being to amend the act of 1865, and described that act by its own title, and the enacting clause also specified the former act in the same way. The only provision of the act of 1879 expedient to quote, is the following: "All saloons, restaurants, bars in taverns or elsewhere, and all other places where malt, spirituous or intoxicating liquors are sold, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday, election days, or legal holidays, and no malt, spirituous or intoxicating liquors shall be sold or given away in any such place at any time during such days." The exception in favor of persons whose principal business is dealing in drugs and medicines requires no notice.

It is impossible to avoid seeing the exact sense that the Legislature, in passing this statute of 1879, attached to the expression "legal holidays." It was constitutionally necessary that the title of the provisions should express the object, and there being no question of incompatibility, it is matter of plain reason to use all the light obtainable from both to fix the construction. It is therefore material to observe that the same days which the title of the act signifies under the collective name of "holidays," are, in the body of the act, separately and specifically pointed out. On reading together the two parts of the statute, we find in one a complete enumeration of the particulars included under the general term used in the other. What days are meant by the word "holidays" is shown explicitly. The Legislature applied it to the group described in order to distinguish them from such others as particular sects and classes might voluntarily

observe as holidays, and to impart to them, under the name of "holidays" or "legal holidays," a somewhat special character. As we have seen, the 25th of December is one of the category.

A further consideration may be added. The argument for the defendant proves too much. Were Christmas day to be excluded on the ground contended for, it would follow unavoidably that nothing could be retained to answer to the call for "legal holidays." The ground taken for excluding Christmas would, according to the necessary meaning of the context, equally exclude all other days possibly capable of being classed under the head of "legal holidays," and leave nothing whatever for that phrase to apply to. The construction would have the unavoidable effect of nullifying a part of the statute which seems to have been deemed very important and to have received the serious attention of the Legislature, and no one will strenuously contend for an interpretation involving such consequences.

The remaining exception is somewhat obscure, but if rightly understood it is in substance that the defendant having paid his tax for the current year, under the statute of 1877, and complied with all the requirements of that act before the statute of 1879 became operative, he acquired a vested right to sell under the conditions of the former law, and hence at whatever times that law did not forbid, of which Christmas was one; and that it was not within the power of the Legislature to prevent his making sales on that day in the year in question.

It is not needful to object, what is in fact the case, that the record authorizes no assumption that the defendant performed any act or paid anything under the statute of 1877. Let it be admitted that he held all the rights of one who, as a seller of liquor at a saloon, had paid the tax called for by the act, and had kept all the requirements of law preceding the enactment of 1879, and still the claim set up is fallacious. The Legislature considered the business as one proper to be taxed and at the same time to be regulated, and it legislated accordingly. The sovereign powers of taxation and of police

were mutually exerted. They are State powers, residing together and capable of harmonious employment to effect the ends of good government. Where the object will admit the co-operation of their energies without multifariousness, there is no objection. Even a single measure may be indebted to both without infringing the Constitution. The Legislature abdicated no part of its authority by the legislation of 1877. It did not disable itself from doing what it might subsequently deem wise. It entered into no engagement to abstain from further or other taxation, or from other regulations more or less rigorous. The body convened in 1879 had the same ability as its predecessor of 1877 to exert its judgment through legislation concerning public interests, and the general safety and morals; and the defendant's calling was not superior, any more than that of others, to the exercise of that ability. He carried on his business subject to the authority and duty of the Legislature to adopt the best measures which its wisdom could devise to protect the lives, health and property of the citizens, and maintain good order, and preserve the public morals.

The act of 1879 is to be regarded as a measure so devised and adopted. Whether, intrinsically considered, it was the wisest possible or the best attainable is not a question for the court.

For discussions having a bearing, see *People v. Hawley* 3 Mich. 330; *Langley v. Ergensinger* id. 314; *People v. Gallagher* 4 Mich. 244; *Youngblood v. Sexton* 32 Mich. 406; *East Saginaw Manuf'g Co. v. City of East Saginaw* 19 Mich. 259; s. c. 13 Wall. 373; *Beer Co. v. Massachusetts* 97 U. S. 25; *Bartemeyer v. Iowa* 18 Wall. 129; *Bertholf v. O'Reilly* 74 N. Y. 509.

The exceptions are overruled, and the court is advised to proceed to judgment.

The other Justices concurred.

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JAMES MCGUIRE v. THE PEOPLE.

Robbery—Testimony of children—Reasonable doubt.

A child between six and seven years old may be properly examined as a witness to sustain a prosecution for robbery, if the trial judge fully satisfies himself that the child is conscious of the duty of speaking the truth, and if the jury is properly cautioned concerning his statements.

A young child testifying as to the identity of a person accused of robbing the child's father was asked on cross-examination if his father had not told him the prisoner was the man, and answered in the affirmative. *Held*, that it was not improper in examining the child's father to allow him to deny this. It was not an attempt to impeach the child's testimony, as it did not refer to contradictory statements out of court, and it was competent to show facts making it unlikely that he had made his conclusion of identity from improper *data*; and the credibility of the witness was for the jury.

The effect of excluding testimony bears on the question whether it is admissible.

Where a witness, not familiar with the full bearing of questions put to him, gives answers that seem ambiguous, or raise suspicions of collusion, it is not improper to show what the facts are.

In a prosecution for robbery the recognition of the assailant is a circumstance bearing on the merits, and is not a mere collateral matter.

On a trial for robbery a fellow-prisoner of the accused testified to an account of it given by the latter, and named other prisoners who were present. One of these was asked as to conversations with the accused in the presence of the witness, but the questions were ruled out as not referring to the particular conversation. He was at length allowed to answer that he heard a statement by the accused in the witness' presence, and counsel for the respondent dropped the inquiry at that point, although no adverse ruling had been made. *Held*, that as no one understood there was any objection to testimony which would contradict the witness or explain what he referred to, there was no error in the previous rulings, which were not meant to exclude proper questions.

A reasonable doubt is not far-fetched, speculative or arbitrary, but is such that after looking over the testimony and considering all the facts proven to their satisfaction and the natural circumstances surrounding the facts, the jury are still unable to say that the accused is guilty.

Error to Superior Court of Grand Rapids. Submitted June 22. Decided October 6.

INFORMATION for robbery. Conviction affirmed.

McBride & Carroll and *E. S. Eggleston* for plaintiff in error.

Attorney-General *Otto Kirchner* for the people.

CAMPBELL, J. McGuire was convicted before the Superior Court of Grand Rapids of robbery, while armed with a dangerous weapon, committed on one Albertus Meyer. Meyer testified positively to the robbery on the night of November 17, 1879, while he was walking home with his little boy. He was approached from behind, gagged and thrown down, and his money stolen. He could not recognize the two men who robbed him before they ran out of sight, but the boy recognized McGuire and identified him. The most important evidence, therefore, was that of the child, who was a few months over six years old.

An exception was taken to the examination of this boy, on account of his extreme youth, and the judge who tried the cause had some hesitation about it. He, however, took the lad into his own room and had a long conference with him, in addition to what appeared in court, and he finally came to the conclusion that the child was sufficiently conscious of the duty of speaking the truth that he might be received as a witness, subject to such cautions to the jury as were proper concerning his statements.

We held in *Washburn v. People* 10 Mich. 372, that the reception of such testimony was permissible where the judge was satisfied. We think that in the present case the course taken was such as to justify the judge in doing as he did. The boy was the only witness who could recognize the prisoner, and it was therefore important to receive him if there was any sound reason to believe he could give reliable information. There is of course some danger that a child of tender years may be influenced to tell what is not true. But the

inability of such an inexperienced boy to keep up a consistent false story through the various questionings of a trial is a pretty safe guard against any great danger on that head. He is far more likely to answer wrongly from not fully understanding questions put to him, than from deliberate falsehood. His method of telling his story here was simple and childlike, and, so far as we can tell from a paper description of it, was candid and honest. At any rate the jury must have thought so, and we are not surprised that they did. The judge cautioned the jury fully and clearly on the necessity of sifting his testimony very thoroughly. He could not well have been more explicit. We cannot think the danger of receiving such a witness is any greater than that of rejecting him.

On the cross-examination, in answer to some questions concerning his recognition of the respondent at the police station, he was asked whether his father had not told him respondent was the man, and he answered in the affirmative to this and one or two similar questions about the recognition. And while the questions were not quite broad enough to exclude any other knowledge, they had with the answers a bearing on the fact of his knowledge. When the father was examined as a witness he was asked if he had ever told the boy respondent was the man who assaulted him, and allowed to answer, and replied in the negative. This is also assigned as error.

We do not think this was improper. It was in no sense an attempt to impeach the lad, for it did not refer to any contradictory statements out of court. It seems to us competent evidence to show facts making it unlikely that the boy had made a conclusion of identity from any but proper *data*. The whole facts were before the jury. If they thought he had intentionally stated what was not true as to his source of knowledge, or if they thought the father had prompted him and then denied his own action, they had seen both when testifying and could judge accordingly. They evidently concluded that the cross-examination did not bring to the child's attention the point whether his recognition was spontaneous

or only the result of prompting from his father. Perhaps one of the best means of judging whether testimony is proper is to consider what would happen from its exclusion; and we think that where a child or a person not familiar with the full bearing of such questions as are put to him makes answers that appear ambiguous, or that raise suspicions of collusion, it is not improper to show what the facts are. It must be borne in mind that the recognition of the assailant is in itself a circumstance bearing on the merits, and not a mere collateral matter.

A witness Britton, who was confined in jail at the same time with McGuire, testified to an account given by the latter of the robbery, and on cross-examination gave the names of several persons who were in prison at the time, and among others a man with red whiskers, who is claimed to have been one James Carson. Several questions put to Carson concerning conversations with McGuire in Britton's presence were rejected as not referring to this particular conversation. We have some doubt whether some of these rulings may not have gone too far. But finally he was allowed to answer that he heard a statement made by McGuire in Britton's presence, and respondent's counsel, without any ruling against it, dropped the inquiry without pursuing it further. We are satisfied that no one understood there was any objection to testimony which would contradict Britton, or explain what he referred to, and that respondents' counsel, when the door was fairly opened to the inquiry, chose to leave it as it was. There was therefore no error by reason of the previous rulings, which we think were not meant to shut out proper questions. We see no pertinence in the inquiry concerning the previous reading of newspapers referring to the robbery.

We think the court charged as fully and carefully on the weight to be given to the child's testimony and the caution to be used in acting upon it as was necessary, and that nothing important was omitted that did not come within the general instructions. What was said about the prisoner's statement left its whole effect to the jury. We are not informed what it was, and cannot assume it required different treatment. We

are unable to say that the jury would have been made any wiser by any other instruction concerning reasonable doubt.* If they understood English they could get little aid from any closer definition.

We discover no error, and the court below should be advised to proceed to sentence on the verdict.

The other Justices concurred.

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44 290
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The People v. Hugh Cline and Erwin W. Ellis.

False pretenses—Bill of exceptions—Handwriting—Identity of names—Prosecutor disqualified by relationship to complaining witness.

An information for obtaining property by false pretenses concerning a mortgage assigned to the defrauded party is sufficient if it alleges in effect that the mortgage was assigned to him directly, that the false representations were made to induce him to purchase it, and that in reliance upon the statements and representations made he did purchase it and parted with his property thereafter.

Where the evidence is not made part of the bill of exceptions, but is merely printed with it, the Supreme Court will not examine it to ascertain the facts.

Where the bill of exceptions does not purport to set forth all the evidence, it must be assumed that there was enough to warrant the conclusion of the court.

One is not guilty of obtaining property by false pretenses by merely being present when it is received and taking part of it, even if he had then full knowledge of the representations made to obtain it.

In a prosecution for obtaining property by the assignment of a fabricated mortgage and accompanying note, proof by comparison of hand-

*The court charged with regard to "reasonable doubt" as follows: "The expression itself seems to comprehend the whole subject matter. *Reasonable* doubt, of course—that is, not a far fetched one; it is not a speculative one; it is not an arbitrary one; but it is just what it assumes to be, a reasonable doubt. If you, after looking over the testimony, and considering all the facts proven to your satisfaction in the case, and the natural circumstances that surround those facts—if you are still unable to say that the prisoner is guilty, it is your duty to acquit. And that, we apprehend, is what is understood by a reasonable doubt in the law."

writings that the signature to the assignment and the indorsements on the note were in the same handwriting as the body of the mortgage, and that the signatures were forged, is not sufficient to connect the respondent with the offense if it is not also shown as a basis for the comparison that the handwriting in any paper is actually his.

An information for obtaining property by using a fabricated mortgage alleged the false representation that the pretended mortgager lived somewhere in a particular quarter of the State. *Held* that evidence that a person of that name had lived in another part of the State and was dead was not enough to establish the fabrication of the mortgage, especially if it was not shown that the pretended mortgager had not signed it, or that a person of that name had been represented as owner and as the person who had signed.

Identity of common names and of residence in cities or long settled localities is not enough to establish identity of persons where the personal liberty of others depends on the fact.

A prosecuting attorney is disqualified from prosecuting for obtaining money by false pretenses where the complaining witness is his brother, and a firm to which he himself belongs is affected by the transaction.

Exceptions from Huron. Submitted June 22. Decided October 6.

FALSE PRETENSES. Information against Hugh Cline and Erwin W. Ellis, otherwise known as James H. Warner, charging that they "on the 2d day of August, A. D. 1879, at the township of Port Austin in the county of Huron aforesaid, unlawfully, knowingly and designedly, did, with intent to defraud and cheat Thomas Winsor and Mark Carrington, feloniously, knowingly, falsely, designedly and deceitfully, represent, assert, and pretend to Thomas Winsor and Mark Carrington, who then composed the firm of Thomas Winsor & Company, that certain paper writings which the said Hugh Cline and Erwin W. Ellis * * then and there produced and delivered to said Thomas Winsor and Mark Carrington purporting to be a mortgage and accompanying promissory note made by Strother M. Beeson on the 6th day of June, A. D. 1879, on all the piece or parcel of land situate in the township of Rubicon, county of Huron and State of Michigan, known and described as follows [description] for the payment to the order of James H. Warner of the sum

of three hundred and fifty dollars, two years after the date thereof, with ten per cent. interest per annum until paid, said paper writing purporting to be a mortgage as aforesaid, then and there further purporting to have been signed, sealed and delivered, in the presence of John Watson and Cyrus Z. Jackson, as witnesses, and that the execution thereof was acknowledged by Strother M. Beeson, before John P. Stillwell, as a Justice of the Peace in and for said county of Huron, was a genuine and valid mortgage and note duly signed, sealed, executed and acknowledged by Strother M. Beeson. That they, the said Hugh Cline and Erwin W. Ellis, otherwise known as James H. Warner, knew and were acquainted with Strother M. Beeson, that he signed said paper writings, purporting to be a mortgage and note, and that he, the said Strother M. Beeson, then lived in the central part of this State, and that they, the said Hugh Cline, and Erwin W. Ellis, otherwise known as James H. Warner, knew that Strother M. Beeson signed said paper writing, purporting to be a mortgage, and that he was the owner of the land therein described at the time of the execution thereof. That they, the said Hugh Cline, and Erwin W. Ellis, otherwise known as James H. Warner, had had an assignment of said paper writing, purporting to be a mortgage, executed by the said James H. Warner, at White Rock, in the county of Huron, aforesaid, before Charles S. McKee, a Notary Public in and for said county of Huron, on the 11th day of July, A. D. 1879, because the said James H. Warner was then working at White Rock, in said county of Huron; that the said Hugh Cline had become the owner of said paper writing, by having traded his homestead of 160 acres of land, to said James H. Warner, therefor; and that they, the said Hugh Cline, and James H. Warner, had had an assignment of said paper writing, purporting to be a mortgage, made directly to said Thomas Winsor, and Mark Carrington, in the firm name of Thomas Winsor & Company, which assignment, in writing, was, on said second day of August, at said township of Port Austin, delivered to said Thomas Winsor, and Mark Carrington, by means of which said false pretenses the said Hugh

Cline, and Erwin W. Ellis, * * did on the said second day of August, A. D. 1879, at the township of Port Austin, aforesaid, designedly and feloniously obtain from the said Thomas Winsor, and Mark Carrington, in exchange for said paper writings, the following personal property and valuable things of the goods and property of the said Thomas Winsor, and Mark Carrington, to wit [invoice]. Defendants were convicted, and the case is brought up on exceptions. Reversed.

Prosecuting Attorney *Richard Winsor* for the people. The prosecuting attorney must prosecute on behalf of the people, even before justices, (Comp. L. § 530; *People v. Navarre* 22 Mich. 4; *Meister v. People* 31 Mich. 102; and is disabled only by the acceptance of a fee, or interest in a given result: *Sneed v. People* 38 Mich. 251; *People v. Hurst* 41 Mich. 330; handwriting may be identified by a comparison of papers in the case: *Vinton v. Peck* 14 Mich. 291; *Van Sickle v. People* 29 Mich. 64; *Foster Will Case* 34 Mich. 25.

James H. Hall and *Atkinson & Atkinson* for respondent.

MARSTON, C. J. We are of opinion that the information filed in this case was not fatally defective within the ruling of *Enders v. The People* 20 Mich. 240. In this case the false pretenses are fully set forth, and the information shows an assignment of the mortgage direct to the parties injured, and alleges that by means of said false pretenses Cline and Ellis obtained from Winsor and Carrington, *in exchange for said paper writings*, the goods, etc. The information in other respects contains the usual formal allegations. It is thus, we think, sufficiently alleged, and appears from the allegations, that the false representations were made to induce Winsor and Carrington to purchase the mortgage referred to, and that in reliance upon the statements and representations made they did purchase the same and parted with their property therefor. It is, we think, clear that they relied upon the statements and representations made, and parted with their property upon the strength thereof and of the

assignment, or what purported to be the assignment to them of the mortgage. It is also urged that there was no evidence in the case tending to show that any of the representations alleged were made by defendant Ellis, and that he was therefore entitled to an acquittal.

If it appeared by the bill of exceptions that all the evidence tending to show Ellis' connection with the matter was set forth therein, the view taken would be correct. We cannot go outside of the bill of exceptions and examine the printed testimony in order to ascertain what the facts were, as the evidence is not made a part of the bill.

It does not appear that Ellis was present at the time the false representations were made, and the trade consummated, or that he had any knowledge thereof, or that such was the design or intention of respondents in preparing these papers—if they did—if that would be sufficient. The fact that he was present afterwards, when Cline received a part of the consideration, and that Cline gave Ellis a part thereof, would not be sufficient, even if Ellis then had full knowledge of the representations made by Cline, which does not appear. The evidence set forth in the bill of exceptions clearly tends to show, at least in some parts, whether complete or not we need not now determine, that an offense was jointly committed by these respondents but not the one alleged and for which they were tried.

We must therefore assume that other and necessary evidence was given to connect Ellis with the representations made. If there was not, he would be entitled to his discharge.

Charles Flowers, an expert in handwriting, was examined. He compared the signatures to the assignment and the indorsement on the note with the writing in the body of the mortgage, and compared the signatures of James H. Warner to the assignment, and the indorsement of James H. Warner on the note, with the writing in the body of the mortgage, and testified that all were in the same handwriting. Similar testimony as to the other signatures was given by this witness, and also that the signatures appeared like forged hands.

What tendency this evidence had to connect the respondents with the transaction we are not advised. It is true these papers were in evidence, but we do not understand that any part of the same was admitted, or appeared beyond dispute to have been the handwriting of either of the respondents, so that the same could be taken as a basis for comparison. Admitting the fact that these instruments and the signatures thereto were in the handwriting of one or two persons, would not necessarily tend to connect the respondents therewith. Proof that the body of the instrument and signatures were in the same handwriting would be a link in the chain, which, with farther evidence to connect the respondents, one or both, therewith, would become material. It could not however be argued or inferred that the signature was written by the respondent, because it resembled the handwriting in the body of the instrument, unless it appeared that the handwriting in the body was actually his. The mere fact alone that the paper was already in evidence upon some other branch of the case, would not be sufficient to connect the respondents with the execution thereof.

A question was raised as to the sufficiency of the proof that one Beeson did not sign the mortgage. It was shown that Cline had represented that Beeson, the purported mortgagor, "lived somewhere in the central part of the State," and evidence was introduced "tending to show that Strother M. Beeson (the name of the mortgagor) formerly lived at Niles, and died December 30th, 1878, and that the signature to the note and mortgage was not his." If it was necessary to prove that the person whose name purported to be signed as mortgagor did not in fact sign the same, it could only be upon the assumption that he was the owner of the land, or possibly that a particular person of that name had been represented as owner and the person who signed. Neither appears to have been shown in this case. There was the representation that Strother M. Beeson "lived somewhere in the central part of the State," and that he (Cline) knew Beeson had made the mortgage. There must be very great difference in the weight of testimony upon the question of identity, based upon the

identity of names and residence only. Some names are very common, and where the residence is fixed in a city or old-settled portion of the country, without any distinct place of residence being pointed out, or some other means of identification, the proof would be too uncertain where the liberty of a citizen was at stake.

We are also of the opinion that the prosecuting attorney was disqualified from conducting the prosecution in this case. It distinctly appeared that the complaining witness was a brother of the prosecuting attorney. He testified "that he arranged with the prosecuting attorney to discount the mortgage in question at the usual rates, and arranged with Cline that one-half the discount be charged to Cline, one-half to Winsor & Co., the complainants; * * * that he obtained from the prosecuting attorney's firm three hundred and thirty-five dollars at the time by checks." It farther appeared that the money belonged to one Carrington, for whom the firm was doing business. The prosecuting attorney was therefore distinctly interested in the result, and unable to attend the case, within the meaning of Comp. L. § 534. See also *Meister v. People* 31 Mich. 101; *Sneed v. People* 38 Mich. 251; *Ulrich v. People* 39 Mich. 249.

We are of opinion that the respondents are entitled to a new trial, and it will be certified to the court below accordingly.

GRAVES and COOLEY, JJ., concurred.

CAMPBELL, J. I concur in the result.

THE PEOPLE v. WILLIAM E. LONG.

Pocket-picking—Prisoner's conversation in evidence—Res gestæ—Absent witness—Recommendation to mercy—Verdict.

Picking a pocket or appropriating a dropped pocket-book needs no description in an information for larceny different from that employed in other cases of stealing.

The admission of evidence of a conversation between a policeman and a prisoner is not prejudicial on the ground that the latter was influenced, if he made no confession.

On the trial of a youth for the larceny of a pocket-book the fact that an officer had seen the prisoner's father search him immediately after the theft and take from him what seemed to be a gold piece and put it into his own pocket, was a part of the *res gestæ;* and the prosecution was not bound to call the father as a witness, as it was not claimed that he knew anything more about the transaction than the finding, and as he was actively aiding the defense, his position in regard to the facts was not such as to make him a necessary witness for the prosecution to protect defendant against a false accusation.

The efforts made to secure an absent witness, or the reason why his deposition was not obtained, should be shown to warrant reproducing his testimony on a former trial.

In a prosecution for stealing a dropped pocket-book at a saloon, the exclusion of testimony as to what the complaining witness had done, at another saloon, in dropping his pocket-book and charging theft, was not improper: such inquiries would be allowable on cross-examination of the complaining witness himself.

A verdict of guilty with recommendation to mercy does not violate public policy or entitle respondent to a new trial.

A delay of seven hours in agreeing to a verdict is not uncommon, nor are recommendations to mercy, especially with young offenders, and they do not indicate that the verdict was obtained by improper means.

It cannot be assumed that a jury found a false verdict and compromised against conscience.

Exceptions to Recorder's Court of Detroit. Submitted June 22. Decided October 6.

INFORMATION for larceny. Conviction affirmed.

Attorney-General *Otto Kirchner* for the people.

Miller & Clarke and *Maybury & Conely* for respondent. Converting lost property is not larceny: *Rex v. Wilkinson* 1 R. & R. 470.

CAMPBELL, J. Long was convicted of stealing a pocket-book and its contents from Frederick H. Blood, at a music hall in Detroit, kept by his father, John P. Long, on the 23d of January, 1880. A motion was made to quash the infor-

mation, on the ground that the respondent had never been examined on the same charge, and that the information was too general, and should have set out more fully the circumstances of the larceny.

The facts on which he was convicted were that, while Blood was at the music hall, sitting at a table and drinking with some companions, Long either picked his pocket, or picked up his pocket-book from the floor to which it had dropped after he had taken it out. The examination before the police justice was for the same offense. He was satisfied from the proofs before him that defendant should be committed, and his finding on the testimony is not in issue on the trial. There was no variance between the charges. So far as the form of the information is concerned, we do not know how this case of stealing differs from any other, or needs any different description.

Objection was made to the testimony of a policeman to a conversation with respondent while in arrest, it being suggested that as he was a boy of 17 years there was evidence that what he said was under influence. As the respondent made no confession whatever, there was no influence exerted to his prejudice on the trial.

Officer Hazard testified to seeing the elder Long search respondent immediately after the theft, and that the father took from his son what appeared to be a gold piece, and put it in his own pocket. Witness described it as apparently about the size of a silver twenty cent piece. This testimony respondent's counsel asked to have struck out unless the prosecution called John P. Long. It was clearly admissible evidence of a part of the *res gestæ*.

The failure to call John P. Long was not, we think, under the circumstances erroneous. There was no claim that he knew anything more about the transaction than the finding of the gold piece. It appeared that John P. Long was present in court, and active in aiding the defense. His position in regard to the facts was not such as to make him a necessary witness for the prosecution to enable defendant to be protected

against a false accusation, and his relation to the defense made it still less important.

The showing in regard to an absent witness, George Sisson, who testified on a former trial, was not sufficient to justify proving his former statements. It does not appear what efforts were made to secure his presence, or why his deposition was not obtained.

We do not think testimony about what Blood did at another saloon in Detroit, in dropping his pocket-book and charging theft, was improperly excluded. Such inquiries would have been open on cross-examination of Blood. We are not informed whether he was asked any questions on the subject.

We do not understand what principle of public policy is violated by a verdict of guilty with recommendation to mercy, or why such a verdict should entitle a party to a new trial. There is nothing in the record to indicate that the verdict was obtained by improper means. A delay of seven hours in agreeing is not unusual, and a recommendation to mercy is common also, especially with young offenders. We have no right to imagine the jury found a false verdict, and compromised against conscience.

There is no error in the record. Judgment should be rendered on the findings.

The other Justices concurred.

JOHN HIGLER v. THE PEOPLE.

False pretenses—Claim of being a "storekeeper."

Act 218 of 1879 provides for the punishment of any person who "with intent to defraud or cheat another shall designedly by color of any false token or writing, or by any other false pretense" obtain signatures to a written instrument. *Held* that the statute does not attempt to enumerate the false pretenses in particular terms, so that the term "any other false pretense" is not limited to a particular kind of pre-

tense, and the rule of construction that general terms must be construed as of the same tenor as preceding particular terms, previously enumerated, has no application.

The false pretense of being a storekeeper, if used successfully for the purpose of obtaining credit, will sustain a conviction under Act 218 of 1879 which provides for the punishment of persons who, with intent to defraud, obtain money from others by false pretenses.

Error to the Recorder's Court of Detroit. Submitted June 22. Decided October 6.

INFORMATION for false pretenses. Conviction affirmed.

Miller & Clarke for plaintiff in error. An information for false pretenses cannot be sustained where ordinary prudence would have prevented imposition: *State v. Stroll* 1 Rich. 244; *People v. Stetson* 4 Barb. 151; *People v. Haynes* 11 Wend. 566; *People v. Williams* 4 Hill 9.

Attorney-General *Otto Kirchner* for the people. Obtaining money by a false pretense that one is a storekeeper would have been punishable at common law as a cheat (*Reg v. Bloomfield* 1 Car. & Mar. 537; *Com. v. Drew* 19 Pick. 179), and is within Comp. L. § 7590.

COOLEY, J. The plaintiff in error has been convicted in the Recorder's Court of Detroit upon an information charging him with obtaining twenty-five dollars of one Burley by false pretenses. The pretense alleged was "that he, the said John Higler, was then and there engaged in store-keeping in Cadillac, Wexford County, Michigan." * No further repre-

* The information was as follows:

State of Michigan, County of Wayne, City of Detroit.—ss: The Recorder's Court in and for the city of Detroit, in said county, of the March term thereof, in the year of our Lord one thousand eight hundred and eighty. In the name of the people of the State of Michigan, I, Henry N. Brevoort, prosecuting attorney in and for the county of Wayne, who prosecute for and on behalf of the people of said State, in said court, come now in said court, and give the said court now here to understand and be informed that John Higler, late of the city of Detroit, heretofore, to wit, on the third day of February, A. D. 1880, at the said city of Detroit, in the county aforesaid, having applied to one Lafayette Burley to loan him, the said John Higler, the sum of $25 in money, and in order to induce the said Lafayette Burley to believe him, the said John Higler,

sentations are set up as accompanying this false pretense, whereby it was made effective. The question now is whether the information will sustain the conviction.

The statute under which the information was filed is as follows:

"Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, cause any person to grant, convey, assign, demise, lease or mortgage any land * * or obtain the signature of any person to any written instrument, the making whereof would be punishable as forgery, or obtain from any person any money, personal property or valuable thing, or by means of any false weights or measures, obtain a larger amount or quantity of property than was bargained for, * * * shall be punished by imprisonment," etc. Public Acts, 1879, p. 197.

It is said that this statute enumerates certain kinds of false pretenses, and that according to a familiar rule of construction the "other" pretenses which the statute intends can be those only which are of a kindred nature to those which are

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worthy of credit, and loan him, the said John Higler, the said sum of money, to wit, $25 in money, of the value of $25, with intent to cheat and defraud said Lafayette Burley, he, the said John Higler, did then and there designedly, falsely, fraudulently, and feloniously represent and pretend to the said Lafayette Burley, that he, the said John Higler, was then and there engaged in store-keeping in Cadillac, Wexford county, Michigan, and he, the said Lafayette Burley, believing and relying upon the said false pretenses and representations, so made as aforesaid by the said John Higler, and being then and there deceived thereby, and being then and there induced thereby, was induced to make said loan and to deliver, and did then and there deliver, to the said Higler, the sum of $25, of the moneys, goods and chattels of him, the said Lafayette Burley. And the said John Higler did then and there designedly, knowingly, falsely, fraudulently, and feloniously obtain from the said Lafayette Burley, by means of the said false, fraudulent, and felonious pretenses aforesaid, $25 in money, of the value of $25 of the personal property, goods, and chattels of him, the said Lafayette Burley.

Whereas, in truth and in fact, the said John Higler was not then and there, to wit, on the third day of February, A. D. 1880, engaged as a store-keeper at Cadillac, Wexford county, Michigan, or at any other time or place; all of which the said John Higler then and there well knew, to the great damage and deception of the said Lafayette Burley, and to the evil example of all others in like cases offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

HENRY N. BREVOORT,
Prosecuting Attorney of Wayne County, Mich.

mentioned. *State v. Simpson* 3 Hawks 620; *State v. Sumner* 10 Vt. 589. But the rule has no application, because this statute does not attempt an enumeration of the pretenses that shall be held criminal. False tokens are mentioned, but the term is general, not particular, and the same may be said of false writings. The idea suggested to the mind by these is something cognizable to the sight or touch. "Any other false pretense" is a specification equally general, and will embrace other classes.

It is said further that the pretense, to be within the statute, must be one calculated to deceive a man of ordinary prudence, and that if it be a false representation of facts, these facts must be such as were calculated to influence a person of common caution to part with that which was obtained. Is the false representation that one is a "store-keeper" a pretense of this sort? It may be true and yet the man be utterly without responsibility and without character; and in that case the fact of the business would offer no security that a loan made in reliance upon it would be repaid. The term is indefinite: it may mean a wholesale merchant, or a petty dealer in toys or candies; it may imply a principal, or an agent or a servant; it may be applied to one notoriously without capital and who lives by his wits rather than by legitimate trades; in short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan.

All this is true; and if the reliance in accommodating another person with a loan were pecuniary means or responsibility, it might be very conclusive. But, notoriously, the fact is otherwise. Men are trusted in large amounts every day who have no pecuniary responsibility, and are known to have none. Sometimes the reliance for repayment will be a supposed business ability; sometimes on a business that would be injured by the existence of overdue debts; but most often, perhaps, a reputation for integrity. And if in any case the existence of any particular fact would be likely to beget confidence, there is no reason why a false assertion of its existence should not be a criminal pretense, as much as would be

a false assertion of pecuniary responsibility, provided it is equally relied upon, and equally effectual to accomplish the fraud designed.

Pecuniary responsibility is no more a necessary attendant upon a commission in the army than upon the keeping of a store; but the false assertion that one holds such a commission has been held a false pretense. *Regina v. Hamilton* 1 Cox C. C. 244; s. c. on appeal 9 Q. B. 271; *Thomas v. People* 34 N. Y. 351. So the pretense that one is buying horses as a gentleman's servant may be a criminal false pretense, though the fact of service by itself would not be likely to inspire confidence except in connection with the further fact, expressed or understood, that the master was to pay the purchase price. *Rex v. Dale* 7 C. & P. 352.

Now it is unquestionable that the fact that one is a store-keeper is one which would be likely to give a degree of confidence and credit. There is an implication, if not of solvency, at least of the possession of considerable means, in the very idea that one is keeping a store; with no knowledge of his responsibility one would sooner trust him for small sums than if he had no business, or if his business were unknown. A store-keeper is not expected to refuse payment of small debts, whether payment can or cannot be enforced; it is inconsistent with business prosperity that he should do so, and *prima facie* he will have in his hands the means whereby such debts may be paid. And if such a person, when away from home, had occasion to borrow a few dollars for expenses, a lender would trust, not to his responsibility, but to his honor, for re payment, and would probably ask no questions further, after learning what was his business.

But the question of the materiality of the pretense is one rather of fact than of law. If it was false, and had a tendency to deceive, and did actually deceive and accomplish the intended fraud, the case is within the statute. *Regina v. Hamilton*, supra.

"The materiality and the influence of the pretenses in question is for the jury to determine on evidence by verdict; unless some inducing circumstances upon the face of the

indictment show that the pretenses are clearly immaterial and could not influence credit. The averment of the pretenses by the indictment is only to give the defendant notice of what may be proved against him; the mode of obtaining need not be pleaded; and if any pretense is capable of defrauding, that is sufficient." *Thomas v. People*, supra. The pretenses in that case were that the prisoner was a chaplain in the army, just returned from the army and wanted money to get home with; and it was said of them: "A court cannot say, as a matter of law, that these were not material representations, and were not calculated to deceive; and to induce credit; and were not within the statute, which speaks of obtaining by any false pretense."

In this case the jury has found that the pretense was both false and effectual. There are no exceptions in the case, but the question of sufficiency is raised upon the face of the information itself. It is a question, therefore, whether the pretense is one which can, under any circumstances, be within the statute, and not whether it was so in the particular case under the facts disclosed by the evidence. As was said in *Thomas' Case*, we cannot say as a matter of law that the pretense was not within the statute.

The judgment must be affirmed.

GRAVES and MARSTON, JJ., concurred.

CAMPBELL, J., dissenting. I think our previous decisions and the general course of authority lead to the result that the statute only intends to reach such pretenses as are reasonably calculated to defraud. A merchant or any other business man would never trust another merely because he is a storekeeper, because a person may undertake such a business whenever he pleases, without either capital or credit, and may never have property enough to be subject to execution. Without some statement as to capital or business, it cannot be supposed reasonably safe to give credit. The cases which have held a false statement of office or position sufficient are mainly, and so far as original authority goes

are, I think, entirely cases where the character assumed involves such elements as to make it safe to trust the party from that alone. They are such instances as officers of the army and navy, government officers, and English university commoners. An officer of the army or navy is liable to punishment for any sort of dishonest conduct, and officers appointed to honorable positions are presumably reputable. Moreover, all of these have a pecuniary income which is known to every one, and the assumption of their character is a representation of their means and station. The conditions of residence in an English university make it entirely safe for a local tradesman to trust a commoner to any reasonable extent.

When the position involves in itself no trustworthiness, it seems to me the assumption of it falsely cannot be a sufficient ground by itself to convict under the statute.

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GEORGE HARRIS AND THOMAS WILLIAMS v. THE PEOPLE.

Burglary—Information—Penalties—Accomplices.

Burglary is a common law offense and not a statutory crime; but Michigan statutes distinguish between the degrees of punishment for simple and for aggravated burglary, and if all the incidents warranting the severer penalties are not alleged in the information but the offense is stated as at the common law, the smaller punishment only can be inflicted.

A common law information for burglary is not bad in alleging that one respondent was armed and another was not.

Whether unarmed participation in an attempt at burglary with another who is armed does not involve all participants in the severer penalties imposed by statute for armed attempts.—Q.

The various breakings resembling burglary and made criminal by Michigan statutes, are distinguishable from the common law offense of burglary, and information therefore must set forth in substance all their statutory elements.

Introducing a knife between the upper and under sash of an outside win-

dow of a dwelling house with the felonious intent to break and enter, is enough to sustain a conviction for an attempt at burglary.

An information, under Comp. L. § 7561, for an attempt to commit burglary by one who was armed, must allege that there was some one lawfully in the dwelling house which he attempted to enter or the allegation that respondent was armed is mere surplusage, and conviction can only be had for the common law offense of burglary.

Error to Recorder's Court of Detroit. Submitted June 22. Decided October 6.

INFORMATION for attempt to commit burglary. Affirmed.

Miller & Clarke for plaintiffs in error. An information for an attempt to commit a felony must allege the acts constituting the offense: *Com. v. Clark* 6 Grat. 675; *Beasley v. State* 18 Ala. 535.

Attorney-General *Otto Kirchner* for the people.

GRAVES, J. The plaintiffs were prosecuted by the same information for a joint attempt at burglary, and were convicted. The burglary was set forth as at common law, but the pleader saw fit to add that Harris was armed and Williams not armed. As we understand the record, it is now contended that, by this means, the information assumed to implead the two as having jointly attempted to commit what, if the attempt had been carried out, must have been a separate and distinct crime by each, and would not have been a single joint offense on the part of both; and the argument is drawn from the regulations in the statute which limit the penalty in case a burglar is armed, etc., to twenty years' imprisonment, and in other cases to fifteen years.

The two provisions, it is said, make two different crimes, and the information, in setting up that one party was armed and the other not, imputed an attempt by each to perpetrate a crime different from that alleged to have been attempted by the other. The point suggests several considerations into which we need not enter. It may be a question whether,

where two make an attempt in concert, and one is actually armed, it will not apply to both. For the purpose of apportioning the punishment, the statute distinguishes between simple burglary and burglary when attended by certain facts which are naturally regarded as increasing its enormity. In case the perpetrator is armed with a dangerous weapon, and there is some one lawfully in the dwelling house, the penalty may be twenty years' imprisonment; but if the circumstances of aggravation are not present the imprisonment cannot exceed fifteen years. Burglary is a common law offense, and not a crime ordained by legislation; and it is a single or identical offense, as it was originally. The statute does not carve it into two. It exposes it to different grades of punishment, according as it may or may not be accompanied by the incidents specified in the statute. It may be laid according to the common law, and without referring to the facts on which the imposition of the higher penalty depends; but in such case the punishment cannot exceed the lesser penalty. The accusation will support nothing more. Where the facts are supposed to warrant it, and the higher penalty is contemplated, the crime must be described with the attending facts which justify that penalty.

The various breakings resembling burglary which have been declared criminal by the legislature, are distinguishable from the ancient offense of the common law. They owe their definition to the statute, and the statute must be consulted to ascertain their ingredients. When they are charged they must be set forth in substance, as in the statute, with all descriptive incidents, whether negative or otherwise. *Koster v. People* 8 Mich. 431; *Byrnes v. People* 37 Mich. 515. Recurring to the objection in the record, and its failure on its own theory is evident. It construes Comp. L. § 7561 as constituting a distinct crime composed of the facts specified therein, and denoted by being described as in the statute; and, proceeding on this foundation, the claim is put forth that when the information said that Harris was armed, it charged him with an attempt to commit the offense in that section, whilst Williams was accused of an attempt to com-

mit the offense in the section following. The premises do not warrant the conclusion. Pursuing the theory contended for, the statement that Harris was armed was not enough to meet the requirements of section 7561. The further fact that there was some person lawfully in the house, was indispensable.

The statement that one was armed and the other not, standing alone and without the other facts belonging with it to constitute the aggravated case described by the statute, is wholly destitute of force. It adds nothing to the essential charge and detracts nothing from it. It is mere surplusage, and the legal effect of the information is to charge the parties with a joint attempt to commit a burglary punishable by not to exceed fifteen years' imprisonment.

It is next objected that the information is bad for want of due certainty in showing that something was done as commencement of a burglary. The averment is that they "feloniously and burglariously to break and enter the said dwelling house, did insert between the upper and under sash of an outside window of said dwelling house a certain instrument, to wit: a knife." We think this is a sufficient allegation to sustain the judgment. It embodies a charge of the beginning of a breaking burglariously with intent to effect a burglarious entry. The specific intent is set up, and along with it and in pursuance of it the direct application of a kind of force which common knowledge recognizes as employable for such ends.

Nothing further is necessary. The judgment is affirmed.

The other Justices concurred.

Harry Clark v. The People.

Examination as to plea of guilty.

Judgment on a plea of guilty was reversed and the prisoner discharged, where the record showed that the information was sworn to and the

accused was arraigned, pleaded guilty, and was sentenced on the same day, and did not show anything from which it could be inferred that he was examined under Act 99 of 1875 as to whether his plea of guilty was voluntary.

Error to Kent. Submitted June 22. Decided October 6.

INFORMATION for "grand larceny." Respondent brings error. Reversed. Prisoner discharged.

Gibson & Parkinson for plaintiff in error.

Attorney-General *Otto Kirchner* for the people.

MARSTON, C. J. This case comes clearly within *Edwards v. People* 39 Mich. 760. The information was sworn to December 26, 1878, and on the same day the respondent was arraigned, pleaded guilty, and was sentenced, and there is nothing in the record showing, or from which it can be inferred, that any examination, such as the act of 1875 contemplates, was had.

The judgment must therefore be reversed and the prisoner discharged.

The other Justices concurred.

ELIZA M. BROWN ET AL. v. DELIA M. CLARK ET AL.

Wife's control of her property—Tenancy by curtesy.

The Revised Statutes of 1846 in creating a statutory estate by the curtesy, did not in any manner interfere with the wife's absolute control of the property during her lifetime, or with her right to dispose of it, but only subjected it after her death to the interest of the surviving husband as a limitation upon the inheritance.

The legislative power to subject any existing estate to the rights of tenancy by curtesy is the same as the power to modify the rules of descent for the subsequent transmission of property, and do not interfere with any constitutional right of the wife.

Error to Kalamazoo. Submitted June 22. Decided Oct. 6.

EJECTMENT. Defendants bring error. Affirmed.

Edwards & Stewart and *T. R. Sherwood* for plaintiffs in error.

Balch & Shakespeare and *Brown, Howard & Roos* for defendants in error.

COOLEY, J. The action in this case is ejectment. The facts are in the main undisputed. In June, 1846, Joseph Brown purchased the lands now in controversy, and caused them to be conveyed to Irene F. Brown, his wife. Irene F. Brown died March 4, 1847, leaving nine children surviving her. Joseph Brown was then in possession of the land, and he continued to occupy it from that time until his death, which occurred in 1878. In 1848 he inter-married with Eliza M. Brown, who survived him and is now his widow. By her he had children who survived him.

After the death of Joseph Brown, the heirs at law of Irene F. Brown, who were children of Joseph Brown by his first marriage, brought this suit against Eliza M. Brown and two of her children, then living with her upon the land. They defended, relying upon a title by the adverse possession of Joseph Brown from the time Irene F. Brown died, in 1847, till Joseph Brown's death in 1878. In the circuit court this defense was not sustained and the plaintiffs had judgment.

The circuit judge tried the case without a jury, and there is no finding of facts. We are not informed, therefore, whether he did or did not reach the conclusion that Joseph Brown, after his first wife's death, claimed to hold the land adversely to her heirs. There was evidence which might support that conclusion, and there was also some of a contradictory nature. The plaintiffs below claimed that Joseph Brown's occupation was that of a tenant by the curtesy, while the defendants denied that any such tenancy did or could exist under the laws then in force. The question is

one of statutory construction, and the view taken by the defense may be stated as follows:

Tenancy by the curtesy, except so far as the right might then be in existence, was in effect abolished in 1844, by an act which gave to married women the complete enjoyment of their estates. Sess. Laws 1844, p. 77; Rev. St. 1846, p. 340, § 25. The Revised Statutes of 1846, which took effect March 1, 1847, created a statutory estate by the curtesy. *Hill v. Chambers* 30 Mich. 422. But these cannot constitutionally apply to the lands in dispute, for Irene F. Brown had acquired them in 1846, and her fee could not be limited by subsequent legislation. The estate was finally abolished in 1855. *Tong v. Marvin* 15 Mich. 60.

This is the argument. But we may concede that there was no curtesy between 1844 and 1847, and the argument will nevertheless fall to the ground. The statutory curtesy under the statutes of 1846 attached at the death of the wife, and not before. The rents, profits and income of the land up to that time belonged to the wife, (Rev. St. p. 340, § 25); and the surviving husband's interest only attached as a limitation upon the inheritance. There was no want of legislative authority, therefore, to make any existing estate subject to it; the power to do so was the same with the power to modify the rules of descent for the subsequent transmission of property. Its exercise interfered with and limited no constitutional rights of the wife, but left her in the full enjoyment of them all to the last moment. If she sold the land she conveyed the fee; if she continued the owner to the time of her death, she remained owner of the fee. There is no room for the suggestion that her constitutional rights were invaded.

It follows that Joseph Brown, after the death of his first wife, held the land as tenant by the curtesy. The judgment of the circuit court was right, and it must be affirmed with costs.

The other Justices concurred.

William Rose v. John E. Chapman.

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Wife's admissions as evidence against her husband—Agency.

Where a wife's admissions are not confined to acts of agency they cannot be used against her husband in an action on contract against him unless where they are *res gestæ* and admissible as acts instead of relations of facts.

Error to Clinton. Submitted June 22. Decided Oct. 6.

Assumpsit. Defendant brings error. Affirmed.

H. & H. E. Walbridge for plaintiff in error.

Dennis & Baker and *R. Strickland* for defendant in error.

Campbell, J. Chapman sued Rose for board of Rose's step-mother, under an agreement to pay what it was reasonably worth. The old lady was about seventy years old, and Rose endeavored to show that her services were such as to reduce the value of board. Only one exception was taken on the trial.

Mrs. Chapman having been sworn for plaintiff below, this question was put on cross-examination, but ruled out because offered expressly for a single purpose that was not lawful: "State whether you had the charge and management of the household matters in your family, and the direction of the work." Defendant's counsel, in putting this question, said that his object was, if receiving an affirmative answer, to show admissions of Mrs. Chapman as to the work of the step-mother while living with plaintiff.

No objection was raised against showing what work the old lady did perform, and it is not likely any would have been made to the question itself if not put for the special purpose named. We do not see any error in the ruling. The question was not put with any view to an impeachment, and was unnecessary for any such purpose. Mrs. Chapman was

examined as to the whole facts, and if it appeared she made any statement on the stand contrary to admissions made elsewhere, then, on a proper statement of time and place, she could have been inquired of concerning them. But the purpose here was to use her admissions against her husband as binding him, although not confined to acts of agency. There is no foundation for any such proposition, unless in some cases where the admissions are *res gestæ*, and admissible as acts, and not as relations of facts. The offer was vague, and pointed to nothing tangible.

There is no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

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THE DETROIT SCHUETZEN BUND v. THE DETROIT AGITATIONS VEREIN.

Societies for unlawful purposes cannot sue as corporations—Security for costs.

Corporations cannot exist except by force of express law.

A society that cannot be incorporated because organized to resist the enforcement of laws, cannot sue in its society name for the collection of a debt.

Judgment will not be rendered in the Supreme Court against a security for costs where judgment for the plaintiff below has been reversed and the case sent back for new trial, and it is not shown that the security was required, and there is nothing on the face of the bond to show that it was approved.

Error to Wayne. Submitted June 22. Decided October 6.

ASSUMPSIT. Defendant brings error. Reversed.

Hawley & Firnane for plaintiff in error.

T. D. Hawley and *E. F. Conely* for defendant in error.

MARSTON, C. J. Action was brought by the Detroit Agitations Verein to recover a sum of money loaned to the plaintiff in error, and from which the plaintiff below received an obligation, a copy of which is given herewith:

"$900. DETROIT, September 1st, 1870.

"The Detroit Schuetzen Bund hereby acknowledge the receipt of nine hundred dollars ($900) of the funds of the Detroit Agitations Verein, which amount of $900, or any part thereof, the Detroit Schuetzen Bund promise to pay to the said Detroit Agitations Verein, with interest at ten per cent. per annum, within sixty days after demand having been made in writing by the trustees, or other competent officers, of the said Detroit Agitations Verein.

"For the Detroit Schuetzen Bund:

"JOSEPH A. KURTZ, President.
"ALBERT SHEU, Secretary.
"PHILIP KLING, Treasurer.
"GEORGE KITTELBERGER, } Trustees."
"MAX BROEG, }

The plaintiff declared as "a body corporate organized and existing under the laws of the State," and a copy of its "constitution" or charter and laws appears in the bill of exceptions. The defense in the court below, as here, rested solely upon the proposition that the plaintiff was not a corporation.

In the briefs of counsel, upon which this case was submitted, we have not been referred to any statute of this State under which the plaintiff had or could have organized as a corporation, nor do we know of any under which a corporation with such objects and aims could be formed. It would seem, from the constitution and laws of the society, that it was formed principally to oppose the enforcement of a *prima facie* valid act of the Legislature of this State.*

* The object of the society, as set forth in its constitution, is as follows:

PREAMBLE.

In order to energetically oppose the so-called temperance laws passed by our last State Legislature, which, in their unheard-of presumption, seek to diminish the personal freedom of the citizens of this State, and by these means endanger the freedom and independence guaranteed us by the constitution of the United States as our inalienable rights, German

There may be cases where organization and "agitation" would be proper for the purpose of effecting the modification or repeal of some obnoxious or oppressive law. That the organization in question was designed to and did go farther than this, the record clearly shows. It is alleged therein, that the society had collected from its members, and received from other similar societies, considerable sums of money, "and had disbursed large sums of money in furtherance of the objects prescribed by the [its] constitution; *i. e.*, in defending prosecutions under the prohibitory law, in testing the validity of the liquor law and of some ordinances against saloon keepers, influencing legislation, and in some cases in paying the fines of those who were convicted under the laws and ordinances which the society was organized to oppose; and the Verein had also held numerous public meetings at various places for the purpose of influencing public opinion in furtherance of this general purpose."

No corporation can exist except by force of express law. As already intimated, no statute has been called to our attention which authorizes the formation of corporations to oppose the enforcement of other statutes, or to agitate for their appeal, or to influence legislation, or to give immunity to convicted parties by paying their fines for them. Every

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citizens of the city of Detroit have united themselves as an *Agitation Society* against said law, and have formed and adopted the following constitution, in the strict adherence to which they see the most effectual way of rooting out such laws, so inimical to freedom.

CHAPTER I.

The society is known as "Agitation Society against the liquor law now in existence in the State of Michigan, and it is composed of passive and active members.

CHAPTER II.

OBJECT OF THE SOCIETY.

The members of the society bind themselves (active and passive) by all legal means at their command to oppose the temperance law passed at the last session of our State Legislature, and that as follows:

1. By unitedly working together in this matter, by holding meetings from time to time, in which shall be deliberated on the most effective ways and means of agitation.

2. By binding themselves at elections to vote only for such candidate, irrespective of political party affiliations, of whom the members of the society are convinced that they oppose from principle this and similar laws, and bind themselves thereto towards the society in writing.

citizen has an undoubted right to agitate for such changes in the laws as he may desire, and to be charitable to those whom he may think are wrongfully punished; but it would be preposterous for the Legislature to provide for organizing corporations for such purposes, since the very provision would be an admission that the laws were wrong, and ought to be repealed without agitation or outside influence. When the Legislature is thus convinced, it is to be presumed that all needful changes in the laws will at once and in a direct manner be made, in the interest of peace, good order and justice, without its calling upon the people for agitation or excitement as a preliminary thereto.

Finding no law for the incorporation of this society, the judgment must be reversed. This would be the necessary result, even if the purpose of the society were one in the propriety or usefulness of which every citizen concurred, since the law does not authorize an unincorporated society to bring suit in its society name.

It follows that the judgment must be reversed with costs of both courts.

The other Justices concurred.

Motion for judgment against surety for costs. Submitted and denied October 8.

PER CURIAM. Where judgment for plaintiff is reversed and the case sent back for new trial, the Supreme Court will not, under Comp. L. § 6133, give judgment against the surety for costs, there being no showing in the record that such security was required, and nothing on the face of the surety's bond to show that it was approved by the court below. See *Ortmann v. Merch. Bank of Canada* 42 Mich. 464.

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BEHMAN H. POWERS AND FRANK HEIMSATH v. GEORGE O'BRIEN AND EDWARD O'BRIEN.

Dissolution of attachment issued on the ground of fraud.

Fraud is not inferable from mere breach of contract, and where an attachment is asked for on the ground of fraud, the burden of proving it is on the plaintiff.

On an application to dissolve an attachment granted on the ground of fraud by a party to a contract, a finding that there has been no breach and that defendant is right is a finding that defendant designed no wrong, and negatives fraud: and if there is no evidence to show the specific fraud on which the affidavit of attachment was based, there is no finding that can be reviewed so as to disturb a conclusion dissolving the attachment.

Certiorari to Joseph Theu, a Circuit Court Commissioner for Allegan county. Submitted June 23. Decided October 6.

Padgham & Padgham for plaintiff in certiorari.

Frank Donaldson for defendants in certiorari.

CAMPBELL, J. In this case plaintiffs sued out an attachment against defendants on the ground that they had disposed of and concealed their property with intent to defraud creditors. On a motion to dissolve, which was founded on a sufficient application, plaintiffs went into testimony at length of the contract on which they sued, and its supposed breach. It was a contract whereby defendants agreed to sell plaintiffs their crop to be raised, within certain limits of quantity, of potatoes and onions. The potatoes were to be raised on upland, and no point was made as to their non-delivery. The onions were to be raised two acres of one kind, and one of another, and there was no stipulation as to where they should be raised. Neither did the contract forbid defendants raising more potatoes or onions than those to be sold to defendants. It was expressly agreed to the contrary. Plaintiffs were not

willing to accept so much as could be gathered from three acres of onions which defendants offered to deliver them, and insisted on the deficiency being made up from onions grown on other parts of the defendants' lands.

There was no evidence whatever given or offered of any fraud or concealment, unless the refusal to comply with plaintiffs' demands could be so regarded. The commissioner dissolved the attachment, and was of opinion that there had been no breach of contract, and that defendants were in the right. This finding, whether correct or not, on the construction of the contract, was certainly a finding that defendants had designed no wrong, and negatived fraud. There was evidence which he had a right to act upon in reaching such a result; and the burden of proof was on the plaintiffs to show fraud, which cannot be inferred from a mere breach of the contract. The specific fraud on which the affidavit for attachment was made was not in any way sought to be made out by any testimony. There was no finding, therefore, by the commissioner, which we can review, that would justify us in disturbing his conclusions; and it is not very clear to us how he could have done otherwise.

The order must be affirmed with costs.

The other Justices concurred.

Abel Hill v. Amos Snyder.

Damages for collision on highway.

In an action for damages from defendant's careless driving it is not admissible on cross-examination of the plaintiff to ask him as to his own habits of running horses on the highway, or of being intoxicated while driving, if it is not pretended that he was indulging either of the habits at the time of the injury.

Error to Clinton. Submitted June 23. Decided Oct. 6.

TRESPASS ON THE CASE. Plaintiff brings error. Reversed.

A. Stout for plaintiff in error.

A. Cook for defendant in error. Where a drunken or reckless driver sues for an injury caused by a collision resulting from his own driving, the negligence of the other party is immaterial: Whart. Neg. § 332; *Butterfield v. Forrester* 11 East 60; *Clayards v. Dethick* 12 Q. B. 446.

MARSTON, C. J. Hill sued defendant in trespass to recover damages for injuries sustained caused by defendant's careless driving upon a public highway. The plaintiff was called as a witness in his own behalf, and upon cross-examination he was asked if he was not in the habit of running horses in driving on the highway up to the day of the accident; and whether he was not in the habit of using intoxicating liquors to excess whenever he came to the village, and frequently drove out of town while under the influence of liquor. These questions were objected to, and the objection was sustained by the justice, and we have no doubt but that the ruling was correct. It was not pretended that at the time of the injury plaintiff was either running horses or intoxicated. His previous habits, therefore, in these respects, would afford no excuse or justification to the defendant; rather should he have been more careful because thereof, if known to him.

The judgment of the circuit court must be reversed and that of the justice affirmed, with costs of both courts.

The other Justices concurred.

HENRY GOSS v. COMMON COUNCIL OF VERMONTVILLE.

Where *mandamus* is sought to compel a municipal council to approve a liquor seller's bond, the petition for the order to show cause should

show respondent's reason for refusing, if any was given, and the circumstances of refusal; otherwise the reason must be presumed sufficient and the order may be refused.

MANDAMUS. Motion for an order to show cause. Submitted and denied October 5.

M. V. Montgomery for the motion.

WILLIAM CHAMBERLAIN IMPLEADED WITH WILLIAM H. EWING v. WILLIAM JACKSON.

Questions of fact—Partnership.

Facts tending to show a partnership are for the jury in an action involving partnership liability.

Error to Allegan. Submitted April 29. Decided Oct. 7.

ASSUMPSIT. Defendant Chamberlain brings error. Affirmed.

Pope & Hart and *Philip Padgham* for plaintiff in error.

Fenn & Donaldson and *F. J. Littlejohn* for defendant in error.

COOLEY, J. Ewing & Chamberlain were sued as partners for the price of apples which Jackson claimed to have sold them. There was no dispute respecting the sale, but Chamberlain claimed that the purchase was made by Ewing alone. The questions raised by the record all relate to the evidence given to show the alleged partnership, and whether any of such evidence legally tended to prove the fact.

We discover no error in any of the rulings in the reception of evidence, and we are entirely satisfied that the court was right in leaving the case to the jury. Nothing remains but to affirm the judgment with costs.

The other Justices concurred.

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MICHIGAN AIR LINE RAILWAY CO. v. HARVEY MELLEN ET AL.

Railroad aid bonds—Accounting—Payment—Deed to trustee.

Township aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so. *Held*, on a bill for an accounting, that he should be charged with the bonds.

Where several persons either as co-partners or joint contractors had done work under an agreement with a railway company, a payment made to one of them in township aid bonds binds the rest if with full knowledge of the facts they decline to repudiate the payment and make a distinct claim upon the company.

Creditors who have received bonds in payment cannot retain them and question their validity or value at the same time; if they wish for a payment in cash they must give up the bonds.

A creditor cannot keep money paid to him to satisfy any claim but that on which it was actually paid, unless his debtor consents.

A debtor when making a payment has the right to direct its application, and the creditor cannot refuse to apply it accordingly and credit it on some other account.

It is a fraud upon the rights of a railway corporation if a director who buys lands for the use and benefit of the company and pays for them with its funds, takes the title in his own name or jointly with others; and the nominal grantees would hold in trust for the company.

Appeal from Macomb. Submitted April 8. Decided October 13.

BILL FOR ACCOUNTING: to compel a conveyance of the premises to complainant; to compel the delivery of certain bonds to complainant; and to enjoin defendant from suing in ejectment for the premises referred to in the bill. Complainant appeals. Reversed.

Irving D. Hanscom and *Ashley Pond* for complainant.

Dwight N. Lowell, *A. B. Maynard* and *James B. Eldridge* for defendants.

MARSTON, C. J. From the evidence we find the following facts in this case:

Defendant Harvey Mellen was director of the Michigan Air Line Railroad Co.—complainant company having acquired its rights and property by purchase—and as such director he had charge of the eastern end of the company's road, negotiated and acquired for it right of way and depot grounds, and acted for the company quite generally.

Other directors of the company acting with Mellen had agreed that certain lands should be purchased from the Bailey heirs for depot grounds in the village of Romeo, and Harvey Mellen agreed to negotiate for and purchase such grounds. He with the assistance of a brother and John Phelps succeeded in purchasing the lands, and the title thereto was taken in their joint names as owners. Phelps afterwards conveyed his interest to defendant Tackles. Defendants erected a depot building upon these grounds and other work was done by them, and they now claim that the Railroad Company must pay them the value of such improvements, and the price paid by them for the land to the Baileys, when they will convey to the company, subject to certain rights which they claim they were to have in and to an elevator and lime house which they erected on their own account upon these grounds under an agreement with the company.

These depot grounds purchased from the Baileys were purchased by Harvey Mellen acting as a director and paid for by him in bonds belonging to the company drawn out of the bank where deposited for that purpose. This seems too clear to be really open to dispute. The small amount paid in cash—less than $100—the difference between the face of the bonds and the price of the land, is not worthy of notice in this connection. It does not appear that either of the other parties, John Phelps or John N. Mellen, put one dollar into the land. We also find as a fact that Harvey Mellen afterwards received from McNaughton, managing director of the company, twenty-five hundred dollars in township aid bonds, which at their par value was more than sufficient to pay for depot buildings and other improvements; that when he received these bonds he agreed that a deed to the company, if not then executed, would be and be delivered and

recorded, which was not done. These bonds he still retains or the proceeds thereof, and should be charged therewith. The building having been erected under an agreement with the company, whether the defendants were copartners or joint contractors, in either event Harvey Mellen would have a right to receive payment from the company therefor and bind the others thereby. Whether he could bind them by taking anything else but cash we need not at present determine, as they, with full knowledge of the facts, made no distinct claim upon the company, in repudiation thereof, for a long period thereafter. The authority of Harvey Mellen to represent his associates is not seriously questioned. All the defendants concur in saying that the bonds were not accepted, as they wanted the money and were uncertain as to the value or validity of the bonds. They could not, however, retain the bonds and at the same time question their validity or value. If they desired to have the company pay them the amount due, in cash, they should have surrendered up the bonds, but this was not done. It is true Harvey Mellen says he claimed to hold these bonds upon another claim he had against the company. This, however, he could not do without the consent of the company thereto. Having received them to apply upon one claim, he could not refuse so to apply them and credit them to some other account. The debtor had the right at the time of making the payment to direct the application. This was done, they were delivered to apply on the amount due the defendants, and they could not refuse to so receive them, and yet retain and apply them upon an individual account without the debtor's assent.

Harvey Mellen as a director of the company could not purchase lands for its use and benefit, and pay for the same with the funds of the company, and at the same time, without authority, take the title thereto in his own name or jointly with others, as in this case. Such would be a fraud upon the rights of the company, and they would hold the title in trust for the company.

The company and defendants have been in the joint possession of this property, and defendant's possession must be

held a sufficient compensation for the taxes and insurance they have had to pay, especially as their holding was wrongful.

Under their original agreement they were to have an exclusive right to build and use an elevator and lime house. Such a building they have erected, and they should be protected in their rights thereto in accordance with the agreement.

The decree below must be reversed with costs of both courts and one entered here in accordance herewith.

The other Justices concurred.

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William H. Tabor, adm'r, et al. v. The Michigan Mutual Life Insurance Company.

Insurance—Revivor of policy—Payment by note—Renewal receipts—Surprise as ground of equity.

A life insurance agent by false representations that a policy had become forfeited, and by great urgency, persuaded the insured, who was too feeble to withstand his arguments, and whom he would allow no time for consultation, to give up his policy which was for the benefit of his wife, and accept instead a policy, for its surrender value. The wife was not consulted as if she had any rights, and the husband died soon afterwards. *Held*, that a bill seasonably brought by the wife to compel the re-establishment of the policy, should be sustained.

The acceptance of a note for the amount of premium due on a life insurance policy and the giving of a renewal receipt by the company, amount to a payment of the premium.

The doctrine which makes parties bear the consequences of mistakes of law is often hard and can only be maintained on grounds of general policy. It is not so universal as to exclude relief in some instances where mistake is only one element and is combined with the fraud or misconduct of the other party.

Equity often gives relief where one has been surprised into doing what it is inequitable to hold him to, where fact and law are blended, or where the mistake of law is so combined with other things that it cannot reasonably be regarded as a deliberate blunder.

A delay of less than two months in filing a bill to obtain the re-establish-

ment of an insurance policy, the surrender of which had been procured by fraud was not such delay as to preclude relief, the insured having died meanwhile, and the beneficiary being his wife, and no injury being caused to the company.

Appeal from Hillsdale. Submitted April 22. Decided October 13.

BILL to revive policy of life insurance. Defendant appeals. Affirmed.

E. L. Koon for complainants.

Wilkinson, Post & Wilkinson and *C. A. Kent* for defendant.

CAMPBELL, J. The bill in this cause was originally filed to obtain the revival and establishment of a policy of life insurance, issued January 20, 1874, for $5000, on the life of Benjamin F. Tabor, now deceased. The policy was issued to Sarah A. Tabor, his wife, and payable to her, or in case of her death to their children. The premiums were payable annually. In every instance notes were taken signed by Benjamin F. Tabor, the last note being for the premiums of January 20, 1877. This note was dated January 20, 1877, and was payable at six months for $179.97, with interest at ten per cent. It was not paid at maturity, and was extended to November 1, 1877. When this note was given a renewal receipt was delivered, acknowledging payment of the premium.

On the 7th of December, 1877, one Vanderburg, an agent of defendant, called on Benjamin F. Tabor and procured a delivery up of the policy, on a claim that it was forfeited, and a paid-up policy was sent to him for $265, which is claimed to be the surrender value of the first policy after deducting the premium note and interest. This was sent to Mr. Tabor a few days after the old policy was given up. The bill was filed on the 13th of February, 1878, after tender of full premium and of the substitute policy, and refusal by defendant to restore the old one.

The bill claims the surrender of the first policy was obtained by improper means and under circumstances indicating actual or constructive fraud.

It appears that all the negotiations were had between Vanderburg and Benjamin F. Tabor, and without any dealings with Mrs. Tabor, and without procuring her signature to the surrender, and that the new policy was sent to her husband and not to her. The original policy was in her hands and handed over by her when Vanderburg and her husband met at the house to get it. But she was not treated as having anything to say about it, or as having any right to be consulted or dealt with. At the time of its surrender she was only informed in a very general way that it was forfeited, and that the only thing to be done was to take a paid-up policy for such sum as would be fixed by defendant.

The defense is based on two principal grounds, *first*, that the surrender was voluntary, and *second*, that there was injurious delay before suit brought.

Upon the most important facts there is not much dispute, although upon some things the discrepancies are more serious. Much of the testimony was taken on a legal theory of defense which is now abandoned, leaving the substantial controversy much narrowed.

It was at first claimed, and the defense was originally chiefly rested on the claim, that when the policy in dispute was given up it had been already forfeited, and the surrender was all that the insured could desire. But in the case of *Mut. Ins. Co. v. Bowes* 42 Mich., 19, it was held in a similar case arising out of a policy issued by the present defendant, that the acceptance of note and giving renewal receipt, as in the case before us, operated as a complete and not as a conditional payment of premium. And it is not now seriously contended that there was anything unpaid or any forfeiture of the policy now litigated. The defense, therefore, is brought down to a surrender made under a mistake of law, but which is relied on as intentional and binding.

Before considering the facts it is perhaps desirable to look at the condition of things as assumed by the defense to have

existed on the theory of non-payment. It is admitted in the answer and there is no doubt of the fact that the time of payment of the premium note was extended until November 1, 1877, and that up to that date there was no default which could have caused any forfeiture. By section 2952 of the Compiled Laws, it was provided that no policy should become void by reason of unpaid premiums, but that a paid-up policy should be issued to the party in default applying for it, for a value to be ascertained according to the age of the insured, under the "American Experience" tables: and liability was to cease if application was not made to the company within one year after default.

Regarding the payment as in default January 20, 1877, the parties had until January 20, 1878, to apply. If reckoned, as it would have been, from November 1, 1877, then they would have had until November 1, 1878, long before which time Benjamin F. Tabor died, and the right to a money payment matured. There was not on any theory any pressing reason for haste. Upon the theory on which the company appears to have acted no premium was earned for 1877, and the adjustment which took out the whole premium note and ten per cent. interest from its date was incorrect, on any theory. No data are given in the record from which it can be determined on what basis the paid-up policy was calculated, so as to give its precise and proper value. This was not dwelt upon on the argument, as the case was put upon the general equities. It is not, therefore, important except as having some bearing on the methods by which the surrender was brought about.

The facts, as they appear to us as fairly drawn from the evidence, so far as material, indicate that prior to December 7, 1877, neither Mr. nor Mrs. Tabor had any idea that they were not fully protected by the policy, or that the premium was not paid by Tabor's note. Mr. Tabor's health had been failing for some months, and was getting worse. His illness was such as to affect seriously his nervous system, rendering him despondent, and impairing his capacity for work and for resisting importunity.

On the 7th of December Vanderburg called several times during the day at the clerk's office of Lenawee county (Tabor being county clerk), and said he would call till he found Tabor alone, which he did about five o'clock in the afternoon. He then told Tabor he was round gathering forfeited policies, and that Tabor's was forfeited. Tabor stated his understanding that it was not forfeited under the arrangements that had been made. Vanderburg assured him it was forfeited; that the Insurance Commissioner refused to allow notes as assets in making up their balances, and they had therefore been obliged to cut down their capital. He further represented that a great many were surrendering their policies, among others Leonard H. Bailey and Fred. A. Sanders, as well as himself in part. Tabor insisted he did not wish to surrender, but wanted to keep it paid up as he had done thus far. Vanderburg told him he could not do so; that it was already forfeited; and wanted him to surrender it that night. Tabor wanted time to think and to advise with some one. Vanderburg told him he must have it then, that he would have to deliver it up so that he could get a paid-up policy. To Tabor's repeated remonstrances he replied by further urgency and assertions of forfeiture, and refusal to accept payment of the note, or do anything but receive the surrender. When asked how much the paid-up policy would be, he said he did not know, but that the actuary would figure it out. They thereupon went to Tabor's house, when Tabor told his wife Mr. Vanderburg said the policy was forfeited and good for nothing, but that if given up, a paid-up policy would be issued. She got the policy and Tabor signed some endorsement on it and gave it to Vanderburg. Vanderburg made no statements to Mrs. Tabor, but heard what was said by her husband. All the parties seem to have acted on the idea that she had nothing to say in the matter, and that her husband was the person to deal with. She was surprised and could not understand how the policy was forfeited, but assumed her husband and Vanderburg knew how things stood.

Vanderburg represents it differently, and that he first

applied to have the note paid, and told Tabor if not paid he must surrender. There is some testimony from other witnesses indicating that Vanderburg knew that Tabor's life had become precarious, and that he took these steps to save the company from having to pay a loss of $5,000 which was likely to accrue before very long. We are satisfied that the story told by Tabor is true. We are satisfied also that Tabor would have paid the note rather than risk the policy, and that he had reason to think it would not be pressed until Vanderburg's visit.

It is not pretended by Vanderburg that he had any talk on the subject with Mrs. Tabor. So far as she was concerned she acted under the immediate pressure of an assurance without explanation that the policy was forfeited and that a surrender was necessary to save anything. So far as Tabor was concerned it is equally manifest that he was driven by the false statements and urgency of Vanderburg into acting without advice and accepting as true what was not true. For it was not true that the Commissioner would not have recognized or allowed Tabor's note, and it was not true that policies had been surrendered by the parties named. And it was also not true that any forfeiture had been incurred, or that if there had been, it was a matter in which there was any urgency, or anything to be lost by delay. In Tabor's condition he was not capable of standing up against the sort of pressure that was brought to bear on him, and taking advantage of his infirmity was itself fraudulent and unconscionable.

There was no consideration whatever for giving up a valid policy and getting back nothing more than would have been a matter of right in case of actual default, and it cannot be imagined that any such arrangement would have been made unless under some gross mistake, whether brought about by fraud or not. There is no foundation in fact for any claim that there was either bargain or settlement willingly or understandingly made. And so far as Mrs. Tabor is concerned there is no testimony in any way tending to show that

her consent was either asked or given. She used no judgment in the transaction.

If this had been a mutual mistake of law, and there had been the ordinary surroundings of a fair contract, the application of the rule that relief will not be granted against such mistakes might not be improper. But this was not a deliberate arrangement, nor was it supposed to be a compromise. It was submission to an unlawful and unjust claim, under circumstances of urgency and undue pressure, and upon false statements of fact. There can be no doubt that Tabor yielded against his will, and that Vanderburg meant to and did drive him into yielding by pretenses well calculated to deceive him and throw him off his guard. What he did was reasonable if what Vanderburg said was true. Having been defrauded in fact, the question is whether the fact that if he had known the law he would probably have done otherwise, puts the case beyond redress.

The doctrine which makes parties bear the consequences of mistakes of law is a hard one in many cases, and can only be maintained on grounds of general policy. It is undoubtedly expected of persons that they will act with prudence. But the rule is not so universal as to hold parties beyond relief for all cases—however hard—when mistake of law is an important element. When it is only one of various elements, and is combined with fraud or misconduct, the courts will not refuse to do justice in all cases. In *Pusey v. Desbouvrie* 3 P. Wms. 315, a release of an orphanage share of a freeman's daughter in London made as a condition of obtaining a legacy, was set aside as made improvidently, though without fraud, where the legatee reposed faith in her brother, the executor, for knowledge of her rights under the custom, and he had innocently failed to enlighten her. In commenting upon the case Judge Story (1 Eq. § 118) justifies it both on grounds of confidence and also as really involving surprise connected with facts. In *Evans v. Llewellin* 1 Cox 333, there was no ignorance of facts, and it was held there was no actual fraud, yet on the ground of surprise and action taken suddenly without due caution, a conveyance was set

aside as improvidently made. The cases are quite common in which relief is given where a person has been surprised into doing what it is inequitable to hold him to, when fact and law are blended, or where the mistake of law is so mixed up with other things that it cannot be regarded in the view of good sense just as it would be if it were a deliberate blunder made without haste or artifice. See Story Eq. § 134, and generally §§ 117–139.

In the case before us we have a man who from sickness was practically and obviously unfit to protect himself, beset by very unseemly urgency by a cool and calculating agent who went on purpose to get his policy away from him and not only misstated to him the fact of forfeiture, which was a mixed question of fact and law, but also misinformed him concerning the action of the Insurance Commissioner, and the action of some of his neighbors touching the surrender of their policies. All of these things must necessarily impress any one, if credited, because showing on the one side an official decision on the law as to notes, and on the other acquiescence of business men in its interpretation. The questions of law were not such as most men would in fact know much about, and there are few persons who would not be impressed somewhat by the representations of the agent of a responsible company. While, as we held in *Mayhew v. Phœnix Ins. Co.* 23 Mich. 105, a person cannot generally be justified in acting solely on the statement of his legal rights by an adverse agent in insurance controversies, yet—as there intimated—they may be so mixed with unconscionable conduct as to stand differently. Here there was a positive refusal to give time to take advice, and a positive claim that there must be immediate action or complete forfeiture. If such conduct supported by falsehood in fact, and practiced upon a person weakened by disease, can be held free from legal blame, the doctrine of constructive fraud becomes too technical and attenuated to be of practical service. When a fraudulent result is both designed and accomplished against one comparatively helpless, over nicety is not equity.

If the transaction whereby the policy was procured was

fraudulent, we do not think the delay was such as to render relief improper. The condition of Mr. Tabor was itself such as to excuse both him and his wife from haste, and there were no third parties to be injuriously affected. A tender of the premium in January would not have been accepted, and its omission is not set up in the answer as a ground of defense, and was not given as a reason of refusal. The defendants were in no way injured by the brief space of time that elapsed before filing the bill.

We think the decree should be affirmed with costs.

GRAVES, J., concurred.

COOLEY, J. I have taken a somewhat different view of this case from my brethren, but as the case turns upon the facts I do not deem it important to enter upon a review of them under the circumstances.

MARSTON, C. J., did not sit in this case.

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44 332
s6NW 846
s38AR 272
r111US 176
r28Led 390
r4SC 355

SARAH HEYMAN v. LEONARD COVELL.

Replevin in State Court against United States Marshal.

Replevin will lie in a State court against a United States Marshal to recover goods seized by him on final process issued from a federal court, where the goods belong to some other person than the defendant named in the writ.

Error to Kent. Submitted June 8. Decided Oct. 13.

REPLEVIN. Plaintiff brings error. Reversed.

Norris & Uhl for plaintiff in error.

Butterfield & Withey for defendant in error. Neither federal nor State officers can levy upon property in one

another's custody: *Hagan v. Lucas* 10 Pet. 400; *Wallace v. M'Connell* 13 Pet. 143; *Campbell v. Emerson* 2 McL. 33; *The Oliver Jordan* 2 Curt. 414; *Taylor v. Carryl* 20 How. 591; *Peck v. Jenness* 7 How. 612; *De Visser v. Blackstone* 6 Blatch. 236; *Chapin v. James* 11 R. I. 86: 14 Am. L. Reg. [N. S.] 214; *Brooks v. Montgomery* 23 La. Ann. 450; *Matter of Spangler* 11 Mich. 298.

CAMPBELL, J. Mrs. Heyman, the plaintiff, sued defendant in replevin for certain goods which, as we understand the finding, the court below held were unlawfully taken from her by defendant, but nevertheless gave judgment in his favor. Defendant at the time the goods were replevied held them as United States Deputy Marshal, under an execution issued from the Circuit Court of the United States for the western district of Michigan, against one Adolph Heyman who was plaintiff's husband. There are no legal conclusions set out in the finding, and there are some facts set out which would seem to indicate that there were questions discussed concerning the validity of plaintiff's title. We have had some doubt whether the court below did not err in failing to find more specifically as requested. But the facts actually found show title in plaintiff and show nothing to controvert it. We shall assume, therefore, what has been assumed by counsel for both parties, that the ground of the decision was that defendant's possession, though wrongful, must prevail over State process issued in favor of the real owner. And we shall consider the record as involving the question whether a United States Marshal, by seizing the property of a stranger to the execution in his hands, can cut off the right of the owner to recover his property thus wrongfully seized. For the right is effectually cut off if it cannot be replevied in a State Court, when there is no remedy provided by law for trying the title anywhere else.

The case supposed to stand in the way of this remedy is *Freeman v. Howe* 24 How. 450. The language of that case does, when taken by itself, tend to sustain the claim of defendant, and if it were applicable here, and not affected by subsequent decisions, we should be disposed (as stated in

Carew v. Matthews 41 Mich. 576) to regard it as perhaps disposing of the case. But when this decision is considered in the light of other decisions which are recognized as binding in the United States Courts, we think it has no force when applied to the issue before us.

The only ground of the decision was that the property there in controversy was in the custody of the United States Court for legal purposes, and that an effectual remedy existed in that Court to try and determine the rights of the adverse claimant. If this was so there was little room for discussion. The remedy there suggested was a bill in equity, which it was said would not be treated as a separate suit but only as a collateral proceeding in the same suit. And reference was there made to some other cases in which the question decided was, not whether one jurisdiction could interfere with another, but whether the remedy in equity was a proper remedy to protect the particular rights in controversy. In *Freeman v. Howe* there can be little doubt that there was a remedy in equity so far as the subject-matter was concerned, for the complaining parties were railroad mortgagees in trust and the property replevied by them was taken in that capacity against a levy not by execution, but under mesne process.

There was certainly some force in the suggestion that the remedy was there adequate, and the fact that the property was in the custody of the court was assumed. Possibly that is true in some cases in regard to property held under mesne process. But such has not been the view concerning property held under final process, and it has been uniformly held that a Marshal is a trespasser and in no way protected by his process when he seizes the property of a stranger.

In *Buck v. Colbath* 3 Wall. 334, the action was trespass, and therefore all that was said about other remedies was *obiter*. But it was distinctly intimated that the difficulty did not arise except concerning property actually or constructively in the possession of the court, and while litigation was still pending. Property under mesne process is in some cases the only basis of jurisdiction, and it is often subject to disposition for various purposes *pendente lite*, so that it may not only be

discharged from seizure, but may sometimes be dealt with otherwise. This creates at least a colorable, if not a real distinction, and may give some force to the claim that it is in the custody of the Court, although we are not prepared to say the distinction is usually in fact very important. The case of *Buck v. Colbath* is significant in confining the doctrine of conflict to interference with the action of courts, and in holding that a Marshal who levies on the property of a stranger is in no sense acting under process unless the writ directs the seizure of the specific property taken. The distinction between writs against specific property and those against undescribed property of named persons is made the turning point. And it was said emphatically that "the plaintiff in error is mistaken when he asserts that the suit in the Federal Court drew to it the question of title to the property, and that the suit in the State Court against the Marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it, in the usual course of proceeding in such a suit."

In the subsequent case of *McKee v. Rains* 10 Wal. 22, it was held that a trespass suit by a third person against a Marshal could not be removed into a Court of the United States, because his levy could not be regarded as made under any authority of the United States. This is certainly equivalent to holding that he is no better off than if he had no process, and it is difficult to conceive how it leaves any room for holding that a disturbance of his wrongful possession is an interference with the Court.

It would not be—we suppose—competent for Congress or any State, even by positive enactment, to deprive the owners of property of the right to vindicate their title by legal process in a judicial trial. There is no legislation which provides any method whereby Mrs. Heyman could secure her rights in the United States Court against Covell. Unless she has such a remedy in due form of law her only resort must be to the State Courts, and this is recognized in *McKee v. Rains* as well as in *Slocum v. Mayberry* 2 Wheat. 2. It was indeed held in *Freeman v. Howe* that equity would relieve in that

particular instance, and was said that it would in any case of wrongful levy on a third person's goods. If this were so, the case would not be difficult of redress. But it has since been held that there is no such remedy. In *Van Norden v. Morton* 99 U. S. 378, a bill in equity was filed in the Circuit Court of the United States for the district of Louisiana to secure protection and restoration against a Marshal's levy under an execution from the same Court, and the Circuit Court made such a decree. But on appeal to the United States Supreme Court it was held that replevin was the proper remedy to regain possession, or some similar proceeding in the nature of a common-law replevin, and that equity had no jurisdiction. The decree was reversed for want of jurisdiction, without prejudice to an action at law or other redress.

If there is no remedy by bill in equity then it follows that a common-law action is the proper redress, and such an action can only be brought in a court of the United States where the parties are such as to confer jurisdiction; and in such cases the statutes have made the jurisdiction concurrent with power of removal under certain circumstances. In the present case it does not appear that suit could have been brought anywhere but in the State Court, and the case has gone to judgment in the usual course.

We think there was no ground for refusing redress to plaintiff, and that she was entitled to judgment on the finding.

Judgment must be reversed with costs and judgment entered for plaintiff with nominal damages of six cents.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. My brethren may be right in their view that the later decisions of the Federal Supreme Court have in effect overruled *Buck v. Colbath*, but I prefer to await an authoritative declaration to that effect by the court itself.

WILLIAM W. FURY v. WILLIAM H. STROHECKER.

44 337
117 457

Title to crops on land fraudulently transferred.

A judgment creditor is entitled to crops grown upon the land of his debtor after it has been transferred in fraud of his rights, so far at least as the fraudulent grantor retains an interest in them by an understanding with the grantee; and where there is reason to suppose there is such collusion all doubts should be solved in the creditor's favor.

Considerable latitude is allowed in the introduction of evidence tending to show fraud.

Error to St. Joseph. Submitted June 10. Decided Oct. 13.

ASSUMPSIT. Defendant brings error. Reversed.

H. H. Riley for plaintiff in error.

Bean & Eaton for defendant in error. A judgment creditor cannot levy upon crops not in existence at the time when the land upon which they are grown was conveyed in fraud of his rights: *Pierce v. Hill* 35 Mich. 201; *Peters v. Light* 76 Penn. St. 289; *Jones v. Bryant* 13 N. H. 53.

MARSTON, C. J. The principal question in this case relates to the right of a judgment creditor to crops grown upon lands fraudulently conveyed, and which were not in existence at the time the fraudulent transfer was made.

There is much to be said against the right of the creditor in such cases, and no doubt he may, by mere lapse of time or otherwise, so acquiesce in the transfer that he could not follow the crops grown thereon by the grantee.

So there may be cases where the labor and capital, one or both, of the grantee, enters so largely into the crop or product, that it would be inequitable to permit the creditor of the fraudulent grantor to make any claim to the crop while permitting the conveyance to stand. Upon such and kindred cases we neither express nor intimate any opinion.

Where, however, the debtor for the purpose of defrauding his creditors makes a conveyance of his real estate, yet retains the possession, or receives the rents, issues and profits thereof in whole or in part, the mere fact that the grantee is the ostensible owner of the farm or its products, or that the crops had not been sown or planted at the time of the fraudulent conveyance, should not deprive the creditor of his right to resort to the crops, at least to the extent of the fraudulent grantor's interest therein, in satisfaction of his debt.

The conveyance is good as between the parties thereto, and the grantee may, as against the fraudulent grantor, retain what he has received and reap the fruits thereof for his own exclusive benefit. Or he may in pursuance of the fraudulent agreement, carry on the business apparently for himself, but in fact, in whole or in part, for the use and benefit of the fraudulent grantor, thus enabling him to reap the benefit, in part at least, of an owner in fact while not in appearance.

In such cases there can be no good reason against the creditor taking the crops so raised, and if any doubt exists in a given case it should be solved in favor of the honest creditor. A grantee who thus lends himself to the fraudulent grantor should run all the risks, for if he loses it is but one of the results of his own voluntary act.

In reference to the other questions raised, this court has repeatedly held that a broad latitude should be allowed in the introduction of evidence tending to show fraud, and we need not pass upon the several questions raised.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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83 633
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103 296
44 339
106 503

FRANKLIN KINYON v. ABRAHAM C. YOUNG.

Good faith of execution purchase—Enforcement of parol contract for land.

A purchaser on execution who knows that land which he buys was subject to a contract of sale before judgment was rendered is not a *bona fide* purchaser as against the contract purchaser.

A parol contract was made for the sale of land and was carried out by giving a deed which was ineffectual for misdescription. The land was afterwards levied upon and sold on execution, and the contract purchaser filed a bill to enjoin an action of ejectment by the execution purchaser, to correct the mistake in the deed, and to have the deed on execution set aside as clouding his title. *Held*, that to entitle complainant to enforce the parol contract as against the owner of the legal title he must show (1) a contract, the terms of which are clear and complete, so that no reasonable doubt can exist respecting its enforcement according to the understanding of the parties, if enforcement seems equitable; (2) such acts of part performance, as according to equitable principles, will justify its enforcement, notwithstanding the failure to comply with the statute of frauds in making it; (3) the payment of the purchase price.

Appeal from Tuscola. Submitted June 11. Decided October 13.

INJUNCTION to restrain action of ejectment. Defendant appeals. Affirmed.

John A. Edget and *John Hurst* for complainant. Specific performance of an oral contract for lands may be enforced where the vendor's obligation to convey is found to be certain and definite (*Wilson v. Wilson* 6 Mich. 16) and the matter has been taken out of the statute of frauds by part performance: *Freeman v. Freeman* 43 N. Y. 34; *Miller v. Ball* 64 N. Y. 286. An execution purchaser is not a *bona fide* purchaser if he bids in the property after receiving notice of the interest of a third party in it: *Columbia Bank v. Jacobs* 10 Mich. 349; and notice which will put him on inquiry is sufficient (*Hosley v. Holmes* 27 Mich. 416, *Converse v. Blum-*

rich 14 Mich. 109), and he must inquire of the claimant: *McKee v. Wilcox* 11 Mich. 358; *James v. Brown* id. 25; *Woodward v. Clark* 15 Mich. 104; if the claimant is equitable owner and the purchaser has bought subject to his equities, the former may enjoin an action of ejectment brought by the latter against him, and equity will establish his rights: *Salisbury v. Miller* 14 Mich. 160; *Det. & Mil. Ry. v. Brown* 37 Mich. 534; *Bush v. Hicks* 60 N. Y. 298.

Black & Quinn for defendant. An equitable title cannot be established by parol evidence as against the muniments of title unless the proof is very clear and distinct: *Van Wert v. Chidester* 31 Mich. 209; *Jones v. Tyler* 6 Mich. 364. Part performance will not take a parol contract for land out of the statute of frauds unless it is in execution of that particular contract, and the contract is clearly established: *Phillips v. Thompson* 1 Johns. Ch. 131; Fry on Spec. Perf. 260; *Lord v. Underdunck* 1 Sandf. Ch. 46.

Cooley, J. The bill in this case is filed for a threefold purpose: *First*, to enjoin the prosecution of a suit in ejectment by defendant for the recovery of certain lands described therein; *second*, to correct a mistake in a deed whereby complainant makes claim to the land; and *third*, to have a conveyance under which defendant asserts title to the land set aside as a cloud on complainant's title.

The substantial facts are the following: In 1871 Josiah Kinyon owned the land in controversy. Complainant is his son, and was then living with him. He came of age at about that time, and he claims that he then made arrangements with his father whereby the land was sold to him. The chief consideration was to be four years' labor thereafter performed; and this it is claimed was performed so as to entitle complainant to a deed in 1875. The land had constituted a part of the farm of Josiah Kinyon, on which he resided, and had upon it very little improvement. The value was perhaps $600. A deed to convey the land to complainant was executed and delivered in October, 1875, but it was ineffectual

by reason of a misdescription of the land, which was not discovered until the land was levied upon as hereinafter stated.

In the early part of 1875, Josiah Kinyon was sued by defendant for the non-performance of a log contract. There was a long trial in justice's court, in which Kinyon succeeded. Defendant appealed, and the case was pending in the circuit court at the time Josiah Kinyon made the deed to complainant. The case was not brought to trial in the circuit court until November, 1876, and defendant then recovered judgment for something over two hundred dollars. It is the theory of the defendant in this suit that the pretense of a contract between Josiah Kinyon and complainant for the purchase of the land by the latter in 1870 was baseless; that there was no purchase and no payment of consideration, and that the deed executed in 1875 had for its purpose to put the land beyond the reach of defendant in case he should recover judgment. This theory is supported by evidence which seems to show very clearly that after allowing his exemptions, Josiah Kinyon without this land would have neither real nor personal property from which defendant's judgment could be collected.

There never was any written contract by Josiah Kinyon to deed this land to complainant; and this suit is therefore in effect a suit to compel the specific performance of a parol contract for the conveyance of lands. Defendant after obtaining his judgment caused the land to be sold on execution, and bid it in himself, so that the legal title subject to complainant's equities is now in him. It is subject to those equities, if any exist, because it appears beyond question that defendant was informed of the mistake in the deed before he made his purchase, and he is, therefore, not a *bona fide* purchaser as against complainant. The question in the case, therefore, is this: whether complainant has proved such equities as entitle him to enforce the parol contract as against the owner of the legal title.

To make out his case complainant must show (1) a contract, the terms of which are clear and complete, so that no reasonable doubt can exist respecting the enforcement of it accord-

ing to the understanding of the parties, if enforcement shall seem to be equitable; (2) such acts of part performance as according to equitable principles will justify its enforcement notwithstanding the failure to comply with the statute of frauds in making it; (3) the payment of the purchase price.

It is claimed on the part of the defense that none of these things are shown, and that the case fails at every point. And it must be conceded that at no point is the showing as distinct, positive and unquestionable as would be desirable.

As regards the contract between Josiah Kinyon and complainant, the evidence almost exclusively comes from them. It appears to have been communicated to some of the neighbors, but not to the grantor's wife, who was complainant's step-mother. The parties to the contract agree in saying that complainant was to work four years for the land, and to give his father a cow he then had, which was worth $55. They also agree that he was to give another cow, then owned by him as a calf, and $15 in money; but the testimony of both shows that the two items last mentioned were not embraced in the original understanding as constituent terms of the contract; for they agree that the $15 was paid for lost time, so that, though it was part of what was paid for the land, it was paid only as a substitute for labor not done. The manner in which the witnesses confuse what was paid with what it was agreed should be paid must be accounted for by their ignorance, which is apparent all through their testimony, but there is an air of candor in what they say, and the severe cross-examination to which they were subjected did not remove this appearance of truthfulness. We accept their statements as substantially correct, and are convinced that complainant bought the land as they testify, paying one cow at a time, and the other when his father saw fit to take it. The only vagueness about the arrangement concerned this second cow, but that was an insignificant part of the consideration, and whatever was left vague concerning it, if anything, was made certain when the father received it.

The acts of part performance have consisted in taking possession of the land, making improvements and spending

money upon it. But these acts have not been of a nature as conclusive as could be desired. Complainant, being still unmarried, has continued to reside with his father, and both having very limited means, the improvements have not been extensive or specially noticeable to others. Moreover living thus together the parties have worked together considerably; complainant says, because they found it convenient to accommodate each other by an exchange of services; defendant says because Josiah Kinyon in fact considered himself the owner of all the land. But we are inclined to think the separate possession of complainant was as distinct as could have been expected; the son living with the father as he did, the two supporting themselves by hard labor, practicing strict economy, and making improvements only as their meagre crops after supporting themselves from them, would furnish the means. We assent, therefore, to the conclusion of the circuit court, that there have not only been acts of part performance, but that the contract has been completely performed except so far as the mistake in the deed of conveyance has hindered. The consideration has been fully paid, and nothing remains to be done to make out the case for complainant.

In this view of the facts it does not become necessary to determine whether a desire to defeat defendant in the enforcement of his demand had anything to do with Josiah Kinyon's action. No direct evidence to that effect was given, and some circumstances point in another direction. As the litigation stood at the time the deed was made to complainant, Kinyon was successful, and we do not know that he anticipated any different result in the circuit court. Moreover after judgment against him had been recovered he made a proposition for a settlement, which the evidence in the case shows would have secured to defendant full payment had he accepted it. But as the equities of complainant antedate those of defendant, this branch of the case is unimportant.

The decree must be affirmed with costs.

The other Justices concurred.

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84 384
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120 290
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141 483

THE NEW YORK IRON MINE v. THE CITIZENS' BANK.

Post dated drafts—Agent's authority to draw unusual negotiable paper—Bills of exchange—Burden of proving execution—Notice of equities—Local usage.

Where defendant in an action on a bill of exchange drawn by his agent, pleads the general issue, and files with it an affidavit denying the execution of the bill, the plaintiff has the burden of proving that it was drawn with competent authority.

The authority of an agent in charge of an iron mine to draw post-dated bills of exchange on his principal was not presumed from his having done so before without objection, where there was nothing to show that the party relying on his authority knew the fact, and a long interval had passed since it occurred, and the mine had meanwhile become prosperous and better supplied with ready money, and where in the former case the bills were drawn on time and were post-dated only long enough to give the drawee the benefit of the full period of discount after receiving them, while in the latter they were made payable at sight, and post-dated several weeks for the agent's private advantage.

Where knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities, he must have had actual notice of such equities, or, at least, knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it an act of bad faith.

Parties discounting paper drawn by an agent upon his principal, are bound to act in the light of all facts within their knowledge bearing on his authority, and cannot disregard any fact which might lead a prudent man to suspect that the agent is acting in fraud of his principal.

Local usage can affect the general rules of mercantile and banking law only to a very limited extent, and under circumstances in which the usage must be considered as made by a party a part of his contract.

A post-dated draft purporting to be payable at sight, is, for all the legal purposes of presentment, demand, protest and payment a draft payable so long after date; but that authority to make time paper shall be held to cover post-dated paper, their legal effect must not only be the same, but all their incidents so far identical, that both may fairly be supposed to have been in mind when the authority was given.

Authority to an agent to give unusual business paper is not to be construed on technical reasoning but on the actual intent.

A post-dated bill of exchange differs from a bill made payable a corresponding period after it is drawn, in that the time bill may be sent forward meanwhile for acceptance, while the post-dated bill cannot, and the drawee cannot retain funds to meet it before its date as against other bills previously falling due.

An agent's authority to draw bills of exchange payable on time or at sight, does not include authority to draw post-dated bills.

Error to Marquette. Submitted June 15 and 16. Decided October 13.

ASSUMPSIT. Defendant brings error. Reversed.

W. P. Healy and *A. B. Maynard* for plaintiff in error. An agent's authority to make one kind of paper does not empower him to make another: 1 Pars. N. & B. (2d ed.) 107; *Trip v. Swanzey Mfg. Co.* 13 Pick. 293; *Robinson v. Yarrow* 7 Taunt. 455; *Attwood v. Munnings* 7 B. & C. 278; *Wallace v. Branch Bank* 1 Ala. 565; *Union Bank v. Mott* 39 Barb. 180; *Mechanics Bank v. Schaumburg* 38 Mo. 236; *Batty v. Carswell* 2 Johns. 48; *Floyd's Acceptances* 7 Wall. 666; authority to make post-dated drafts cannot be implied from the fact that they had been made before without objection under different circumstances: *Beach v. Vandewater* 1 Sandf. 277; *Dickinson v. Valpy* 10 B. & C. 128; the right to draw checks does not carry the power to post-date them: *Foster v. Mackreth* L. R. 2 Exch. 163; post-dated drafts are due on and after the day of their date: *Pasmore v. North* 13 East 517; *Mohawk Bank v. Broderick* 13 Wend. 134.

Dan. H. Ball and *Ashley Pond* for defendant in error. Post-dated drafts are not illegitimate or suspicious: 1 Dan. Neg. Inst. 73–4; 2 id. 538; Edwards on Bills 151; *Brewster v. McCardell* 8 Wend. 478; bills of exchange need not bear any date: Pars. N. & B. 41–2.

COOLEY, J. The Citizens' Bank is a corporation doing business at Marquette, Michigan, and was organized for that

purpose in May, 1871. The New York Iron Mine is a corporation, organized under the laws of Michigan in or about the year 1865, for carrying on mining operations near Marquette, but having the business offices of its president, secretary and treasurer in the city of New York. In the circuit court the bank sued the mine to recover the amount of the following bill:

"OFFICE OF THE NEW YORK IRON MINE,
"MARQUETTE, LAKE SUPERIOR, July 5, 1877.

"At sight, acceptance waived, pay to order of F. M. Steele, cash, five thousand dollars. NEW YORK IRON MINE.
"By W. L. Wetmore.

"*To Saml. J. Tilden Esq.*, 12 Wall St. N. Y."
"$5000."

The defendant pleaded the general issue, and filed an affidavit denying the execution of the bill. This plea and denial imposed on the plaintiff the necessity of proving that the draft was drawn by Wetmore with competent authority. The evidence which was given for this purpose is set forth in the bill of exceptions. It appears from this that at the organization of the defendant corporation Samuel J. Tilden and William L. Wetmore were the principal stockholders, and after a time, perhaps, the sole stockholders; that Tilden was president and also acted as treasurer, and Wetmore was general agent and manager at the mine; that the directors, besides Tilden, were men in his employ, and the board met but seldom, and the management of financial matters at New York was left exclusively to Mr. Tilden; that Wetmore while acting as general agent for the mine, was also operating on his own account in company with a brother under the firm name of Wetmore & Bro., and also as a proprietor in the Bay and Munising Furnace Companies. As the sales of products of the New York Iron Mine were made under Mr. Tilden's direction, and the moneys received went into his hands at New York, the means of carrying on mining operations were obtained by Wetmore by means of drafts drawn by himself on Mr. Tilden, which were either discounted at Marquette or Negaunee or sent forward for collection. At

first these seem to have been principally time drafts, but the mine proved to be very profitable, and after 1872 the drafts were generally at sight. In 1869 four post-dated drafts were drawn by Wetmore, the first of which was drawn seven days before its date, the second four days, the third five days, and the fourth nine days. In each instance Mr. Tilden was advised of the drawing by letter on the day the drafts were made, and it does not appear that any objection was made by him to their being post-dated. The first and fourth were drawn in January and December.

It was shown by Wetmore and not questioned by any one that the draft in suit together with a large amount of other paper was drawn by Wetmore for his own purposes without the knowledge of Mr. Tilden. The circumstances under which it was taken by the bank are shown by the testimony of Mr. Steele, the cashier of the bank. It appears by his evidence that the following post-dated drafts purporting to be sight drafts, were drawn by Mr. Wetmore and discounted at the bank: one for $5000, dated May 6, 1876, discounted April 29th; one for same amount dated August 5, 1876, discounted July 15th; one for same amount dated November 2, 1876, discounted October 23d; one for same amount dated December 4, 1876, discounted November 8th; one for same amount dated February 8, 1877, discounted January 6th; one for same amount dated March 3, 1877, discounted February 9th; one for same amount dated May 12, 1877, discounted April 9th. All these when their respective dates arrived were forwarded to New York and were paid. There is no evidence that Mr. Tilden knew before paying them that any one of them was a post-dated draft, and he testified that he never did. Wetmore also drew and the bank discounted for him May 23, 1877, a draft post-dated June 3d. This was not forwarded, but was taken up by Wetmore June 7th, by another draft post-dated July 3, which the cashier was requested not to forward. The reason assigned by Wetmore for thus taking it up was that he had had a fire at the Bay Furnace location, which demanded all his attention for the time, and he could not then make up his New York

accounts. The draft in suit was discounted by the bank June 16, 1877, post-dated July 5. With this was given a draft dated June 16, 1877, payable July 8, for a like amount, which was considered as collateral. The giving of the collateral draft appears to have been at Wetmore's suggestion, on a supposition, as he explains it, that if he were to die before the date of the principal draft arrived, it would become invalid. Similar collateral time drafts had been given in other cases where post-dated drafts had been discounted.

In all cases but one in which Wetmore obtained discounts at the bank, on paper purporting to be that of the New York Iron Mine, the money was paid or credited by the bank to him. The exception was of the draft in suit the proceeds of which, by Wetmore's direction, were credited to the mine, but were almost immediately drawn out on his checks. It was shown that a portion of the proceeds was paid out on the pay roll of the mine, but Wetmore, who was a witness for the plaintiff, admitted that this was in place of money belonging to the mine which he had used for his own purposes. The mine never had any other account with this bank.

The cashier of the bank testified that while discounting post-dated paper he did not regard it as suspicious; that discounting such paper was common with the banks in that part of the country. He was asked how it was elsewhere, but was not permitted to answer. He also testified that he did not look upon it as suspicious that he was requested not to forward the post-dated paper.

Immediately on the bill in suit being discounted Wetmore started for New York, where he had an interview with the secretary of the mine and with Mr. Tilden. To them he presented a statement of paper issued improperly by him in the name of the New York Iron Mine, and which he endeavored to induce them to assume for the corporation. The amount was $63,933.84, of which he had charged to himself $49,005.14 on the corporate books. Previous to going there he had counseled with a leading lawyer at Marquette, and been assured that he was not liable criminally for

these issues, but he did not in New York attempt to justify or excuse his conduct. Mr. Tilden refused to recognize the paper in any way, and denied the liability of the corporation upon it. Included in the statement was the draft in suit, and the one dated July 3d, and also two notes of $5000 each discounted by the same bank.

The foregoing is a very brief and much condensed statement of the principal facts upon which the legal questions depend. The evidence leaves upon our minds no doubt upon the following points:

Mr. Wetmore from the first had ample authority to draw bills in the name of the New York Iron Mine on Mr. Tilden, who acted as its treasurer, either at sight or on time, as the wants or convenience of the corporation should dictate, or as its circumstances should appear to render most desirable. But he had no express authority to execute for the corporation negotiable paper of any other description for the purposes of discount.

If Wetmore had implied authority to give post-dated bills, it must be either because he had drawn several such bills in 1869 which had been paid without protest with full knowledge, or because, as it was contended on behalf of defendant in error, a post-dated bill purporting to be payable at sight, is the same in legal effect with a bill dated when drawn and payable at a future day, so that authority to draw the one includes authority to draw the other also.

Of the fact that the bills which Wetmore drew in 1876 and 1877 were post-dated, Mr. Tilden and the other corporate officers in New York had no knowledge, and it was not intended by Wetmore that they should have. There was no corporate necessity or corporate reason for drawing them in that form, and it was done improperly for the benefit of Wetmore, and with the intent that when the bill reached New York it should be supposed they were just drawn. None of the bills were sent forward by the bank for acceptance, and the circumstances suggest the inference that there was at least an implied understanding between the bank and Wetmore that the parties in New York would not be notified

that the paper was post-dated. Both the cashier and Wetmore testify to the request of the latter that the draft of July 3d should be retained until that date arrived, and there is scarcely room for doubt that Wetmore understood all this post-dated paper was being kept back in the same way. It is not important to know whether there was or was not any agreement to that effect: the significant facts were that Mr. Tilden when paying drafts would not be apprised that they were post-dated, and that those handling the paper had no reason to suppose he would be.

Upon the foregoing statement it would seem indisputable that if a post-dated bill is to be treated and considered in all respects like a bill payable at a certain time after it is drawn and dated, then Wetmore had authority to draw the paper in suit. But if it is to be considered and treated as paper so different as to require special authority for an agent to execute it, we doubt if there is any evidence in this case that tends to show Wetmore had such authority. We do not overlook the post-dated drafts issued in 1869; but in determining their importance as evidence the following circumstances are to be considered: (1) The great lapse of time. It was conceded on all hands on the trial that the condition of the mine had greatly changed prior to 1876, and it had become and was understood to be a prosperous corporation with abundant means. The presumption that an authority existing in 1869 to make unusual paper was still in force seven or eight years later after a considerable change in circumstances would certainly not be very strong or forcible. (2) The drafts made in 1869 were essentially different from the post-dated bills of 1876–7. The former were all payable at either 30 or 60 days after date, and were post-dated only four and five days in the summer and seven and nine days in the winter months. Compared with the time they had to run this post-dating was not very significant; it was in fact little more than the time that would be required for transmitting the paper from Marquette to New York and for presenting it, and perhaps the purpose was that the dating should correspond to the time when the paper would be likely to reach

the office in New York, instead of to the time of negotiation. If post-dated paper was unauthorized so slight an irregularity might well have been overlooked, even if notice had not been promptly given of the drawing of the bills, as seems to have been the case with the paper of 1869. It is not readily perceived that the post-dating in those cases could have been in itself important for any purpose, and the form was probably adopted merely as a convenient one whereby Mr. Tilden in New York would be given the full thirty or sixty days after advice in which to provide for the paper. On the other hand the paper of 1876–7 was for the most part post-dated much longer; it was besides payable at sight so that the period of post-dating would be the whole period of discount. There was no notification of its issue until it was sent forward when the day of its date arrived, so that it was well calculated to subserve fraudulent purposes as it actually did in this case. It was only necessary for Wetmore to refrain from notifying the New York office, and he might then have the benefit of the corporate credit for the purposes for which he had not been empowered to use it, to the full amount of such post-dated paper as he should see fit to draw, and for such time, longer or shorter, as he should post-date it. We cannot in view of all these differences say that much support for the bills of 1876–7 can be drawn from the payment without protest of the bills of 1869. But (3) the bank had no connection with the bills of 1869: it does not appear that any of the officers of the bank ever knew of them; they were drawn, as the dates before given will show, sometime before the bank had an existence. This is important as it bears upon the claim of the bank that they had a right to suppose from appearances and from Wetmore's management of the business that his power was ample.

On this subject, also, the circumstances attending the drawing and sending forward of this paper are important. It was said on the argument that there is nothing suspicious in the circumstance that a bill is post-dated; nothing that puts the purchaser upon inquiry. The legal authority for this is to be found—if anywhere—in *Brewster v. McCardell*

8 Wend. 478, where SUTHERLAND, J., says: "There is no legal objection either to antedating or post-dating a note, and I am not prepared to say that either is, in itself, and disconnected from other circumstances, a legal ground of suspicion, so as to put the endorsee upon inquiry, and subject him to all the equities existing between the original parties." This cautious statement, that the post-dating, as a ground of suspicion, fell short of charging the indorsee with equities existing between the original parties, has doubtless by inadvertence been converted by one text-writer into a positive asseveration that the fact that a bill or note is negotiated prior to the day of date "is not a suspicious circumstance against which parties must guard." 1 Daniell Neg. Inst. § 85. But the difference between a merely suspicious circumstance, and such "legal ground of suspicion" as will charge an endorsee with equities existing between the original parties is so great that we need not fall into confusion here. The same text-writer in his valuable treatise has carefully collated the adjudged cases to show that the decided weight of authority in this country, and the settled law in England is, that mere knowledge of circumstances that would excite suspicion in the mind of a prudent man at the time he becomes the transferee of negotiable paper, is not sufficient to affect the paper in his hands with pre-existing equities. 1 Daniell Neg. Inst. §§ 770-776. To charge the transferee with such equities he must have had actual notice of them, or at least, he must have had knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it an act of bad faith. *Goodman v. Simonds* 20 How. 343; *Murray v. Lardner* 2 Wall. 100; *Phelan v. Moss* 67 Penn. St. 62; *Hamilton v. Vought* 34 N. J. 187; *Magee v. Badger* 34 N. Y. 247; *Crosby v. Grant* 36 N. H. 273; *Farrell v. Lovett* 68 Me. 326; *Commercial etc. Bank v. First Nat. Bank* 30 Md. 11; *Spooner v. Holmes* 102 Mass. 503; *Matthews v. Poythress* 4 Ga. 287; *Bottomley v. Goldsmith* 36 Mich. 27. Many other cases are to the same effect.

But the question now is, not whether the bank has taken

under suspicious circumstances paper issued by the party whose name it bears, but whether when that party repudiates the paper as issued without authority the bank has made good its claim that the paper was taken under circumstances that justified its officers in believing that it was properly issued. As bearing upon this question the bank gave evidence of the manner in which Wetmore was allowed to conduct the business of the mine; that he was the sole managing officer or agent at the mine, and that he was permitted to issue paper bearing some resemblance to the paper in suit. The bank officers are supposed to have acted in the light of all these facts, as constituting certain indications of Wetmore's authority. But they must also be deemed to have acted in the light of all facts within their knowledge having a contrary tendency, and they had no right to disregard any circumstance known to them which would be calculated to lead a prudent man to suspect that Wetmore might be acting without authority and in fraud of his principal.

Now it would be a bold court that should venture to assert that the offer of a post-dated bill for discount was not in itself a circumstance calculated to arrest attention, or that when purporting to be drawn under a power, it would not tend, any more than any other, to excite suspicion. No one disputes that such paper may be lawfully made, or that it will charge the maker with responsibility, or that it is sometimes negotiated; but when put upon the market it will commonly be for special reasons, and these may or may not be such as the maker would be willing to disclose. A post-dated check, for example, may be made instead of another, because the maker at the time has no funds against which he can draw, but expects to supply them before the date named shall arrive; and a post-dated bill may be issued for the same reason. In either case if the maker were responsible, and had made the check or bill himself, no occasion would appear for questioning the paper, though even then the query would naturally be suggested, why the ordinary form of time paper was not adopted. But we have no reason to believe that any banker to whom paper should be presented for discount by a

third party before the time of its date, would look upon the offer as so far an ordinary occurrence that he would take it with the same promptitude as he would any other paper of equal apparent responsibility, and on the supposition that he had as little occasion to inquire into the circumstances of its issue. But in this case the paper was not only post-dated, but it was issued under a claim of agency, and the question of power was involved. It was the plain duty of a party proposing to take it to take notice of whatever was unusual, either in the form of the paper, or in the accompanying circumstances, which might tend to raise doubts in his own mind whether the authority which was asserted had in fact an existence; and among the most important of these circumstances would be those which indicated that the paper afforded special opportunities for fraud upon the alleged principal. He would not be at liberty to look exclusively at the facts which lead to one conclusion, and to disregard merely suspicious circumstances because in themselves they were inconclusive; for the fact of authority or apparent authority is one to be deduced from all the circumstances, and he must at his peril take them all into consideration.

In this case the bank assumed from certain facts and circumstances that Wetmore was lawfully empowered to draw the disputed bill. These were, that he was a stockholder in the mine; that he was general agent in that locality; that he had undoubted authority to draw time and sight drafts; and we will add the further fact not then known to the officers, that eight years ago when the circumstances of the mine were different, and when it was not reputed, as it was at this time, to have plenty of ready means, Wetmore had drawn some post-dated time drafts which had been paid without dispute. But to set over against these were the following facts: Wetmore for more than a year had been making in the name of his principal paper of an unusual form and to a large amount. The power under which he assumed to make it was one easily abused, and for the existence of which there was not, so far as his principal was concerned, the slightest apparent occasion. In legal effect the paper was time paper, but it was so

made use of and managed that when it went forward for payment, it would appear to be sight paper, and unless the principal was notified to the contrary, it would be accepted and paid as such. It was therefore deceptive paper, and on the face of the transaction, not an honest reason would be apparent for issuing it, rather than paper of the same legal effect which would tell its own story on its face, and consequently be incapable of the like deception. Dishonest reasons, on the other hand, might readily be suggested, and a circumstance not previously mentioned might tend to supply these. Wetmore was then seriously embarrassed in his own affairs; was in great want of money, and had difficulty in meeting his financial necessities. The bank officers had some knowledge of this fact. If he drew time paper upon his principal, it might at once be sent forward for acceptance; but whether so sent or not, it would show when presented at what time it was drawn and for what time it had been discounted. But the discount of post-dated paper which his principal would suppose when payment was made, was issued at the time it bore date, might easily be made to assist him in supplying his own necessities on the credit of his principal, provided it was not prematurely sent forward. This was not likely to happen; but a request in a particular case that it should not be, could only be explained on the supposition that Wetmore desired his principal to remain in ignorance that the paper was negotiated. The last bill issued before the discount of the one in suit, was made to take up another post-dated bill, which had never been sent forward at all, but was both made and taken up by Wetmore himself. Now if Wetmore could legitimately do this once, he could do it any number of times; and he would thus make the power to draw bills equivalent in his hands to the power to make promissory notes, which would be a manifest perversion and abuse of that power.

Then again, the fact of the giving by Wetmore of what he called a "collateral draft" when he thus procured a post-dated draft to be discounted, would seem to indicate that he was conscious that the transaction was not legitimate. If

Wetmore lived, the post-dated bill would be sent forward for payment when the date was reached, and would appear to Mr. Tilden legitimate, proper and usual. If Wetmore chanced to die, the time paper would be sent forward instead, and would also appear legitimate and proper. But that would be sent forward only after all opportunity for using paper for fraudulent purposes had gone by. If the bank officers had demanded of Wetmore his reason for issuing the principal bill at all when the collateral would have accomplished the ostensible purpose as completely, and would have been the customary and regular paper to give and take, it is probable that his illegitimate transactions would have terminated at the first occasion on which such a "collateral" was offered.

We attach no importance to the evidence which was received to show that the post-dated paper was so common in the Lake Superior region as not to attract special notice. If there is no mistake about the fact, it is certainly remarkable; and if it is exceptional, as it was on the trial assumed to be, it cannot be allowed to affect the rights or liabilities of parties who suppose they are contracting and incurring liabilities only under the general rules of mercantile and banking law. Local usages are allowed to affect these only to a very limited extent, and under circumstances when they must be considered as made by the party a part of his contract. *Mills v. Bk. of U. S.* 11 Wheat. 431; *Jackson v. Henderson* 3 Leigh 196; *Woodruff v. Merchants' Bk.* 25 Wend. 673; *Kilgore v. Bulkley* 14 Conn. 362. A party at New York has a right to suppose that the same rules of commercial prudence, integrity and accountability prevail in Marquette as elsewhere, and that he is subject to no unusual liabilities or contingencies by reason of the paper to which he becomes a party being made at that point.

There is no denying, as we think, that the facts disclosed in the evidence and above recited were suspicious facts, and ought to have been so regarded and to have put the bank officers upon special inquiry regarding the authority which Wetmore assumed to exercise. They were not at liberty to overlook and wholly disregard such facts, as they evidently

did in this case. We do not say that if Wetmore's authority had been ample, these circumstances would have been sufficient to defeat the paper in the hands of the bank, but they were most cogent evidence on the question of Wetmore's authority, and they so pressed themselves upon the attention when the paper in suit was discounted that they could not fail to be noticed. But is it true that post-dated drafts are to be considered as so far identical with the customary time drafts, as that authority to draw the one must be deemed to include authority to draw the other? The circuit judge has answered this question in the affirmative.

It is no doubt the fact that a post-dated draft, purporting to be payable at sight, is for all the legal purposes of presentment, demand, protest and payment, a draft payable a certain time after date. But in order that authority to make time paper shall be held to cover post-dated paper, their legal effect must not only be the same but all their incidents so far identical that we may fairly suppose both were in mind when the authority was given; for the authority is not to be construed on technical reasoning but by intent. Is this the case? Unfortunately judicial decisions throw but little light upon the subject. In *Forster v. Mackreth*, L. R. 2 Exch. 163, it was decided that authority to draw a check did not authorize drawing a post-dated check, because, "so far as regards its practical effect, a post-dated check is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the check and the date marked upon it." And see *Re Brown* 2 Story 502; *Andrew v. Blachly* 11 Ohio St. 89. But while a bill of exchange is usually allowed days of grace, a post-dated check is not. *Mohawk Bank. v. Broderick* 10 Wend. 304: s. c. 13 Wend. 133; *Salter v. Burt* 20 Wend. 205; *Taylor v. Sip* 30 N. J. 284. The proposition, therefore, that authority to draw bills would include authority to draw post-dated checks, is one which could not be supported. The two classes of instruments are similar, but they are not, in legal effect, identical.

But a post-dated bill differs also from a bill payable a corresponding number of days after it is drawn. It is true that

the question of the right to days of grace might be settled by the terms of the bill itself, but there would be an important difference in this; that the time bill would be subject to be sent forward for acceptance while the post-dated bill would not. The latter must stand upon the responsibility of the drawer until the time of date arrives. It could not be dishonored by refusal to accept it before its date, because the drawer does not undertake to have funds in the drawee's hands to meet it before that day arrives; and the drawee if he were in funds to meet it, could not retain them for the purpose as against other bills drawn and payable before the date arrived. *Godin v. Bank of Commonwealth* 6 Duer 76; *Champion v. Gordon* 70 Penn. St. 474, 476.

Now it is evident that it was precisely this difference between time bills and post-dated bills that Wetmore relied upon in making use of the credit of the New York Iron Mine for his own purposes. It is true that all time bills are not required to be sent forward for acceptance, but any of them may be, and as a matter of prudent precaution and for additional security are liable to be. Wetmore must have known the rules of the law merchant on this subject, and he also knew that for time paper he must eventually account as of the day when it issued. But for post-dated paper he would account only from the time of its date; and if he concealed from the New York parties the fact of its being post-dated, he might continue improperly to use the credit of the corporation. But the sending forward for acceptance of a single bill would have exposed his abuse of his trust.

How can we say that authority to draw one paper includes authority to draw another, when the difference between them consists in a particular that peculiarly exposes the principal to be defrauded and plundered? Especially when the one paper is that which is common and customary so that it would naturally be in mind in creating an agency, while the other is altogether exceptional?

But a claim is made by the bank that the mine should be held liable upon this draft because a portion of the proceeds were used by Wetmore to pay its bills. If this were true, it

is probable that the mine might be held liable on any quantity of unauthorized paper which Wetmore saw fit to issue. His evidence shows that he used these proceeds where he should have used moneys he had misappropriated, so that it was rather accidental than otherwise that these particular moneys went to pay demands against the mine. The fact remains, however, that the draft was drawn to aid a misappropriation, and the question of liability upon it is purely a question of authority to make it. We think the court erred in its rulings bearing upon the question of authority.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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TRUMAN MOSS, WILDMAN MILLS ET AL. v. TRUMAN E. CUMMINGS.

Taxation—Assessment on false valuation.

Failure to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was also involved a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance.

The failure to list property for taxation in accordance with law cannot constitute a wrong to an individual unless he can show that his individual assessments are thereby made a larger proportion of the aggregate taxable property than they should have been. The collection of the tax levy may be restrained in such a case so far as it is excessive.

The wrong involved in an assessment of taxes by a supervisor on a false valuation is a public wrong and should be redressed by public prosecution.

Action lies to recover back moneys paid under tax proceedings that on their face are fatally defective.

A tax assessment is in the nature of a judgment, and cannot be assailed for fraud or irregularity in a suit against an officer who enforces it under process which on its face is valid.

It seems that an individual taxpayer has no right of action against a supervisor for assessing property on a false valuation except on the ground of fraud or malice.

Error to Sanilac. Submitted June 16. Decided October 13.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

Brown & Farrand and *C. A. Kent* for plaintiffs in error.

John Divine for defendant in error.

COOLEY, J. This in its purpose is a praiseworthy suit, for it is brought to compel obedience by public officers to their duty under the law. The plaintiffs in the year 1878 were owners as partners of taxable property in the township of Lexington in the county of Sanilac, and the supervisor for the year listed it for taxation, and it was taxed. The defendant was township treasurer, and plaintiffs have paid the tax to him under the compulsion of his process, and now seek to recover it back as an illegal exaction. The ground of illegality is, that the supervisor, instead of assessing the property of the township at its true cash value, as the law and his official oath required, assessed the real estate at only one-third its cash value, and the personal estate at only one-half its cash value, and that he failed altogether to assess much personal estate that should have been brought into this list. The circuit court refused to permit evidence of these facts to be given, and the suit failed.

It was conceded by the plaintiffs that the tax proceedings for the year were regular upon their face. The supervisor under the sanction of his oath made his certificate, stating in due form that he had assessed all the property at its true cash value, and that the assessment roll contained a true statement of the aggregate valuation of the personal estate of each and every person named in the roll. If he purposely did something different, and disobeyed the law after having taken an official oath faithfully to perform his duty under it, he has not only shown himself regardless of the obligations of an oath, but he has been guilty of a public offense. Whether he has been guilty of such a wrong to these plaintiffs as gives them a right of action is another question. The failure to

perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance. And in no case, we apprehend, could the failure to list property for taxation in accordance with the law constitute a wrong to an individual unless he could show that his individual assessments were thereby made a larger proportion of the aggregate taxable property than they should have been. We have held that the collection of the tax levy might be restrained in such a case, so far, at least, as it was excessive. *Merrill v. Humphrey* 24 Mich. 170.

It would be out of place for us to intimate what remedy we might think the taxpayer might have against the supervisor—*First*, because every case must stand upon its own peculiar facts; *second*, because a case against the supervisor is not now before us; and *third*, because the wrong primarily is a public wrong, and ought to be redressed in a public prosecution. It may be said and is said that the public remedy is worthless, because the local communities sympathize with the habitual disobedience of law, and convictions are impossible, and also because no sufficient penalties are prescribed; but such difficulties, if they exist, cannot give new rights of action. If these ought to be created, the legislature must create them.

If tax proceedings on their face are fatally defective, a suit will lie to recover back money paid under them. *Smith v. Nat. Bank* 17 Mich. 479; *Grand Rapids v. Blakely* 40 Mich. 367; *Wattles v. Lapeer* 40 Mich. 624. But a tax assessment is in the nature of a judgment, and the authorities are numerous that it cannot be assailed for fraud or irregularity in a suit against an officer who holds process fair on its face for enforcing a tax based upon it. *Holden v. Eaton* 8 Pick. 436; *Lincoln v. Worcester* 8 Cush. 55; *Cheever v. Merritt* 5 Allen 563; *Hubbard v. Garfield* 102 Mass. 72; *Savacool v. Boughton* 5 Wend. 171; *Nowell v. Tripp* 61 Me. 426; *Cunningham v. Mitchell* 67 Penn. St. 78; *Greene v. Mumford* 4 R. I. 313; *Glasgow v. Rowse* 43

Mo. 479; *Erskine v. Hohnbach* 14 Wall. 613; *Bird v. Perkins* 33 Mich. 28. There are numerous decisions which extend a like immunity to the assessing officer, and which do not suffer his assessment, when regular on its face, to be impeached in a suit against him, and there are none, so far as we are aware, which support an action at the suit of an individual except on the ground of fraud or malice.

There is in our minds no room for question that the judgment under review was legally correct, and it must be affirmed with costs.

The other Justices concurred.

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EDWIN A. WETMORE AND WILLIAM L. WETMORE v. ISAAC NEUBERGER.

Supplemental parol contract for interest in land—Part performance construed as grant of license—Assignment of right of action.

A written contract was supplemented by an oral agreement whereby one of the parties was to advance money and use it in buying an interest in land for the other. *Held*, that under the statute of frauds the arrangement had no force (Comp. L. § 4692) and that as the obligation to buy could not bind the other party he could not be charged with the cost of executing such obligation.

So far as the parties to an oral agreement for the sale of standing timber execute it in good faith before it is revoked, the sale may, for their protection, be regarded as a license for what has been fairly and seasonably done. Greeley v. Stilson 27 Mich. 153; Haskell v. Ayres 35 Mich. 89.

The assignment after maturity of a note given in pursuance of a contract does not necessarily transfer to the assignee a right of action for a breach of the contract, or entitle him to base a claim thereon in order to cancel a set-off against the note. An action on the note by the assignee would not bar an action by the assignor for breach of contract.

Error to Marquette. Submitted June 17. Decided Oct. 13.

ASSUMPSIT. Defendants bring error. Reversed.

F. O. Clark for plaintiffs in error.

E. J. Mapes for defendant in error.

GRAVES, J. This case was first tried before a justice of the peace, and was taken by appeal to the circuit court. The action was brought by Neuberger as indorsee of a promissory note given by the Wetmores in their partnership name of E. A. Wetmore & Co. to Martin Pattison or order, on the 26th of August, 1878, for $250, payable thirty days after date at the Citizens' Bank at Marquette. The Wetmores pleaded the general issue with notice of set-off, and the jury finding in favor of Neuberger they brought error. The fact is unquestioned that the note was given as alleged and that Pattison the payee transferred it to Neuberger after maturity. Again, there is no dispute about the origin of the note. It grew out of a lumbering transaction between the Wetmores and Pattison.

May 17, 1878, they entered into the following written agreement: "Memorandum of agreement between Martin Pattison, of the city of Marquette, of the first part, and E. A. Wetmore & Co. of same place of second part, witnesseth: That said Pattison agrees to get out and deliver to said Wetmore & Co. at Marquette in such booms as shall be furnished, Norway logs enough and of suitable length and sizes and qualities entitled to work into the following bill and to work to good advantage and make lumber suitable to be accepted by the parties contracting with said Wetmore & Co. as follows: 200 pieces 5x12—28 feet long, for car sills; 200 pieces 5x12—30 feet long; 1500 pieces 4½x8—28 feet long; 800 pieces 4½x8—30 feet long; 600 pieces 3½x6—28 feet long; 400 3½x6—30 feet long; 400 pieces 5x13—33 feet long; 800 pieces 4¾x8—33 feet long; 400 3¼x6—33 feet long; 150 thousand feet 2x10—16 feet long; 150 thousand feet 2x10—

18 feet long, to be good, live sound timber. The logs to be cut and delivered as soon after June 1st, 1878, as can be conveniently done, and all to be delivered by September 1st, 1878.

"In consideration of the above delivery said Wetmore & Co. agree to pay said Pattison five dollars per thousand board measure, scaled in the boom at their mill, and to guaranty said Pattison that he shall not pay over fifty cents per thousand for towing said logs and not to exceed one dollar per thousand feet stumpage on any land owned by Lac La Belle Co., Marquette Lumber Co., or W. L. Wetmore and Bay Furnace Co.

"Final settlement to be upon the delivery of all such logs; also said Pattison is to cut and deliver to said Wetmore & Co. white pine logs up to 200,000 feet, board measure, of good sound logs not culled out for board timber, but taken as the timber will cut, taking all good, sound trees, and to be cut such lengths as may be directed by said Wetmore & Co., and for such logs said Wetmore & Co. are to pay to said Pattison four dollars and fifty cents and to give same guaranty as to cost of towing as with the Norway logs named above, and payments on both Norway and white pine to be made as work progresses so as to enable work to go on. In scaling logs all logs over 24 feet to be scaled in two lengths."

On the strength of this contract Pattison cut and delivered to the Wetmores a great quantity of logs and they in return made heavy payments and advances and the note in suit was given to be applied upon the contract. The Wetmores claim that on occasion of its coming due and also on its transfer subsequently to Pattison and at the time of their getting notice of the transfer, their payments and advances were in excess of the entire demands in favor of Pattison to an amount considerably beyond the sum called for by the note and that such excess was and is a lawful set-off fully sufficient to extinguish it.

Assuming Wetmore's explanation of the state of the account to be correct, it appears that there existed and now exists a balance in their favor of between four and five hundred dollars. The validity of this balance is accordingly important.

The plaintiff below has assailed it and the questions in the case arise out of that contest. The contract quantity of logs was not furnished; but the plaintiff below avers that the agreement was broken by the Wetmores. It was part of their contract with Pattison that he should not be bound to pay above one dollar per thousand feet stumpage on any land owned by Lac La Belle Co.

On the 4th of June following they made a purchase of the stumpage on certain land, which, according to the indications in the case, was Lac La Belle Co. land, and they claim to have paid $1000 for it. In their account they charge Pattison with this $1000 in this form: "August 3. Paid Lac La Belle Co. stumpage as per verbal agreement with Martin Pattison about May 12, 1878, $1000." It is conceded that Pattison cut enough there to come within a trifle of $600 at the stumpage rate of one dollar per thousand, or the rate which the Wetmores had agreed by their written contract should be the outside limit; and the court ruled in substance that the charge in the account was a proper one to that extent. The rest of it was the subject of earnest controversy but the record is much confused.

There was no writing between Pattison and the Wetmores in regard to their buying for him or on his account this body of stumpage for $1000 and the written purchase actually made was in their own name and apparently on their own account. Their claim seems to be, in reference to it, that subsequent to their written agreement with Pattison of May 17th it was orally agreed between them that they should buy this tract of stumpage at $1000 and pay therefor and that he would take it in their business arrangements and pay them the $1000 so that they should be exposed to no risk, and that they made the purchase on that understanding and debited him with the expense in their account. Assuming this explanation to be true the transaction was within the statute of frauds and the objection raised on that theory was well taken. The scheme contemplated that the Wetmores should provide the purchase money in advance, and in virtue of a power from Pattison expend it in buying an interest in

land in his favor. Such an arrangement is destitute of force unless manifested by writing: Comp. L. § 4692; *Russell v. Myers* 32 Mich. 522; *Colgrove v. Solomon* 34 Mich. 494; *Hillebrands v. Nibbelink* 40 Mich. 646. The contract was entire and the stipulation for the Wetmores to advance the money cannot be separated from the rest.

If the power and obligation to buy for his benefit fall for want of writing and have no force to bind him, the right to charge him with the cost of executing the power and carrying out the obligation must share the same fate. *Greeley v. Stilson* 27 Mich. 153, and *Haskell v. Ayres* 35 Mich. 89 do not apply. Their doctrine is that so far as parties, before revocation, execute in good faith an oral agreement for the sale of standing timber, the sale may, for the purpose of their protection, be considered as a license for what has been fairly and seasonably done.

After the defense rested, the case of set-off made on that side was sought to be opposed by a kind of counter claim on the part of Neuberger, the plaintiff below, and the court, proceeding on the idea that the matter produced by the Wetmores as set-off might be so encountered and be wholly or partly neutralized or extinguished in that way, received evidence to show unliquidated damages caused to Pattison by certain alleged breaches by the Wetmores of the contract of May 17th, and this evidence was submitted to the jury and seems to have been acted on.

In this the court erred. The right of action, if any, on account of a violation by the Wetmores of that contract does not seem to have become the property of Neuberger, and there is no apparent ground entitling him to make use of it to swell his own claim, or which is the same thing, to reduce or cancel the set-off. For all that appears, whatever cause of complaint may have arisen for any breach of the contract on the part of the Wetmores still belongs to Pattison, and in case the subject is gone into in this action in favor of Neuberger, there is no reason for supposing it would preclude Pattison from hereafter suing the Wetmores for the same thing. This case would be no bar. Hence, whether the

general state of the litigation and the nature of the counter claim as unliquidated damages, would or would not alone hinder the introduction of such matter in rebuttal, the objection to it just stated is sufficient.

Complaint is made of rulings concerning three items of charge for money paid for towage, but the record is so ambiguous that it is hardly safe to attempt their investigation. It is not very probable they will turn out to be essential to the disposal of the case.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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ROBERT D. WINEGAR v. ALBERT M. NEWLAND AND DAVID P. WEEKS, ADMINISTRATORS.

Claims against estates—Liability of executor—Intent no ground of equitable jurisdiction.

A father obtained the allowance of a claim against his son's estate, but the son's widow, who was his executrix, refused to pay it, and conveyed away the property out of which it should have been satisfied, and the estate remained unsettled. *Held*, that his remedy was not in equity, but, if not lost by neglect, was in the probate court, where in spite of the conveyances the land was liable in due course of administration and for a limited period, to the claims of creditors, and after the arrival of the time of payment the executor was liable personally or on his bond.

Where a claimant against an estate neglects to take advantage of the means provided by statute for satisfying his claim, he has no remedy at law or in equity.

Intent does not bring a case within equitable jurisdiction if the act to which it attaches does not supply an equitable cause of action.

Appeal from Clinton. Submitted June 18. Decided October 13.

BILL for accounting by administrators. Demurrer overruled below. Reversed: bill dismissed without prejudice.

Alex. W. Dodge for complainant. Equity can enforce as against a devisee of lands the lien of a creditor of the estate: Bisp. Eq. 467; Story's Eq. Jur. §§ 1244–6.

O. L. Spaulding for defendant. A creditor of an estate can enforce his claim only through the administrator, who need not sue for his benefit unless indemnified: *Morris v. Morris* 5 Mich. 171.

GRAVES, J. This bill was filed in January, 1875, and the defendants joined in a general demurrer which was allowed as to the defendant Weeks, but overruled as to the defendant Newland, and he appealed. A reference to the material facts is necessary.

The bill states that complainant's son Ira Winegar in September, 1869, owed him $400 and then gave him his note therefor payable with interest at ten per cent. in 14 months after date; that in February, 1870, the said Ira made his will and subject to the payment of debts bequeathed to each of his two children $250 and gave the residue of his property, including his farm, which he supposed to be worth $4000, to his wife Ruth E. E. Winegar, and appointed her to be executrix; that he died the same day, and the will was soon proved and allowed, and its execution committed to the widow pursuant to its provisions; that subsequently and in June, 1871, the probate court appointed commissioners to decide upon any claims against the estate, and complainant presented his demand before them for allowance, and they allowed the same at $558.57; that frequent application was made to the executrix to pay this allowance, but she neglected and refused, and that the same has remained due and wholly unpaid; that on the 30th of December, 1871, she deeded the farm mentioned in the will, and which was then worth $3000, to one Julius S. Newland for the nominal consideration of $400, and on the next day intermarried with him; that the estate was unsettled, and both had knowledge of the

circumstances and of the existence of complainant's claim and of his right to payment out of the property of the estate; that in January, 1872, the said Julius S. Newland and the said Ruth, then being his wife, joined in a deed of said farm for the nominal consideration of $1500 to his father, the defendant Albert M. Newland, who, according to the belief of complainant, was aware of the circumstances and took conveyance subject to the debt in question; that the said Ruth having ceased to be executrix by reason of her marriage, the court of probate in May, 1873, appointed the defendant Weeks to be administrator of the estate with the will annexed, and he immediately assumed the duties, and has continued hitherto as such representative; that as complainant is informed, said administrator has, however, "done nothing by way of closing up the affairs of said estate, and though repeatedly requested to go on, and out of the estate left by the said Ira, deceased, make and realize the money necessary to and pay complainant the amount of said indebtedness, but thus far has neglected and refused so to do, alleging that no property belonging to said estate has come into his possession, and that he will not take upon himself the risks of litigation for the property;" that there is now no other property belonging to said estate out of which can be made any part of said claim, and complainant has requested said administrator to prosecute the proper proceedings at law to raise the necessary sum out of said farm to satisfy it, but he has refused to move in the matter; that, as complainant is informed, the said Ruth removed to California after her marriage and is now insolvent; that the bill is filed on behalf of all creditors of the estate, but so far as complainant has been able to ascertain nothing remains unpaid except this demand of complainant and the two legacies.

It is not perceived that any ground is set forth here for equitable cognizance. Complainant's remedy, if not lost by neglect to take steps in season, is in the court of probate. And if it has become impracticable to prosecute redress in that forum by reason of having failed to move seasonably, it

neither widens the scope of equity nor gives him any title to proceed in chancery.

According to the case the estate left by the son was solvent and the farm was subject to debts. The claim of complainant is said to have been duly allowed and to remain wholly unpaid. Supposing the state of things to be as represented, the farm was liable by due course of administration in the probate court, and the deeds mentioned did not prevent it. Comp. L. §§ 4322, 4350. Whatever their force they were certainly subject to the prescribed administrative remedies for subjecting real property to the claims of creditors, and the statute enabled complainant to compel the proper action in the court of probate. §§ 4454, 4457, 4460, 4461, 4462, 5200.

The creditor is not confined even to a resort to the assets. The law is express that after the arrival of the time of payment the executor or administrator shall be personally liable, or upon his bond. § 4461, *supra*. If by neglect or choice the complainant allowed his proper and lawful opportunity to run by, he can ask neither law nor equity to help him. § 4463. In all classes of remedial proceedings there is a fixed limit, and in respect to estate cases it is considered wise to make it short. There is no pretense of any homestead question to interfere with the ordinary course of administration, and the record is barren of facts to indicate that complainant was not able to obtain adequate redress in the tribunal set up for the disposal of such matters. It is hence unnecessary to refer to any right he might have had under other circumstances to any proceeding here to compel specific steps by the judge of probate. Neither is it needful to consider whether the administrator with the will annexed might or might not, before or after license, maintain a bill against these conveyances or whether a purchaser at administrator's sale might do so. These points, if arguable, are outside the case. According to the representations of the bill the matter of settlement of the estate is still pending and unfinished in the court of probate, and the facts fail to show any ground for controversy in equity between complainant as a general

creditor of the estate, and the defendant Newland who holds a title to the farm derived from the devisee. So far as now appears the complainant could gain a position from which to attack that title whatever may be its force, in no other way than by some proceeding in the court of probate looking to its total or partial subjection to his debt. The court of chancery has no power to intervene and order the appropriation of the farm or any part of it to that claim.

What is said about the deeds having been made with intent to defraud complainant, constitutes no case. Whatever intent may have been conceived, no acts or transactions appear capable of being an equitable cause of action for complainant whether the intent attached to them or not.

I think the demurrer should be sustained on the part of the appellant Newland, and that he should recover the costs of both courts, the bill being dismissed as against him but without prejudice.

The other Justices concurred.

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THE PEOPLE v. DENNIS CARROLL.

Alternative sentence—Validity of judgment disproved in action on recognizance.

A sentence by a justice to pay a certain sum with costs of prosecution within twenty-four hours, or, in default of such payment, to be imprisoned for a specified period, is void.

It seems that in an action on a recognizance given on appeal from a justice's court, the surety therein is not estopped from showing that there is no valid judgment in force against his principal.

A recognizance on an appeal from a justice's court cannot be said to have been given voluntarily when the judgment is void.

Error to Mason. Submitted June 22. Decided Oct. 13.

ACTION on recognizance. Plaintiff brings error. Affirmed.

Attorney-General *Otto Kirchner* for the people. An appeal from a justice's judgment vacates it, and places the case within the appellate jurisdiction of the higher court. *Campbell v. Howard* 5 Mass. 376.

MARSTON, C. J. Daniel Shay was convicted in justice's court and was sentenced to pay a fine of $50, besides the costs of prosecution, taxed at $12.50, within twenty-four hours, or in default of such payment that he be imprisoned, etc. Shay appealed to the circuit court. The usual recognizance was given on such appeal. Default having been made in the circuit, this action was brought on the recognizance, and Carroll, one of the sureties, defends upon the ground that the judgment of the justice was not authorized by the statute, and could not be the foundation even of a valid bond on appeal. The judgment of the justice was clearly void under the decision in *Brownbridge v. People* 38 Mich. 753, and we think the same may be taken advantage of in the present case. The recognizance given under such circumstances cannot be said to have been given voluntarily, and it might be dangerous to hold that the giving of a recognizance, as in this case, would estop the surety from showing that no valid judgment was in force under which the respondent could have been subjected to the payment of a fine or imprisonment.

We think the ruling was correct and that the judgment must be affirmed.

The other Justices concurred.

JARED L. HOLBROOK v. GEORGE W. COOPER.

Pleadings in justice's court—Extortion by duress of imprisonment.

A declaration claiming to recover back as damages money which defendant had caused to be extorted from plaintiff by duress of imprisonment on criminal process procured by him for that purpose, states a lawful ground of action with sufficient precision, if not demurred to, to be sustained in justices' courts.

No one may derive personal profit from a crime even if he be specially injured by it; and if any one does so, he will be answerable for the profits received, even though he has allowed them to go to another.

Formal defects in the proceedings in justices' courts will be overlooked if no objection is made to them until evidence is offered.

Error to Clinton. Submitted June 22. Decided Oct. 13.

TRESPASS ON THE CASE. Defendant brings error. Affirmed.

H. & H. E. Walbridge for plaintiff in error.

Randolph Strickland for defendant in error.

GRAVES, J. This case being tried on appeal the jury awarded Cooper $10.35 and Holbrook brought error to this court. The main questions arise on the declaration.* Hol

* The declaration was as follows:

GEORGE W. COOPER v. JARED L. HOLBROOK.

Clinton county, ss. In justice court, before Henry P. Adams, Esq., a justice of the peace.

The said plaintiff, by R. Strickland, his attorney, complains of the said defendant, for that the said defendant did fraudulently and without any just or legal cause on, to wit: the 4th day of June, A. D. 1879, make complaint before Henry P. Adams, a justice of the peace for said county, in which said complaint he charged this plaintiff with the crime of larceny, upon which said complaint the said justice of the peace issued a warrant for the arrest of this plaintiff fraudulently and for the purpose of compelling this plaintiff to pay a debt which said defendant claimed that this plaintiff was owing to the said defendant and one John W. Bailey, and the said plaintiff avers that by virtue of said warrant he was arrested, and that while he was so in custody he secured the said alleged debt and paid costs in the criminal case in a large sum, to wit: ten dollars,

brook pleaded the general issue and abstained from objecting until Cooper came to offer evidence before the jury. He then claimed that no evidence was admissible—1st, on the ground that the declaration was for malicious prosecution—an action the justice could not entertain; and 2d, because the declaration was not for malicious prosecution and did not set forth any cause of action whatever.

As we are bound to intend the plaintiff wished to state his case in legal conformity with the facts appertaining to it, we cannot avoid looking at the declaration as an astonishing performance. It would be difficult to find a more striking instance of contempt for the formal proprieties of pleading. And certainly no such experiment is to be commended. It is very clear that malicious prosecution is not alleged. The final constituents of such a charge are wanting. And there is nothing well enough stated to have stood against a demurrer. It was alike a dictate of prudence and good practice to amend when the question was raised if not before, instead of leaving a point not destitute of plausibility at least, to invite a writ of error. But we are bound to overlook awkwardness and faults of form and extend the extreme indulgence accorded to pleadings before a justice of the peace; and particularly where instead of being raised seasonably the objection is held back until the production of evidence at the trial. How large that indulgence is will appear from the cases. *Hurtford v. Holmes* 3 Mich. 460; *Daniels v. Clegg* 28 Mich. 32; *Smith v. Hobart* 43 Mich. 465; *Chancey v. Skeels* 43 Mich. 347; *Wilcox v. T. & A. A. R. R. Co.* 43 Mich. 584; *Snyder v. Winsor* ante p. 140;

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and that thereupon he was discharged from said arrest without being taken before the said Henry P. Adams; and he avers that the said money was taken from him illegally and fraudulently, for the reasons before given and for the further reason that the said complainant, the said defendant, had no right to settle or compromise in any manner the said alleged crime of larceny, without the said party, the plaintiff, having been taken before said justice; and the said plaintiff avers that by and through said fraudulent and illegal proceedings, and the payment of said money so made he has been damaged in a large sum, to wit: in the sum of fifty dollars, and therefore he has brought this suit.

R. STRICKLAND,
Plaintiff's Attorney.

Van Middlesworth v. Van Middlesworth 32 Mich. 183; *Clark v. Field* 42 Mich. 342; *Cook v. Perry* 43 Mich. 623.

After scanning the declaration we think it contains the rudiments and essence of a legal demand of a legal right. Disregarding the question of form and the infelicity of legal expression, the language appears to comprehend the declaration of an actionable grievance. It seems in effect to assert that the defendant caused certain money to be extorted from the plaintiff under duress of imprisonment on a criminal process, which process and imprisonment the defendant procured for that end, and that the plaintiff sued to get that money back as damages. And admitting this to be a correct construction, there was a lawful ground of action. *Seiber v. Price* 26 Mich. 518; *Hackett v. King* 6 Allen 58; *Osborn v. Robbins* 36 N. Y. 365; *Bush v. Brown* 49 Ind. 573; *Strong v. Grannis* 26 Barb. 122; *Brownell v. Talcott* 47 V 243; *Chandler v. Johnson* 39 Ga. 85; *Clark v. Pease* 41 N. H. 418; *Williams v. Brown* 3 B. & P. 69; Cooley on Torts 506.

In case of a crime committed neither the person specially injured nor another has a right to convert it into a source of benefit or profit to himself, and if he proceeds to do so and in the course of the transaction permits a portion of the fruits to go directly into other hands without touching his own, this will not excuse him from being answerable therefor. His wrong and its detriment to the person wronged are not diminished by a division with others of the fruits expected and realized from his misdoing.

It appears from the record that there was enough of pertinent evidence before the jury for their consideration, and that the instructions were sufficiently favorable to the plaintiff in error, and we do not agree with counsel that the special and general findings are *prima facie* incapable of standing together.

The striking out of Holbrook's testimony touching his talk with Bailey about Cooper's effort to get trusted was only prejudicial to Cooper if to either.

On the whole we think the judgment should be affirmed with costs.

The other Justices concurred.

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EMELINE BUNDY AND JOHN J. WHEELER, EX'RS v. HENRY M. YOUMANS AND LEWIS VAN WINKLE.

Accounting by surviving partners—Discount and interest charges—Review of appellee's objections.

A decree against surviving partners for an accounting for assets of which they had jointly taken possession, should be against them jointly for the whole amount, and not severally for the sums into which they divided it between themselves.

Discount and interest charges are inseparably connected with the principal sum, and properly allowed on an accounting against surviving partners in connection with charges for moneys borrowed by the deceased member of the firm.

Where objections to a decree for an accounting relate to details of practice, and were not raised in the lower court, and are urged by a party who has taken no appeal, they will not be noticed in the appellate court.

Parties who have not appealed cannot ask a modification of the decree in their favor; though if the appellants have opened the accounting generally and obtained a change in their favor, the appellate court will consider the objections of the appellees to the decree.

Appeal from Saginaw. Submitted June 23. Decided October 13.

BILL for accounting. Complainants appeal. Decree modified.

Wheeler & McKnight for complainants. Surviving partners have the whole property and are trustees and responsible as such: *Barry v. Briggs* 22 Mich. 201; *Daby v. Ericsson* 45 N. Y. 789; they account jointly: 1 Coll. Part. (6th ed.) 462–9; *Simpson v. Chapman* 4 DeG. M. & G. 154; *Moore*

v. Huntington 17 Wall. 422; *Miller v. Jones* 39 Ill. 54; *Remick v. Emig* 42 Ill. 342.

Wm. A. Clark and *A. C. Maxwell* for defendants.

COOLEY, J. This is a bill by executors of a deceased partner against the surviving partners for an accounting. It appears that on the death of complainant's testator the surviving partners took possession of the assets of the concern, amounting to a large sum, and for a time continued the business. When the bill was filed the assets were represented by charges on the books against the surviving partners severally. The sums brought together were much below the amount of the assets that came to their hands as survivors. The court of chancery decreed that they severally pay to complainants the amounts found equitably due from each to the testator, being $12,781.60 by defendant Youmans and $4,493.83 by defendant Van Winkle.

This decree should have been against the defendants jointly. Had the indebtedness of defendants to the copartnership existed at the time of the testator's decease, the case would have been different, because the testator must be understood to have consented, with the others, to the partners thus severally becoming debtors of the firm. But the partnership was dissolved by the decease of one member, and the survivors took the assets jointly. Both are therefore responsible for the disposition made of them. They cannot, by dividing the assets between them, compel the estate to accept the several responsibility of each for what he has taken.

The justice of certain charges against the copartnership for moneys borrowed by the testator was contested by defendants, on the ground that the loans were procured in part only for the copartnership, and in part for other concerns in which the testator had an interest. The commissioner, however, allowed them, and he also allowed the discount paid, and interest. The circuit judge struck out these last items while allowing the principal sum. We have found no explanation of this discrimination and think the rejection of discount and interest expenses erroneous.

The defendants have not appealed, but they nevertheless in this court raise many objections to the decree. Some of these are to the indefinite character of the allegations in the bill; others to the regularity of the proceedings before the commissioner, and one is to the failure of the commissioner to comply with the order of reference in respect to one item in complainant's account against the copartnership. None of these objections appear by the decree to have been brought to the attention of the circuit judge, and it is therefore useless to raise them here. They relate exclusively to the details of practice. *Barnebee v. Beckley* 43 Mich. 613. Moreover as defendants have not appealed, they cannot ask the court to modify the decree in their favor. If the complainants by their appeal had opened the accounting generally, and we had changed it in their favor, we should have held ourselves bound to listen to any objections the defendants might make to it; but we have discovered no reasons in the argument or brief of complainants for going into it at all. The report of the commissioner, so far as it is excepted to by the complainants, appears to be sustained by the evidence, and the circuit judge approved and confirmed it. The modification of the decree in this court, in respect to the amount allowed, relates only to the contested loans, and corrects an error in the amount which was made by the court in rejecting the discount and interest. These belonged inseparably to the principal sum.

The decree must be modified to meet these views, and complainants will recover the costs of this court.

The other Justices concurred.

William M. Richardson v. Myron Tolman et al.

Foreclosure for portion of consideration withheld to perfect title.

The grantee of land was allowed to withhold part of the consideration for a specified time in order to take up an outstanding title, and to secure the money withheld, he gave a mortgage. *Held* that it was no defense to its foreclosure that to perfect his title he had paid the amount withheld to a person who claimed to have obtained a quit-claim of the outstanding title, when it was neither averred in the answer nor shown by the proofs that the latter claim was valid or truthful.

Appeal from Clinton. Submitted June 23. Decided October 13.

Foreclosure. Defendant appeals. Affirmed.

Spaulding & Cranson for complainant.

Dart & Clark for defendants.

Graves, J. On the 16th of March, 1870, the complainant held the east half of the south-east quarter of section 28 in township 5 north of range 1 west in Clinton county, under a title based on sales for taxes for 1852 and several years preceding, and on that day he executed a grant of the premises to the defendant Myron Tolman for the consideration of $3000, of which some $560 consisted of a mortgage already on the property in favor of one Peacock and which Tolman assumed. The character of the title was mutually understood and the parties took into consideration what chance there was for any *bona fide* claim from the real holder of the original title; and assuming that it might become necessary to get it in, they agreed upon a sum within which as between themselves, the price should be confined. They decided that $500 of the consideration money should be kept back by Tolman for the space of five years to enable him to take care of that title in case of its coming forward, and to buy it up if neces-

sary. They agreed that five years would be sufficient time and five hundred dollars more than enough to take care of the title. They agreed also that for the purpose of carrying out their intent in this respect the best course was for Tolman and wife to give a mortgage back on five years' time for $500 with interest and containing a condition conforming to their understanding on the subject of the separate title. They pursued this plan and the mortgage was executed and delivered, though not recorded until the 28th of September, 1871. The special condition was framed in these terms: "And in case there should be failure of the title to the land above described, or any part thereof, by reason of which said party of the first part should be obliged to pay therefor, the amount he is obliged to pay shall be deducted from this mortgage." Tolman was let into possession and has since held it without disturbance. At the expiration of the five years Richardson filed this bill to foreclose the mortgage.

The defendant Fuller had taken a deed from Tolman subsequent to the mortgage, but had given it priority of record. In joining him as defendant the bill alleged that he bought with actual notice of the mortgage. As he admits having paid nothing his position in the case raises no question.

At the time of the bargain between Richardson and Tolman, and when they exchanged the deed and mortgage, it appeared by the records, and was known to both, that the purchaser from the United States was one Samuel Hall, and it was the title which originated in that grant that the parties had in view and the title to which they referred in the condition set forth in the mortgage. There seems to have been no other title not in harmony with that based on the sales for taxes. The defense set up in the answer is in substance that soon after the mortgage one Washington G. Wiley represented to defendant Tolman that he had become the owner of the premises by purchase from Hall, the grantee of the United States, and he, Wiley, demanded possession; that he, Tolman, notified complainant and insisted on being protected and requested complainant to effect a settlement with Wiley if possible; that complainant refused to do anything,

and thereupon he, Tolman, purchased of Wiley and paid him $500, and subsequently tendered complainant the accrued interest, together with sufficient to defray the expense, and demanded that he discharge the mortgage.

The first observation suggested is that this statement makes out no defense whatever. If admitted, it affords no answer to the bill. No case within the condition can be deduced from it. There is no averment that in fact Wiley obtained or held any title or any color of title, or that his representation had a particle of truth in it. The most that is pretended is that he set up a claim of having become owner under purchase from Hall, and that defendant Tolman was content to give him $500 for what he claimed.

But this is not all. The state of facts proved in regard to Wiley's ownership not only varies from the allegations in the answer, but distinctly negatives the existence of any defense based on the condition. No deeds were introduced, and the evidence respecting the title comes from the mouths of witnesses. The answer relied on Wiley to substantiate his claim of having acquired the title Hall purchased from the United States, and to speak with considerable reserve, his deposition is considered uncandid and is not satisfactory. But the depositions of Hall and of Mrs. Fitzsimmons and her daughter are decisive. Wiley went to see Hall at Elmira, in New York, in May, 1870, for the purpose of getting a quit-claim deed from him, and Hall swears that he had conveyed the land to Fitzsimmons, now deceased, in 1840, and that he informed Wiley of the fact, and that he had no interest whatever to convey; that he finally, on Wiley's request, gave him a quit-claim deed, and observed to him at the same time that he would quit-claim the whole State of Michigan to him for $5; that Wiley then remarked that he had been at some trouble and handed him not to exceed $25, and as he thinks, the sum of $5. The case strongly resembles in this part of it one of the leading features of *Hanold v. Bacon* 36 Mich. 1–7. Hall had nothing to sell, and so notified Wiley, and Wiley bought nothing of him. The transaction was a farce. As a transfer there was nothing real in it. The title which

arose by the sale from the United States to Hall was not obtained, because that title was vested elsewhere and not in Hall, as Wiley well knew, and what the condition in the mortgage contemplated was the getting in of that title and not the concoction of false and deceptive papers to be held out as embracing it.

Nothing has been gained to the title complainant gave and on which the mortgage was based. The original title is as much outstanding as ever, and the possibility of its interfering with the tax title is not cut off now unless by something else than Hall's deed to Wiley. If Tolman suffered himself to be duped by Wiley he cannot force the consequences upon complainant. He must bear them himself.

The decree granting foreclosure should be affirmed with costs.

The other Justices concurred.

William Rosie et al. v. William Willard.

Question for the jury—Scintilla of evidence.

A *scintilla* of evidence gives the case to the jury.

Error to Ottawa. Submitted Oct. 6. Decided Oct. 13.

Trover. Defendants bring error. Affirmed.

Lowing & Cross for plaintiffs in error.

Akeley & Farr for defendants in error.

Marston, C. J. The errors alleged in this case are upon the refusal of the court to take the case from the jury, because there was no evidence of a taking or conversion of the logs, and second, that there was no proof of copartnership of defendants.

We are of opinion that there was evidence tending to establish both propositions, and that within the ruling of *Conely v. McDonald* 40 Mich. 152 the court properly submitted the case to the jury.

A discussion of the evidence would be of no general importance and will not therefore be attempted.

The judgment must be affirmed with costs.

The other Justices concurred.

ELWOOD GRAHAM v. EDWARD TAGGART, OMAR H. SIMONDS AND NIRAM A. FLETCHER.

No consideration for agent's agreement for his own benefit.

An agreement made by an agent entirely on his principal's behalf, but wholly for his own benefit, is without consideration, and will not sustain an action by the agent in his own name.

Error to Kent. Submitted Oct. 8. Decided Oct. 13.

ASSUMPSIT. Defendant brings error. Reversed.

Drury & Maher for plaintiff in error.

G. A. Wolf for defendants in error.

CAMPBELL, J. Defendants in error, who are attorneys, sued plaintiff in error for a balance of charges in a justice's court, and recovered judgment for $40 damages and for costs. They appealed to the circuit court of the county of Kent, where the case was tried by jury, and the judgment increased to $94.90, of which they released $1.50. There was, we think, admissible evidence upon all the larger items, and all but one of the rest.

The principal items disputed were two charges amounting

to $75, for extending a mortgage belonging to one of their clients, on two occasions—once for one year, and once for three years. This was a mortgage against Graham for $500, on which he paid them a commission at the time he borrowed the money, of $25.

According to the testimony of the member of the firm who made the arrangements, Mr. Graham did not employ them to negotiate with their client on his behalf, but the extension was made by the attorneys assuming to act for the client and by his authority or subsequent ratification. It was therefore, if binding at all, an agreement with the mortgagee, and not with plaintiffs. Whether he could himself make an agreement for time not in writing and making the use of his money reach more than ten per cent. is not important here, because he was not sued for it and the attorneys claim it themselves. We think it is not legally competent that an agent shall make an agreement entirely on his principal's behalf, yet entirely for his own benefit. Such an agreement has no consideration. The price, if payable at all, must belong to the person who makes the contract, and he only can sue for it.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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JOHN H. GRANGER, RELATOR v. JUDGE OF SUPERIOR COURT OF DETROIT.

Judgment by default after short notice of rule to plead—Waiver of defects by silence—Establishment of rights by laches—Costs on mandamus.

A judgment by default is not absolutely void for want of sufficient notice of the rule to plead, where process has been personally served; and if the party suffering judgment neglects to seek relief against it on error, until the other party would have lost his remedy by lapse of time, he cannot then have it vacated by mandamus.

Defects in notice are waived if no seasonable complaint is made where the party notified has already been regularly served and suit is fairly progressing.

Costs were not awarded on the denial of a writ of mandamus against an inferior court where the proceeding was brought at the respondent's request.

The special statutory methods of obtaining jurisdiction where actual notice is not given, stand entirely on their own regularity, and if not regular, proceedings based on them are nullities. But where personal service has been had, farther proceedings are not necessarily fatally defective for all purposes, especially if rights based on them are allowed to become established by lapse of time without resorting to common law remedies to set such proceedings aside.

MANDAMUS to vacate judgment. Submitted October 12. Denied October 13.

George D. Lincoln for the writ.

George A. Chase and *Herbert L. Baker* against.

CAMPBELL, J. This is a motion for a mandamus to require the entry of an order vacating a judgment by default for want of due process.

On the 25th of June, 1873, a declaration was filed in the Detroit Superior Court, and rule to plead within ten days entered, and a copy of the declaration and of this rule was duly served. Default was taken July 10th and judgment was finally entered on August 11, 1873.

On September 22, 1880, a motion was made to vacate this judgment and refused.

This application is made upon the idea that in *Wyandotte Rolling Mills Co. v. Robinson* 34 Mich. 433, this court intended to hold judgments obtained under the ten-day rule to plead absolutely void.

That decision was on error, and the entry of such a judgment was held erroneous. But there is no intimation in that case that the judgment is void. Although the commencement of suit by declaration and service of notice of rule to plead is statutory, and must conform to the statute, yet there

is no reason for putting it on any different footing from other process. Either by rule or statute, or by recognized practice, some time has always been required to intervene between the service or return of a writ and the time fixed for appearance; and sometimes a writ is required to run a certain length of time. It would not be competent to enter a default on process which in form or in service did not allow the requisite time to the defendant. And in other cases notice is often required to run for a certain period. But it has not been held that where there has been an actual personal service of such writ or notice, proceedings under it are nullities. 1 Tidd's Pr. 152–160–161–162 and notes. The reason is plain enough. The party having been legally served within the jurisdiction is personally informed that proceedings will be urged against him. He has a right to expect that in due time the plaintiff will discover the error and take steps to rectify it. If this is not done, he has a right to the common law remedies for the correction of errors and may, until those are lost by lapse of time, resort to them to have relief against the erroneous action. But it is not settled and would be unjust to allow a party to attack such proceedings collaterally after long lapse of time, when the plaintiff has lost any other remedy, and thus avoid what was probably a just liability. If he does not see fit to sue out a writ of error, when he knows where the proceedings are pending and has had full opportunity to examine into the action of the court, he should not in fairness be allowed the advantage of what is a merely formal objection, and we do not think the authorities cited sustain any view to the contrary.

Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party therefore has not been notified in any proper way of anything. The purpose

of the statutory methods is to furnish means from which notice may possibly or probably be obtained. But as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and if not regular cannot be said to have been conducted under the statutes. The distinction is obvious, and is not imaginary.

Here there was proper notice of a pending suit, the only defect being the fixing of too short a time for appearance. While the defendant sued had a right to insist on proper adherence to the rules governing such cases, he should have brought error when he found the plaintiff expected to enforce his judgment. If this had been a notice after the party had been regularly served and the suit fairly in progress, the authorities are uniform that the defect would be waived entirely unless seasonably complained of. There is no hardship in the rule which requires in such a notice as the present resort to some recognized method to correct the error, instead of treating it as fatal for all purposes.

The motion must be denied. As the proceedings seem to have been brought at the desire of the judge no costs will be awarded.

The other Justices concurred.

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FERDINAND SCHROEDER, RELATOR v. DETROIT, GRAND HAVEN & MILWAUKEE RY. COMPANY.

Corporate rights—Review on certiorari.

The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed on by the inferior tribunals for assessing damages in condemning lands and cannot therefore be considered on *certiorari* to review their action.

Certiorari to review proceedings for the condemnation of land. Submitted October 5. Decided October 14.

George Gartner and *Alfred Russell* for the writ.

PER CURIAM. This is an application for a *certiorari* to review certain proceedings of the Detroit, Grand Haven & Milwaukee Railway Company in the condemnation of land for its purposes.

The questions which the application raises are whether the corporate existence of the railway company was made to appear in the proceedings, and whether it was lawfully possessed of the franchises it assumed to exercise.

There is a manifest impropriety, as we think, in submitting questions of this very important nature to the inferior tribunals which are created to pass upon questions of value in condemnation proceedings, and the law in our opinion does not contemplate their considering them. But if not considered by them, they are not properly open in any review of alleged error in their proceedings.

CAROLINE M. WAITE, RELATOR, v. GEORGE WASHINGTON, SHERIFF.

Bastardy act—Compulsory support of infant.

The Bastardy Act is to secure the public against the necessity of supporting bastard children; and the expense of enforcing it against the father of such a child falls on the public and not on the child's mother.

Mandamus lies to the sheriff to imprison a person convicted under the Bastardy Act when necessary to compel him to contribute to the child's support; and the mother is a proper relator in applying for the writ.

MANDAMUS to require respondent to imprison a person convicted under the Bastardy Act on complaint of the relator. Submitted and granted October 19.

Frank S. Pratt for the writ.

MARSTON, C. J. The primary object contemplated by the statute in proceedings under the Bastardy Act is the protection of the public against all possible danger of being obliged to support the child. With this object in view the father is required to contribute to its support, and to insure compliance, security is required and imprisonment to compel the giving thereof. Such proceedings being for the benefit and protection of the public, the expense of the imprisonment must fall upon the people and not upon the mother of the child. This is the only correct conclusion that can be arrived at under the legislation and late decisions in this State.

It follows that the writ must issue.

The other Justices concurred.

LEE C. HUTCHINSON v. J. WILSON ROE.

Exemption of working material from execution.

A quantity of shingles and building lumber, worth less than $100, was *held* exempt from execution as stock or material to enable defendant to carry on his trade as carpenter and joiner, where he was about to use it in building a homestead, and had, aside from this, only $75 worth of property connected with his business.

Error to Ingham. Submitted Oct. 5. Decided Oct. 20.

REPLEVIN. Defendant brings error. Affirmed.

Edward C. Chapin for plaintiff in error.

S. L. Kilbourne for defendant in error.

GRAVES, J. The plaintiff in error holding an execution against Roe made seizure of a small quantity of shingles and building lumber and Roe replevied the same before a justice

of the peace, and obtained judgment. Hutchinson appealed. The only controverted question was whether the property was liable to execution under the exemption laws; and the circuit judge being of opinion that the evidence was incapable of any other construction, and was conclusive in Roe's favor, directed the jury to find for him, and they did so.

It was proved that his trade was that of carpenter and joiner; that his wife owned a city lot in Lansing; that he was engaged in putting up a dwelling-house on it for their future home; that they had no homestead elsewhere; that he owned a kit of tools worth $75, and the building materials in question, which were worth less than $100, and owned no other tools, stock or material connected with his trade and business. He was about working this stuff into the house before mentioned and part of it was lying on the lot and the rest in the street in front of it, and a portion was already framed and fitted for use.

It is needless to speculate on the suggestion that the property had perhaps become constructively devoted to the purpose of a homestead and appropriated to an end which exempted it under the Homestead Law, because it is clear enough that it was exempt by the statute applicable to exemptions of personal property. It was stock or material to enable Roe to carry on his trade of carpenter and joiner, and hence the conclusion which the court reached was entirely proper. The facts were undisputed and they authorized no other result.

The judgment must be affirmed with costs.

The other Justices concurred.

JOSEPH KARRER ET AL. v. JOSEPH H. BERRY ET AL.

Injunction against closing thoroughfare—Allegation of ownership.

An injunction bill was filed to restrain certain defendants from closing up premises which complainants claimed the right to use as a street. The bill alleged, in substance, that, in September, 1859, one R., who is also made defendant, being the owner and actual possessor of certain land, conveyed it to complainant, bounding it as on the south side of G street, which did not reach the land conveyed, but which R. expressed the intention of opening through the premises afterwards obstructed by defendants; that complainants had bought relying on such extension, and said R. had aided in preparing the premises for a highway; that defendants hold land on the north side of these premises under a mortgage from R., dated in December, 1859, and recognizing the proposed extension of G street; and that they had erected a small brick office which stands partly on the premises, and for the removal of which complainants ask. *Held*, that the bill sufficiently alleges the ownership of R. and the source of the other defendants' title, to be sustained at least unless specially demurred to; and that a court of equity could require the destruction or removal of the building under the circumstances, there being no adequate remedy at law.

Appeal from Wayne. Submitted October 5–6. Decided October 20.

INJUNCTION. Bill dismissed below. Complainants appeal. Reversed and relief allowed.

Romeyn & Romeyn and *George Gartner* for complainants. A grantor who conveys land as bounded on a street is estopped, as are his privies, from denying the existence of the street or shutting it up: *Smith v. Lock* 18 Mich. 56; *White v. Smith* 37 Mich. 291; *G. R. & I. R. R. v. Heisel* 38 Mich. 71; Bigelow on Estoppel (2d ed.) 240; Washb. Easements (3d ed.) 240. The street need not connect with others at both ends (*Rodgers v. Parker* 9 Gray 445), and need not have been actually constructed: *Epsley v. Wilkes* L. R. 7 Exch. 298; *Loring v. Otis* 7 Gray 563; *Thomas*

v. Poole id. 83; *O'Linda v. Lothrop* 21 Pick. 292; *Tufts v. Charlestown* 2 Gray 271. The right extends to all connections with public ways as far as the grantor's title reaches (*Fox v. Union Sugar Refinery* 109 Mass. 292), though in Maryland it extends only to some public way: *Hawley v. Baltimore* 33 Md. 280; *Moale v. Baltimore* 5 Md. 314; see *Ballard v. Dyson* 1 Taunt. 279. Evidence is admissible to show what street was laid out: *Reidinger v. Cleveland Iron Co.* 39 Mich. 30; *Stetson v. Dow* 16 Gray 373; *Allen v. Bates* 6 Pick. 460; *Waterman v. Johnson* 13 Pick. 261; and as to the width of the street (*Salsbury v. Andrews* 19 Pick. 253), in regard to which reference may be had to deeds under which parties hold (*Brown v. Stone* 10 Gray 61); the right extends to the full width of the street as laid out: *Farnsworth v. Taylor* 9 Gray 162; *Gerrish v. Shattuck* 128 Mass. 571: 10 Rep. 268. See as to the general principle: *In re Lewis Street* 2 Wend. 472; *Livingston v. New York* 8 Wend. 85; *In re Mercer Street* 4 Cow. 542; *Van Meter v. Hankinson* 6 Whart. 307; *Smyles v. Hastings* 22 N. Y. 217: 24 Barb. 44; *Child v. Chappell* 9 N. Y. 246; *Bissell v. N. Y. C. R. R.* 23 N. Y. 61; *Cox v. James* 45 N. Y. 557; *Taylor v. Hopper* 62 N. Y. 649; *Badeau v. Mead* 14 Barb. 328; *Hills v. Miller* 3 Paige 254; *Watertown v. Cowen* 4 Paige 510; *Wiggins v. McCleary* 49 N. Y. 346; *Lewis v. Beattie* 105 Mass. 410; *Roberts v. Karr* 1 Taunt. 495; *Harding v. Wilson* 2 B. & C. 96; *Parker v. Farmington* 8 Met. 260. Equity has jurisdiction to protect private estates from encroachments, by injunction (*Pratt v. Lewis* 39 Mich. 11, but see *Hall v. Rood* 40 Mich. 46), and it will protect easements annexed to the private estate: *Weber v. Gaye* 39 N. H. 187; High on Inj., §§ 544–68; Washb. Easements (3d ed.) 698.

Ward & Palmer, *Henry M. Campbell* and *Alfred Russell* for defendants. Complainants cannot recover on a case not stated in their pleadings, or on allegations without proof or proof without allegations: *Moran v. Palmer* 13 Mich. 367; *Wright v. Dudley* 8 Mich. 115; *Connerton v. Millar*

41 Mich. 608; *Miles v. Skinner* 42 Mich. 181. A court of equity does not order finished buildings to be torn down, but remits parties to remedies at law: High on Inj. § 477; *Deere v. Guest* 1 Myl. & C. 516; *Moreland v. Richardson* 22 Beav. 604.

MARSTON, C. J. The complainants ask to be protected in their right to the use and enjoyment as a highway of a strip of land which would be the line of Guoin street in the city of Detroit if said street were extended easterly past certain premises owned by them, and to have defendants restrained from closing up as a street said strip, and that they may be required to remove a certain brick office which they have lately erected partly within the limits of said strip.

The defendants insist that the bill is silent as to whence they derive their title, and as to the ownership of the strip in controversy; that the defendants are in possession of this strip and presumably are the owners thereof, and although the evidence may show sufficient to entitle complainants to relief, yet they must fail under the familiar and well-settled law of this State which denies relief upon a case proved but not set up in the bill.

We shall therefore first look to the bill in order to ascertain what is there set forth, and in so doing we must bear in mind that the complainants do not seek relief upon the ground that this strip had ever been dedicated or opened as a public highway, but that their grantor in selling and conveying certain premises to them bounded the same on this strip as a street. Their position is that the purchase of a lot described as bounded on a street, estops the grantor and his privies from shutting it up or obstructing it, so as to prevent his grantees making use of it for their own accommodation in the enjoyment of their purchase. *Smith v. Lock* 18 Mich. 56.

Where the defendants in such a case answer claiming the benefit of a demurrer therein, the court will not require the same particularity in setting out the sources of defendants' title as might be required upon special demurrer.

The bill sets forth that George B. Russel being the owner

and actual possessor of certain lands on the 21st day of September, 1859, conveyed the same to complainants, and in the description thereof bounded them as "on the south side of Guoin street," and that this conveyance was on the day subsequent to the date thereof duly recorded. The bill sets up "that Guoin street was an open street, reaching to Adair street on the west of said premises, and said Russel, who then owned property east of Adair street, had intended and claimed his intention to open said Guoin street through the premises in question, and to the eastern bounds of the city; that he so gave out to your orators, and had a map or plat prepared, showing the proposed extension of said street, and that he sold the premises, and your orators bought them in reliance upon said street's being extended and continued as an open street; and they farther show that immediately after the purchase and taking possession of the premises which were sold to them as fronting upon said street, said Russel and they united in plowing the lands included within the boundaries of said street, if extended, throwing them up in proper shape and fitting them for the purposes of a street or highway, and said lands have always remained so, until the unauthorized intrusion," etc.

While these allegations might have easily been so framed as to allege more clearly and distinctly Russel's ownership in the disputed premises at the time he conveyed to complainants, yet under the pleadings we are of opinion that the only fair reasonable inference or conclusion to be drawn is that Russel was then the owner. The acts and sayings were those of an owner and we think the fact is sufficiently alleged.

The bill farther alleges that westerly of complainant's premises, and fronting on the northerly line of Guoin street if extended, are certain premises occupied by defendants, and being fifty feet or the width of said Guoin street distant from complainants' premises. The bill then sets forth the encroachments, and alleges that Russel, their grantor, claims that he has the premises covered by said contemplated street, and that while he acknowledges complainants' right, yet that he insists upon such title and is a necessary party defendant.

The bill farther alleges that defendants claim and pretend to have a title to said strip under a certain mortgage dated December 27, 1859, but which from the description therein recognized this extension of Guoin street and did not cover this disputed strip; also that they claim title thereto in other ways and by subsequent conveyances claim to be owners in good faith of the premises in question.

It will thus be seen from the allegations in the bill that it sufficiently appears to entitle complainants to relief, if proved that defendants are not the owners of the disputed strip and are bound to recognize and respect complainants' right therein, in that it appears that Russel was and is the owner of this disputed strip; that defendants' premises front on the northerly side of said strip, and that they are subsequent purchasers from Russel through the mortgage referred to. When we come to examine the evidence in the case it is clear and explicit; indeed, no serious question was raised upon this part of the case.

It is insisted by the defendants' counsel that complainants have not sought the proper forum or remedy and that courts of chancery will not order a finished building to be torn down and destroyed but will leave the parties to seek a remedy in a court of law.

Counsel for defendants were not very successful in pointing out what proper or adequate remedy complainants would have under such a state of facts in a court of law. They are not the owners in fee of this strip: ejectment could not be maintained by them for it; and even if they could maintain an action for damages the remedy would be inadequate. The street or strip in question is not an open public street where the ordinary remedies for an obstruction thereof could be resorted to, but is one which these complainants as against their grantor and his privies and strangers or trespassers are entitled to have kept free and unobstructed. As to them the obstruction is a private nuisance.

While it may be true as a general rule that courts of chancery will not order the destruction of a building under ordinary circumstances, yet where a party against objection has

persisted in erecting a structure without any greater right than defendants had in this case, the court will not reward them for or assist them in profiting by the wrong done in permitting them to enjoy the fruits of their wrongful act. To do so would indeed be an encouragement which we fear many would be willing to take advantage of. The court will rather look at all the surrounding circumstances and will not inflict unreasonable damages in ordering the removal or destruction of property, where the complainants can fairly enjoy their rights in connection therewith. In all such cases the good faith of the wrong-doer must enter very largely into and be an important factor in shaping and determining the relief to be afforded.

The structure complained of in this case is a small one-story brick office and projects into this way about twenty-five feet. It can probably be easily removed, and if not, can be torn down without causing very serious damage; of this defendants knowingly ran the risk and must now accept the consequences.

The decree below dismissing the bill will be reversed, and a decree entered in this court in accordance herewith, with costs of both courts.

The other Justices concurred.

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Willis H. Bertram v. Addison P. Cook.

Estoppel from contesting landlord's title—Judgment for value.

A tenant's rights rest upon corresponding rights in his landlord, and so long as he claims the former he cannot dispute the latter.

A defendant in ejectment who has obtained possession by collusion with plaintiff's tenant, is estopped for purposes of recovering possession from disputing the plaintiff's title; but the estoppel is not equivalent to an admission of his title in fee.

A tenant is estopped from disputing his landlord's title so long only as the lease continues or he holds over. After he surrenders possession he is as free to set up an independent claim to the property as any other person; and any one who comes into possession by the tenant's consent is no farther estopped than he is.

A plaintiff in ejectment who has estopped defendant from disputing his present right of possession, but has not established title, cannot take judgment for the value of the premises.

A party must stand by the judgment he has elected to take.

Judgment in ejectment for possession cannot be rendered in favor of a plaintiff who has filed his election to take judgment for value, when he is not entitled to the latter but would be entitled to possession.

Error to Lenawee. Submitted Oct. 16. Decided Oct. 20.

EJECTMENT. Defendant brings error. Reversed.

A. L. Millard for plaintiff in error.

Wm. W. Osborn and *Weaver & Weaver* for defendant in error.

COOLEY, J. Cook brought suit in ejectment to recover from Bertram a quarter section of land in Lenawee county, claiming in the declaration the title in fee. On the trial he made a *prima facie* showing of title and rested. Bertram thereupon introduced two tax titles, originating later than the title of Cook, and owned by himself, and which showed *prima facie* that he was owner in fee. To overcome this defense Cook introduced parol evidence which showed that while he was in peaceable possession of the land by James M. Spear his tenant, and was asserting title, Bertram collusively obtained possession from Spear, and retained it till suit brought. Cook thereupon insisted that Bertram was estopped from disputing his title, as Spear was, who had wrongfully let him in; and the court so held.

For the purposes of a recovery of possession this ruling was correct. *Bertram v. Cook* 32 Mich. 518; *Cook v. Bertram* 37 Mich. 124. It appears, however, that the circuit judge treated the estoppel as equivalent to an admission of title in

fee; and he directed a verdict accordingly. This was plainly erroneous.

Spear was in possession as tenant with certain rights which must rest on corresponding rights in Cook as landlord. He cannot claim the one and deny those on which they rest. But the estoppel only continues so long as the lease continues, and for any further time while the tenant may hold over. If the tenant surrenders the possession he has obtained or enjoyed by means of the tenancy, he is as free to dispute the landlord's title and set up an independent right in himself as any other person. *Fuller v. Sweet* 30 Mich. 237; *Page v. Kinsman* 43 N. H. 328. And any one who comes into possession by consent of the tenant, as Bertram did in this case, is subject to the same estoppel, but no other. He cannot dispute the landlord's present right, but the estoppel goes no further. *Newton v. Roe* 33 Ga. 163; *Lowe v. Emerson* 48 Ill. 160; *Abbott v. Cromartie* 72 N. C. 292; *Hughes v. Watt* 28 Ark. 153; *Longfellow v. Longfellow* 61 Me. 590; *Brenner v Bigelow* 8 Kan. 496; *Prevot v. Lawrence* 51 N. Y. 219; *Phelps v. Taylor* 23 La. Ann. 585; *Mattis v. Robinson* 1 Neb. 3.

The error of the court led in this case to some singular results. Bertram had made improvements upon the land under claim of title, and he had the value thereof appraised by a jury with a view to a recovery if he lost the land. Cook also had the value of the land without the improvements assessed, and it was found to be $4508. The record recites that he thereupon elected to abandon the land to the defendant, and the court ordered judgment in his favor for the value so fixed.

Now when it is borne in mind that Cook had established no title, but had only by his parol evidence estopped Bertram from disputing his present right to possession, it is manifest that there was no basis for such a judgment. There had been no appraisal of the value of Cook's interest, but what had been appraised was the value of the fee which, subject to Cook's interest, was *prima facie* in the defendant. It may be that when the defendant's tax titles come to be investigated

they will prove worthless, but the right to insist upon them will remain after the estoppel has ceased to operate; that is to say, after Bertram has surrendered possession. But while the estoppel is insisted upon, evidence of the actual title is precluded, and the court could not know who owned the land. It was only known and determined that Bertram, by reason of the manner in which he obtained possession, was under obligation to surrender the present possession.

It is urged, however, that if the judgment for the value of the land is erroneous, the court may now correct the error by giving judgment for the recovery of possession merely. But if the plaintiff actually filed his election to take judgment for the value, as the record recites that he did, the election still stands, and no other judgment would be admissible. Plaintiff must stand by the judgment he has chosen to take. *Weber v. Henry* 16 Mich. 399. Besides, if we could allow such a judgment at all, it would only be matter of discretion, and we should only do so when satisfied that it was warranted by the record. Technically it would be, in this case, but the verdict as entered, so far as it finds Cook the owner in fee, is manifestly unwarranted.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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CROCKETT MCELROY v. JAMES S. P. HATHEWAY, ICHABOD L. QUIMBY AND CARTER P. HOOKER.

Accounting by executor in equity—Residuary legatee's bond.

Where a residuary legatee has given bond, as executor, to pay the testator's debts and legacies, a surety on his bond cannot maintain a bill in equity against him and the co-sureties for an accounting for assets of the estate, the appointment of a receiver, and an administration of the estate by the chancery court.

A surety is presumed to assume his responsibility deliberately, and if his principal fails to meet his own obligation with due diligence, he cannot appeal to a court of equity for protection, but must first perform his obligation as surety, and may then sue at law for indemnity.

Where a residuary legatee is made executor, and gives bond to pay his testator's debts and legacies, the assets of the estate become part of his general property, and no more subject to the enforcement of a trust in favor of other legatees.

Appeal from Macomb. Submitted October 6. Decided October 20.

Bill for accounting, etc. Bill dismissed below on demurrer. Complainants appeal. Affirmed.

Edgar Weeks and *Edwin F. Conely* for complainant.

Norris & Uhl for defendants.

Graves J. In December, 1871, complainant joined as surety with the defendants Quimby and Hooker on the bond given by defendant Hatheway pursuant to the statute as executor and residuary legatee under the will of his father, Gilbert Hatheway, then lately deceased, and about a year ago he filed this bill against his principal and co-sureties for discovery and relief in equity.

The final purpose of the bill is to transfer the whole remedial jurisdiction over the settlement of the estate from the court of probate to the court of chancery, and to compel, by the authority of the latter court, the executor and residuary legatee and the co-sureties to discover and trace from the death of the testator to the present time all parts of the estate, and through a receiver to enforce an absolute surrender by the executor and legatee, of the whole assets to the court in order that it may assume to conduct the administration to final settlement. No such bill can be maintained. The court has no jurisdiction to override the title of a residuary legatee in the way and on the grounds set forth and the complainant has mistaken his remedy if he has any.

There may be cases no doubt when the court, proceeding

in accordance with its own maxims and keeping within the limits given to it in this State, would find some way for relieving the surety by hastening the principal and preventing him from using his opportunity to oppress and defraud his surety.

The present bill proceeds on a theory altogether different, and it was properly dismissed.

COOLEY, J., concurring. It was decided in *Hatheway v. Weeks* 34 Mich. 237, that when a residuary legatee had given bond to pay the debts and legacies of the testator, the property of the estate became his and he was at liberty to deal with it as he might with any other property of which he was owner. The protection of creditors and legatees was in the bond, and their remedy to sue upon it with permission of the probate court if payment was not made with reasonable diligence.

It seems that Hatheway, the residuary legatee in this case, has not proceeded with promptitude in the payment of the legacies, and McElroy, who is one of his sureties, is unwilling longer to remain responsible for his action. He therefore files this bill, the purpose of which is to bring Hatheway to account in chancery for the assets received from the testator's estate, to have a receiver appointed, the assets applied to the payment of legacies, and the estate fully administered in equity for his protection.

The only equity that can exist in complainant's favor must spring from the relation he stands in of surety to Hatheway and liable to suffer from his principal's default. It is not pretended that this relation is sufficient, in general, to challenge the jurisdiction of equity for the surety's protection. He is supposed deliberately to assume his responsibilities and if the principal fails to meet his obligations with due diligence until the surety deems it necessary to seek a remedy for his protection, he must first perform the obligation he has entered into for his principal, and then sue for indemnity. This is what he must do when he is surety on negotiable paper, or on a money bond, or any similar undertaking. It

will not be claimed that the surety in any such case, when he becomes alarmed at the failure of his principal to pay or perform promptly, can come into equity and compel the principal to turn over his property to a receiver, to be applied to the satisfaction of his undertaking.

The only ground on which this can be distinguished from an ordinary case of suretyship is that here there is a specific fund, received from the estate, which it became the duty of Hatheway to apply to the satisfaction of legacies, and which is charged with a trust to that end. But this is wholly inconsistent with the views expressed in *Hatheway v. Weeks* and with the position of the residuary legatee under the statute, after he has given the bond which was given here. The property he receives does not stand apart from any he may otherwise own, and is not under the supervision, dictation or management of the court of probate, or of any other court, as a trust fund. It is a part of the legatee's general property as much as any he has bought or produced by his labor. The other legatees are neither obliged to look to it for their satisfaction, nor can they follow it specifically and prevent his doing with it whatever his interest may seem to dictate. And if they may not follow and enforce a trust in it, how can the sureties do so? If they say they signed the bond in reliance upon the property received from the estate being applied to their protection, they still make no case that might not be made by any surety in the purchase of a horse or other property, where there was an expectation that the thing purchased would be made use of to raise the means for the discharge of the debt. In short it seems impossible to sustain this bill without assuming a general jurisdiction in equity for the protection of sureties in all cases. We cannot distinguish this case on any grounds, but such as would entitle the parties concerned to demand a regular administration; and that would defeat the purpose of the statute which authorizes the residuary legatee to give bond for the payment of all demands and receive the estate as his own.

The other Justices concurred.

PERE MARQUETTE BOOM COMPANY v. ABBOTT L. ADAMS AND EDGAR A. LORD.

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Boom Company charges—Riparian ownership.

Private ownership of lands bounded on navigable fresh waters is not restricted to the meander line; and even if the owner of the bank did not also own land made within the meander line, it would not belong to the United States, but to the State, which always concedes the right of the owner to the shore.

In deciding what sums booming companies may properly charge for booming under Comp. L. ch. 88, it is proper to admit evidence of the fair market value of their booming grounds as helping to afford a basis for a proper estimate, and the fact that they are generally of little value for any other purpose requires considerable latitude to be exercised in admitting evidence; the value is not conclusively fixed by their actual cost to the company.

It is suggested that charges for boomage should be fixed by statute, or by some board or local authority empowered for that purpose, instead of being left to be fixed by the booming company.

Error to Mason. Submitted Oct. 6–7. Decided Oct. 20.

REPLEVIN. Defendant brings error. Reversed.

White & McMahon for plaintiff in error. Lands beyond the meander line of a navigable stream do not belong to the United States: *Rice v. Ruddiman* 10 Mich. 125; *Watson v. Peters* 26 Mich. 508; *Twogood v. Hoyt* 42 Mich. 609.

C. G. Wing for defendants in error, cited as to the title to lands outside of a meander line of a stream, *Railway Co. v. Schurmeir* 7 Wall. 272; *Barney v. Keokuk* 94 U. S. 324.

COOLEY, J. The substantial question involved in this case is, whether the plaintiff in error was entitled to make certain charges which were insisted upon for the running and booming of logs for the defendants in error. It seems that the company, having a boom on the Pere Marquette lake, and being engaged in running logs on Pere Marquette river, had

run and boomed logs for defendants in error for several years. The most of the company's charges were paid, but some were disputed; and having at length refused to deliver certain logs until the charges were satisfied, the defendants in error replevied them. The replevin suit is the suit now before us. It seems to have been determined in the circuit court that all reasonable charges had been paid.

The statute under which plaintiff in error is organized (Comp. Laws, ch. 88) empowers the company, "in all cases where no rate is fixed by contract, to charge and collect a uniform and reasonable sum for boomage," etc. § 14. As bearing upon the question whether more than a reasonable sum had been charged, the company gave evidence tending to show that the real estate employed by them in their business was of the value of ninety thousand dollars, and their personal estate of the value of ten thousand dollars. The real estate consisted of the booming ground in Muskegon lake and the adjacent shore, and this shore appears formerly to have been a marsh, or perhaps was covered by the waters of the lake. In answer to this showing defendants in error gave evidence tending to show that the value of the boom company's personal property was merely nominal. They then offered to show that the land of the company, which was supposed to be so valuable, was in fact within the meander line of Pere Marquette lake, as surveyed under authority of the general government. This being objected to, the counsel offering it explained the object to be to show that the land, appearing by the survey to be a part of the lake, and having since become made land, it now belongs to the United States. After this explanation the court received the evidence.

The ruling was erroneous. It has been repeatedly decided in this State that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. *Lorman v. Benson* 8 Mich. 18; *Bay City Gaslight Co. v. Industrial Works* 28 Mich. 182; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453. If it were held that the owner of the bank did not also own the land within the meander line, it would belong not to the United States, but the State,

(*Pollard, Lessee v. Hagan* 3 How. 219,) and it is notorious that the State never questions the right of the owner to the shore, but always concedes it.

There seems to have been on the trial great difficulty encountered by both parties in fixing upon any standard whereby to measure the reasonableness of the boom company's charges. Both sides deemed it admissible and important to take into account the real estate made use of by the company in its business, upon the theory that upon the cost or the worth of this the company was entitled to reasonable returns, which would only be received through charges for boomage. The plaintiffs contended, however, that the real estate was to be treated simply as so much of the company's capital, representing the money it had cost, while the company claimed it was to be considered capital according to its present value.

There is a difficulty in measuring the value of booming ground, growing out of the fact that it is commonly of little worth except for the particular business, and for that business the value is likely to be estimated by the profits resulting from its use. These profits depend on the charges for boomage; and if those are excessive the apparent value of the land will be very great. If then the reasonableness of the charges is to be measured by the apparent value of the land, the more excessive are the charges, the easier it will be to establish their apparent reasonableness, and the value of the land would go up *pari passu* with the exactions. This could never be allowed.

The charges of a log-driving and booming company are charges for labor and responsibility only, except that the company must provide for itself the conveniences for making the labor available to accomplish the desired purpose. In this particular the company is on a like footing with persons engaged in many other employments; hackmen and draymen for example, whose charges in the main are for services, but who must have some capital, and must take this into account in estimating charges. But in the case of the boom company, the capital must generally be a subordinate consideration; the

principal matter to be taken into consideration being the value of the services and a fair compensation for the responsibility assumed. But it is proper to take into account the value of all property necessarily made use of in the business; not necessarily the cost, and not necessarily any factitious value which their charges may have given to it; but the fair market value, arrived at with all such aids as the circumstances afford. The fact that booming ground is generally of little value for any other use, and the consequent difficulty in estimating the market value, renders it important that considerable latitude should be allowed in putting in evidence. No doubt it would be proper to show the cost of the ground to the company, as bearing upon the question of value, but not conclusively fixing it.

The case shows, however, the importance of some legislation for fixing the charges, either by statute directly, or by some board or local authority empowered for the purpose. The objections to leaving such charges to be measured by the discretion of the company itself, or by the uncertain judgment of successive juries, are very manifest.

Judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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JOHN WEIMEISTER, GARNISHEE OF JOSEPH FINSTERWALD v. JACOB SINGER AND HENRY BENEDICT.

Garnishment on transcript of judgment.

Act 256 of 1879, allowing process in garnishment to be issued after judgment "in all personal actions arising upon contract, expressed or implied, brought in the several circuit courts or municipal courts of civil jurisdiction," and on "any judgment or decree rendered in any of the several courts hereinbefore mentioned," is meant only to cover cases in which the process could not have been issued before judg-

ment, and does not apply to justices' courts but only to courts whose jurisdiction is similar to that of circuit courts.

A transcript of a justice's judgment filed in the circuit court, is not a judgment rendered in the circuit court.

Error to Mason. Submitted Oct. 7. Decided Oct. 20.

GARNISHMENT. The garnishee brings error. Reversed.

White & McMahon for plaintiff in error.

C. G. Wing for defendant in error.

CAMPBELL, J. This case was argued with another in which one of the questions arose which is shown by this record. The cases however differ in an important particular, and they cannot be disposed of in one decision.

In this case garnishee process was sworn out in the circuit court for the county of Mason, and served in the county. The garnishee made a disclosure completely denying anything which could make him liable. This was January 14, 1880.

On the 19th of January, 1880, demand was filed for the examination of the garnishee on oath before R. B. Gibson, circuit court commissioner of Mason county. On the same day a copy of the demand was annexed to a notice to Weimeister directed to him at Howell, in Livingston county, requiring him to appear before Gibson, at his office in Mason county, on January 31, at 10 o'clock A. M. This was served on Weimeister by the under-sheriff of Livingston county, on the 22d of January.

Weimeister did not appear, and judgment was rendered by default.

This garnishee proceeding is based, not on a suit or judgment in the circuit court, but on a transcript of a justice's judgment on file in the circuit court. The statute (Pub. Acts 1879, p. 269) allows such proceedings "in all personal actions arising upon contract, expressed or implied, brought in the several circuit courts or municipal courts of civil jurisdiction," and on "any judgment or decree rendered in any of the several courts hereinbefore mentioned." This statute

is amendatory of an act which is confined by its title to circuit courts and to the district courts of the Upper Peninsula. It could apply, therefore, to no municipal courts but those whose jurisdiction is similar to that of circuit courts.

While for certain purposes a transcript of a justice's judgment has the effect of a circuit court judgment, it would be an abuse of terms to call it a judgment rendered in a circuit court. The amendment of 1879 allowing garnishee process after judgment in the manner pointed out, is merely designed to cover cases in which it could have been issued before judgment. This could not have been done under this statute on proceedings before a justice.

The whole proceeding therefore is void, and the judgment must be reversed with costs.

The other Justices concurred.

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JOHN WEIMEISTER, GARNISHEE ETC. v. HIRAM S. MANVILLE.

Garnishment—Affidavit—Particularity of averments.

Under Act 256 of 1879, an affidavit for a writ of garnishment must state whether the principal suit is on an express, or an implied, contract, and must distinctly connect the garnishee's indebtedness sworn to with a suit or contract.

An affidavit for a writ of garnishment is defective if based upon the apprehension of any other person than the actual affiant.

Act 256 of 1879 does not authorize the writ of garnishment to issue in suits begun by declaration.

Garnishment is a harsh and peculiar remedy and ought not to be resorted to without sufficient reason; and when the affidavit upon which the writ is taken out is defective no presumption can arise in its favor.

Error to Mason. Submitted Oct. 7. Decided Oct. 20.

GARNISHMENT. The garnishee brings error. Reversed.

White & McMahon for plaintiff in error.

C. G. Wing for defendant in error.

CAMPBELL, J. In this case the facts are the same as in the case of the same garnishee as plaintiff in error against *Singer and Benedict*, except that in the present case the suit against the principal debtor is alleged to be pending in the Mason circuit court. There are, however, some peculiarities about the proceedings which may properly be referred to, that are not found in the other case so distinctly.

By referring to the amendatory act of 1879 it will be found among other things to have changed the requisites of garnishee process in these particulars from the old statute. It provides for actions on contract, adding the words "express or implied" which were not in the old statute, and which have always been included in the attachment laws. This change would not by itself be important if the affidavit, which formerly was only required to aver an indebtedness, were not now required to aver it as existing "*on such contract, judgment or decree*," thus indicating a purpose to require fuller averments of identity than before. The present affidavit, while averring a suit on contract, not only fails to set up whether it is on express or implied contract, but also in no way connects the indebtedness sworn to, either with the suit or with any contract. When a statute introduces such changes by amendment, it must be regarded as designed to secure more distinct allegations, and to require greater particularity than before. No inference can be raised in favor of an affidavit which contains no information within the amendments.

Another important change is that while the old law, which is repealed by the new section, applied to suits "whether commenced by summons, *capias*, declaration, or writ of attachment," the new law omits suits by declaration. We need not inquire whether this does or does not change the extent of relief. The suit mentioned in the affidavit was commenced by declaration.

The statute in order to avoid needless vexation, requires a

distinct averment under oath that the "plaintiff or affiant" is justly apprehensive of the loss of his debt unless a writ of garnishment issue to the garnishee named. The old law, although allowing either the plaintiff or his agent or attorney to swear to the affidavit, required it to aver that the "plaintiff" was justly apprehensive. It is not easy to see how an agent could swear to the apprehension of another person, and the new law has obviated that absurdity. The affidavit in this case, though made by an attorney, does not aver that "affiant" has any such apprehension (which was within his personal knowledge), but that "plaintiff" had, which he could not know. Moreover he does not aver fear of loss unless the writ issue to the garnishee, but unless it issue to Manville. This is most probably a mere slip, but it nevertheless is not the statutory averment, and there is no responsible statement of this important jurisdictional fact.

As the assignments of error cover the defect of jurisdiction, and the writ, which does not itself conform to the affidavit in other respects, was issued without legal authority, we do not think it desirable to inquire into the regularity of the subsequent action.

We, however, feel bound to suggest that this remedy is a harsh and peculiar one and ought not to be resorted to without sufficient reason. The statutes give several grounds of possible garnishee liability—putting them, however, in the alternative. A person cannot truly swear he has good reason to believe in the existence of any of these causes, unless he has something like tangible information from which he can determine whether the garnishee is a debtor, or a custodian of property, or in what particular way he is liable. If it is possible, it certainly is not probable that the same garnishee is liable in every way; and yet the present affidavit covers every kind of liability, although the writ leaves out indebtedness which very possibly was the real ground intended. It is very unjust to allow any such sweeping averment to overcome the sworn denial of the garnishee far enough to allow him to be further vexed without a more specific showing. We are not required now to discuss the validity of such vague

charges to subject a party to expense and personal trouble. But we are very clear that no presumptions should be allowed to help out such a case.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

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ALEXANDER RODGERS v. DANIEL L. WELLS.

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Assignment of railroad stock subscriptions after consolidation—Proof of corporate acts—Declaration on assigned claim.

In an action brought by the assignee of a subscription for railroad stock, to recover the amount of the subscription, the declaration alleged the consolidation of the company in which the stock was taken, and the plaintiff sought to introduce in evidence the articles of the original and the consolidated companies. *Held*, that the objection that they were "incompetent, irrelevant and immaterial" was not sufficiently specific.

Evidence of a stockholders' meeting to ratify a consolidation agreement is properly objected to if no proof has been offered of legal notice of such meeting of stockholders.

A plaintiff who declares upon an assignment of his claim to him by a consolidated railroad company, must fail if he does not show that the statutory conditions to consolidation were substantially observed.

One who declares upon a claim held under an assignment from a consolidated company cannot recover on proof merely that it was assigned by one of the constituent companies to his assignor.

Whether subscriptions to the stock of one railroad company are assignable by another company into which it has been merged by consolidation—Q.

Error to Muskegon. Submitted Oct. 7. Decided Oct. 20.

ASSUMPSIT. Defendant brings error. Reversed.

C. C. Chamberlain and *L. N. Keating* for plaintiff in error.

White & McMahon for defendant in error.

MARSTON, C. J. The declaration in this case alleges the organization of the Muskegon & Big Rapids Railroad Company and that Alexander Rodgers subscribed for a certain number of shares of the stock of said company; that said company and the Chicago & Michigan Lake Shore Railroad Company afterwards consolidated and the corporation thus formed took the name of said Chicago & Michigan Lake Shore Railroad Company; that said consolidated company assigned to Ephraim Mariner the said stock subscriptions of said Rodgers, and that said Mariner afterwards assigned to plaintiff Wells, who brought this action to enforce payment of such stock subscriptions.

The objections made to the introduction in evidence of the several articles of association of these companies were general, and did not point out any specific objection. The general objection made that they were "incompetent, irrelevant and immaterial" did not direct the attention of the court below to any existing defect, or show that anything was lacking to render them competent, and it is very certain that the objection urged in this court would not, from an inspection of the papers during the progress of the trial in the court below, be likely to appear. In all such cases the specific objection or defect relied upon must be pointed out. For these reasons we shall not consider some of the questions presented in this court.

The same objection does not apply to the objection made to the offer of the record of the meeting of the stockholders of the Muskegon & Big Rapids Railroad Company, held to ratify the consolidation agreement. The objection made was that no proof of notice of such stockholders' meeting had been given. No such evidence was given or offered, and in the absence thereof it did not appear that a legal meeting of the stockholders had been held. It does not appear therefore from the record in this case that there was a perfected consolidation of these companies, such as would entitle the consolidated company to the stock subscriptions of the Mus-

kegon & Big Rapids Railroad Company, and the plaintiff in his declaration having alleged an assignment from a consolidated company must fail if the evidence does not show that the statute had been substantially complied with and a proper consolidation perfected.

The evidence also tended to show an assignment of these stock subscriptions direct from the Muskegon & Big Rapids Railroad Company to Mariner and by him to plaintiff, but as the plaintiff had not declared upon any such assignment the proof made cannot avail him.

In any event a question may arise whether stock subscriptions like those sued upon are assignable, but as such question was not raised, we express no opinion thereon, at the present stage of this case.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

ANNEUS J. HILLEBRANDS, EXECUTOR OF SETH NIBBELINK v. HENRY NIBBELINK.

Claim for expenditures by a son for his father.

Where a son living in his father's family expends money at his father's request, and with his knowledge and assent, in building a house for his father, the father is liable to the son for the amount so expended unless there has been a different understanding between them; and it is for a jury to decide whether there was or not, in view of all the circumstances.

Error to Ottawa. Submitted Oct. 7–8. Decided Oct. 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Edwin Baxter for plaintiff in error.

Angel & Soule, *E. S. Eggleston* and *Hughes*, *O'Brien & Smiley* for defendant in error.

CAMPBELL, J. This case comes up a second time from the circuit court for the county of Ottawa into which it had been taken on appeal from the decision of the commissioners. The case is reported in 40 Mich. 646. The claim was brought by a son against his father's estate for various unpaid claims and services, the father having by will made no provision for them.

Upon the former trial we examined all of the important questions raised, and we do not see that in the present record there is any great difference on what is really involved. The judge on the trial confined the jury to the consideration of the various matters making up the amount due for a dwelling-house built in 1871 and 1872, chiefly at Henry Nibbelink's expense.

Upon this we think there was abundant evidence to go to the jury, and that the instructions given were correct. We are not prepared to say as a matter of law that because a son lives at home with his family or single, in his father's house, such an outlay as the building of a house involves stands on the same footing with mere labor done in the domestic service as presumably a voluntary contribution to the comfort and support of the household. Of course it is possible for it to be so intended and the intent may in either case be shown by circumstances. But we think that the executor could ask no stronger charge than that which the court gave. We think that where the expenditure was made at the request and with the knowledge and assent of the father he would be liable unless there was evidence tending to show a different understanding. The charge must not be considered as an abstraction, and it had already appeared in the case beyond doubt that even the ordinary labor done by the son was considered as entitling him to some return, and a receipt appears which the son gave the father on leaving his house in which certain property was accepted in full compensation for his past labor. The jury had all the facts before them, and they were not prevented from weighing all the probabilities, and inferring from them anything that would militate against the claimant.

We need not dwell on the details of the case, because, as before hinted, we cannot see that his claim which was recovered on does not stand substantially where it did before. The court below considered the rulings as required by our former decision. We think there is no such variance as to change the legal shape of the controversy.

The judgment must be affirmed with costs.

The other Justices concurred.

FRANKLIN D. GRAY ET AL. v. ROBERT N. YORK ET AL. 44 415 69 114

Error—Order for dissolution of attachment.

Proceedings to dissolve an attachment are collateral to the main suit, and a commissioner's order dissolving it is interlocutory only, releasing the property from the lien of the writ; it is not a judgment, nor is an order of the court affirming it on *certiorari*.

Error does not lie on the affirmance by the circuit court of a commissioner's order dissolving an attachment; the order only determines the right to the lien, and a writ of error based upon it would not affect the judgment actually given on the merits.

Error to Muskegon. Submitted October 8. Decided October 20.

ASSUMPSIT. Plaintiff brings error. Case dismissed.

L. N. Keating for plaintiffs in error.

Smith, Nims, Hoyt & Erwin for defendants in error. Error does not lie to review proceedings not after the course of the common law unless such remedy is expressly provided: *Cross v. People* 8 Mich. 113; *Jackson v. People* id. 262; *Conrad v. Button* 28 Mich. 365; *Cameron v. Bentley* id. 520; *Fletcher v. Clark* 39 Mich. 374; *Townsend v. Tudor* 41 Mich. 263; as where questions of fact in the cir-

cuit are involved: *Parker v. Copland* 4 Mich. 528; *Baptist Missionary Union v. Peck* 9 Mich. 445; and where the question involved is that of jurisdiction: *Thompson v. School District* 25 Mich. 483; *Taylor v. St. Clair Circuit Judge* 32 Mich. 95; *Robens v. Videto* 33 Mich. 240; *Stall v. Diamond* 37 Mich. 429; it does not lie to review merely special or statutory proceedings: *Heyn v. Farrar* 36 Mich. 258.

Cooley, J. Plaintiffs in this court were plaintiffs in an attachment suit in the circuit court for the county of Muskegon, in which the property of defendants was seized and held. Defendant York applied to a circuit court commissioner for a dissolution of the attachment, and its dissolution was ordered. Plaintiffs thereupon removed the proceedings to the circuit court by common law writ of *certiorari*, and that court affirmed the commissioner's order. Plaintiffs then brought error. Meantime the suit in which the property was attached has gone on to judgment, on personal service of process on one of the defendants.

Does error lie in such a case? We think not. The proceeding to dissolve the attachment was collateral to the main controversy, and was in the nature of a motion heard and disposed of at chambers. Its decision by the commissioner was not a judgment, but was an interlocutory order, releasing property from the lien of the writ, but not disturbing the regular and ordinary proceedings in the case. So the affirmance of that order was no judgment. Nothing was finally determined but the right to the lien, and the judgment actually given on the merits in the court below remains undisturbed and unaffected by this writ.

The case must be dismissed with costs.

The other Justices concurred.

TOWNSHIP OF HART v. COUNTY OF OCEANA.

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Suit for taxes payable by township into county treasury.

A county cannot sue a township at common law for the amount of taxes which the township treasurer should have paid into the county treasury, but has embezzled. But it has a statutory right of action upon the township treasurer's bond, or it can enforce by mandamus against the township authorities its statutory right to have the amount of taxes re-assessed against the township. Comp. L. § 1105. And the failure of the suit on the bond does not bar the remedy against the township itself.

Error to Oceana. Submitted October 8. Decided October 20.

ASSUMPSIT. Defendant brings error. Reversed.

L. G. Rutherford for plaintiff in error. A township is not liable in a suit at law for money due to the county but lost by the township treasurer's default: *Lorillard v. Monroe* 11 N. Y. 392; *Leoni v. Taylor* 20 Mich. 148; the only remedy against the township under Comp. L. § 1105 is by mandamus: *Attorney-General v. St. Clair Sup'rs* 30 Mich. 388.

Smith, Nims, Hoyt & Erwin for defendant in error.

GRAVES, J. The county brought this action of *assumpsit* on the common counts to recover of the township the amount of certain taxes, which the treasurer of the township collected for the county on the assessment roll, and subsequently embezzled. The court sat without a jury, and after making a special finding of facts awarded judgment thereon in favor of the county, and the township alleges error.

By the principles of the common law the township in its corporate capacity could not be subjected to liability to the county for the result of the township treasurer's misdoing. The general relation between the county and the township

in respect to the collection of county taxes, and their return to the county, would not afford any basis for it. In no exact sense can it be said that the township is agent for the county, and no common law obligation arises against the township to guaranty the integrity and responsibility of the treasurer.

For simplicity and convenience of administration the law makes use of the township officer to gather and pay over the county tax. But when it does so and goes no further, the implication is that the local officer is for such function the official agent of the county, and not of the township, and that the county must look elsewhere than to the township for indemnity in case of his misconduct. That such has always been the legislative understanding is sufficiently apparent. There has been no time when a bond from the township treasurer to the county treasurer has not been required.

And the Legislature recognizing that the township was not liable at common law, and deeming that it ought to be made liable in order to afford further security to the county, proceeded to define and fix such liability and declare the remedy to be pursued. The right to pursue the treasurer, or prosecute upon the bond, was not disturbed, the purpose being to allow parallel remedies but of course only single satisfaction. The provision to which reference is made for bringing the township under liability, is set forth in the Compiled Laws in these terms: "All losses that may be sustained by the default of the treasurer of any township shall be chargeable on such township; and all losses that may be sustained by the default of any county treasurer, in the discharge of the duties imposed by this act, shall be chargeable on such county, and the Board of Supervisors of such county shall add such losses to the next year's taxes of such township or county." Section 1105.

That the loss in question is within this statute appears plainly from the finding, and there is no ground for contending that a lawsuit was necessary to fix the amount. The sum lost was charged against the township on the books of the county treasurer, and he proceeded to prosecute upon the

bond, but the result of that action was adverse to the county. The ground of the decision does not appear. But there is no pretense for saying, and it is not claimed, that the asserted loss did not occur. The fact of loss is expressly found. Under these circumstances it cannot be maintained that the adverse judgment in the suit by the county treasurer on the township treasurer's bond is a bar to township liability under the statute. The actual existence of the loss contemplated by the statute draws after it a positive legal liability on the part of the township which is entirely independent of the failure of proceedings on the bond. It is a liability by operation of law and has all the positive force the statute could give it.

The failure of the separate and collateral remedy on the contract obligation of the treasurer and his sureties cannot displace it, and it ought not to displace it. The fact that the remedy on the bond turns out unfruitful is a sound reason why the responsibility of the township under the statute should be maintained.

Other reasons leading to the same conclusion suggest themselves, but a reference to them is unnecessary. But the fate of the present case does not depend on the answer given to the claim that the suit on the bond barred the liability of the township. As previously stated, the township was not subject to any common law liability in favor of the county, or to any other liability than the one created by the statute already quoted, and as that liability was originated, and the mode of its enforcement prescribed, by the Legislature, it is reasonable to suppose that there was no intention to authorize any course substantially variant. The liability being fixed, no action against the township as at common law is contemplated or seems to be necessary. The loss is to be charged to the township and added to the taxes to be raised therein in the succeeding year.

In case the township authorities refuse to act and to take the proper steps to meet and discharge the liability fixed by the statute, the remedy must be by mandamus. No occasion exists for a suit at law. If a judgment were obtained against

the township, the end sought would be no nearer, and the tax payers would be burdened with the expense of an action without any necessity. *Marathon v. Oregon* 8 Mich. 372; *Peterson v. Manistee* 36 Mich. 8.

The judgment must be reversed with costs.

The other Justices concurred.

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The Westchester Fire Insurance Co. v. Charles K. Dodge, administrator.

Insurance—Loss payable to mortgagee—Limitation of time for suing on policy—Suit by administrator of insured.

Where a loss under an insurance policy is made payable to a mortgagee, as his mortgage interest may appear, the death of the insured cannot make the policy void under the provision that it shall become so if any change takes place in title or possession. Whether it would have that effect in any case—Q.

Where proofs of loss under an insurance policy are received within a reasonable time before the expiration of the period fixed by the policy for bringing suit against it, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it.

A claim under a fire insurance policy does not mature until the company has decided whether it will exercise the right to rebuild, if such a right is reserved.

Whether the right of action on an insurance policy can be limited to a shorter period than is prescribed by the statute of limitations—Q.

Whether a mortgagee's rights in insured property belonging to a deceased person can be impaired by delay in appointing an administrator, and in furnishing proofs of loss—Q.

An administrator can sue on an insurance policy for the use and benefit of a mortgagee to whom the loss is made payable.

Error to St. Clair. Submitted Oct. 8. Decided Oct. 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Fraser & Gates for plaintiff in error.

Chas. K. Dodge for defendant in error. An administrator can sue on an insurance policy for the benefit of a mortgagee to whom losses are made payable: *Watertown Ins. Co. v. Grover & Baker S. M. Co.* 41 Mich. 131; *Wyman v. Wyman* 3 Am. L. Reg. 569. An insurance company cannot defeat a right of action by delay in acting upon proofs of loss: *Chandler v. St. Paul Ins. Co.* 21 Minn. 85: 18 Amer. 385; *Killips v. Putnam Ins. Co.* 28 Wis. 472; *Derrick v. Lamar Ins. Co.* 74 Ill. 404. The forfeiture of a policy is waived by requiring proofs of loss: *Penn. F. Ins. Co. v. Kittle* 39 Mich. 51.

MARSTON, C. J. The plaintiff in error insurance company upon the 19th day of October, 1875, by a policy did insure Ira B. Kendrick against loss or damage by fire to the amount of four thousand dollars on certain buildings and personal property, for the period of five years from that date. Ira B. Kendrick died in April, 1877; the property insured was destroyed by fire June 18, 1878; and the present action was commenced July 11, 1879. A judgment having been recovered against the insurance company, the case comes here upon writ of error. The errors assigned will be considered in order:

First, that the policy became void before the loss occurred under the condition in the policy providing that if the property insured be sold or transferred or any change take place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, the policy should be void. It was insisted that, under this provision, the policy was rendered void because of the death of Mr. Kendrick before the loss occurred, and for the farther reason that by the will of the deceased a complicated disposition of his real estate had been made, all of which changed the title, rendering the policy void.

Whether the death of a person insured before a loss occurred would render void the policy, we are not called upon

to determine in this case. By the terms of the policy the loss was made "payable to Chester Downer of Sharon, Vermont, as his mortgage interest may appear," and under such a provision the mortgagee could not be cut off from the protection which the policy afforded him, by the death of the person to whom the policy was issued.

Second, that the plaintiff in error was released from all liability because this suit was not commenced within twelve months next ensuing after the loss occurred, according to the provision of the policy. I certainly have serious doubts whether the policy and law of the State, fixing a period within which actions may be commenced, can so easily be set aside by the agreement of parties at the time of entering into contract. It appears however that after the death of Mr. Kendrick there was considerable delay in the appointment of an administrator, and it was not until April 19, 1879, that the present administrator was appointed. Proofs of loss were on the same day made out and forwarded to the company, which a few days later acknowledged the receipt thereof and asked for a detailed statement of the property destroyed. This was promptly made out and sent forward, and on the 19th day of May the company acknowledged having received them on the 8th, and that they had been passed over to the adjuster of the company, who had the other papers in the case.

On May 29th the attorney representing the claimant under the policy wrote the company quite fully as to the cause of the delay, offering to furnish any farther information desired, and asking that the loss be adjusted within the year, given by the policy, in which to sue. In reply to this letter, the general agent of the company, under date of June 2d, informed the attorney of the parties in interest that the whole matter of the loss had been referred to the company's adjuster who would be governed by instructions from New York, and added, "What action they will take I am not at present advised. And as they have sixty days from receipt of proper proofs of loss before the claim matures, we may not hear

their decision for some days. The questions will be considered by the examining committee of the company."

Without farther citations from, or reference to, the evidence, it sufficiently appears that the company did not consider or treat the policy as having been forfeited or void for any cause, and the company having received the proofs of loss a reasonable time before the expiration of the twelve months after the date of the loss, could not retain them until after that time, and thus cut off the right of the insured to his remedy at law. The fact that the company had sixty days after due notice and proofs of loss had been received would give the company no such right. Fair dealing at least, on the part of the company, would have suggested the propriety of giving the parties interested due notice of the fact that the company had a valid defense and would insist upon it—if the company intended so to do—but not attempt to deprive the parties of their right to test the same in a court of law by keeping silent and retaining the proofs until the time fixed in the policy had expired.

The mortgagee was one of the persons assured within the meaning of the policy (*Watertown Ins. Co. v. Grover etc., S. M. Co.* 41 Mich. 136), and there may be some question whether his rights could be made to suffer by the delay in the appointment of an administrator and the furnishing of proofs of loss. In no view of this case that may be taken can it be said that the right to bring this action was cut off. The company had the option to rebuild, and until it had determined not to the action could not well be commenced, as the claim did not ripen into a money demand until after that period.

Third. It is next claimed that the administrator could not bring this action, as the title to the real estate descended to the heirs upon the death of Kendrick or under the terms of his will. Without passing upon the right of an administrator in ordinary cases, this action has been brought for the use and benefit of the mortgagee, the person to whom this loss, it is conceded, is payable under the terms of the

policy. There is no force in the objection made upon this point.

The judgment must be affirmed with costs.

The other Justices concurred.

Alvah E. Leavitt et al. v. Dolly Stansell.

Consideration—Witness cannot be contradicted on collateral matters.

Where the only question at issue is, whether property was transferred under one contract or another, and no question of fraud is raised, there is no ground for cross-examining a party as to the value of the consideration.

An answer by a witness to a question that is purely collateral and cannot arise under any issue raised in the case, is not open to contradiction.

Error to Wayne. Submitted October 8. Decided October 20.

Trover. Defendants bring error. Reversed.

D. C. Holbrook for plaintiffs in error.

Fraser & Gates for defendant in error.

Campbell, J. Defendant in error, Mrs. Stansell, brought trover for the conversion of a considerable amount of live stock, farm utensils and some other articles, which she claimed were taken from her wrongfully on the 24th of March, 1879, by defendants below.

Their right was derived from Sarah E. Warren, wife of John Warren, who claimed to have purchased the property through a bargain made by John Warren with Garrett Stansell, husband of Dolly Stansell. The testimony on their behalf showed a written agreement between Garrett Stansell and John Warren whereby Stansell agreed to sell Warren a farm in Wayne county and the personal property in question

in exchange for certain real estate in Detroit, and 75 shares of stock in the Detroit Machine & Manufacturing Company, with a further consideration of $2500 in cash, and a second mortgage on the farm subject to a first mortgage, if not more than $3000. This written agreement was made December 5, 1878.

On the 11th of December, 1878, Dolly Stansell and Garrett Stansell executed a deed of the farm to Mrs. Warren, and Garrett Stansell gave her a bill of sale of the personal property, and Warren and wife made the payment and transfers called for by the written agreement, to Dolly Stansell.

To make out her case Mrs. Stansell introduced evidence to prove that she was the owner of the farm and personalty and did not know of or authorize the written agreement or bill of sale; that she made an agreement personally with John Warren upon the same terms as the written agreement, except that the personal property was to be retained by her and delivered over in case the $2500 second mortgage was paid in sixty days. Defendant introduced evidence to show Mrs. Stansell's knowledge of and assent to the agreement made by Garrett Stansell.

John Warren was sworn as a witness and testified to the agreement for an absolute sale and that there was no such oral agreement as Mrs. Stansell set up; that possession was at once given of the personal property and retained till defendants took it under a chattel mortgage. He also testified to the circumstances of the passage of consideration, and the value of the stock and lot in Detroit which formed part of it.

He was then asked, whether in conversation with a Mrs. Kennedy he had not told her—1. That a span of gray horses, being part of the personal property in question, were worth as much as all the property he gave for the farm. 2. That the real estate in Detroit deeded to plaintiff was mortgaged for more than it was worth, and that a year before he tried to raise $200 on it and could not get it. 3. That the stock in said manufacturing company was good for nothing. 4. That he met Stansell in good humor and brought him into the law

office and made out the papers so quick that he thought him under the influence of liquor.

To each of these questions he answered in the negative. Plaintiff then called Mrs. Kennedy who was allowed under objection to testify that he made those statements. This is alleged as error. It is claimed by defendant in error to have been proper impeaching testimony.

The only disputed issue between the parties was as to the agreement for the transfer of the personal property. Plaintiff introduced no testimony to question the consideration which was to be received by her. It was to be the Detroit property and stock, and the second mortgage on the farm. She offered no evidence to show the value of any part of it, and the second mortgage which she took ran for a year. There is no testimony tending to show any representation or supposition on either side concerning the value of any of the property conveyed by either. Each assumed the determination of that for themselves. The dispute therefore was only whether the written agreement or the alleged verbal agreement was the one actually made.

If the written agreement was the one to which Mrs. Stansell assented, it could not be important to know anything else about their dealings. If the verbal contract was the one actually concluded, then, as Stansell was no party to it, it could make no difference what was done with him. The question whether Warren did or did not take him by surprise could be of no possible consequence, except in some proceeding to avoid the contract for fraud. No such issue was presented in this case, and that question was clearly collateral, and its answer by Warren was not open to contradiction.

The gist of the other three questions was to show that Warren had stated that he had got the property without any adequate equivalent, and for a consideration which was entirely worthless. These statements would also have been material if the issue was one of fraud. But they do not seem to bear at all upon the question which of the two contracts was made. If he had stated to any one that there had

been no sale, or only a conditional sale of the personalty—that, if denied, would have been material to the issue and a good ground for impeachment. But there was no question of value involved.

It is claimed, however, that evidence of want of value in the consideration would have a tendency to show that only the farm was sold absolutely, and that it was unlikely Mrs. Stansell would sell the personalty without receiving a larger payment.

Possibly if she had introduced evidence of the relative value of the property as understood by the parties, it might have had such bearing, although somewhat remote. But she raised no such issue. She made no attempt, either in opening or rebutting, to prove that the consideration was not abundantly valuable. It cannot be claimed that Warren's admissions would be receivable for any such purpose.

Moreover no testimony of admissions or otherwise could be pertinent to show the probability of retaining possession of the personalty, unless it bore upon the relative value of the various considerations as estimated by the parties at the time. Proof of the utter worthlessness of the consideration might show fraud, but it could not tend to show that Mrs. Stansell was willing to part with her farm but not with its stock. Nothing that did not tend to show some fact that would be likely to govern parties in their dealings could be pertinent to such an inquiry.

The ruling was erroneous. Judgment must be reversed with costs and a new trial granted.

MARSTON, C. J., and GRAVES, J., concurred.

COOLEY, J. I concur in the result.

Gerard W. Bannister v. William H. Rouse.

Negotiability of note qualified by proviso.

A promise to pay for goods which contains a provision leaving it optional with the payee to reclaim the goods if they are not paid for by a day certain is assignable after maturity as a *chose in action*, and may be sued upon without being indorsed by the assignor.

Error to Kent. Submitted Oct. 8. Decided Oct. 20.

Assumpsit. Defendant brings error. Affirmed.

Fred. A. Maynard for plaintiff in error. Where the promise to pay in a note is absolute, the farther provision that the payee shall have the option to take back the goods for which it is given if there is a default in payment, does not destroy its negotiability: *Wright v. Irwin* 33 Mich. 32; *Preston v. Whitney* 23 Mich. 260.

Drury & Maher for defendant in error. A note is not negotiable that contains another contract than that for the payment of money: *Austin v. Burns* 16 Barb. 643; *Cook v. Satterlee* 6 Cow. 108; *Martin v. Chauntry* 2 Strange 1271; *Bolton v. Dugdale* 4 B. & A. 619; *Davies v. Wilkinson* 10 Ad. & El. 98; *Barnes v. Gorman* 6 Rich. 297; *Ayrey v. Fearnsides* 4 M. & W. 168; *Hartley v. Wilkinson* 4 Camp. 127; *Leeds v. Lancashire* 2 Camp. 205; *Fralick v. Norton* 2 Mich. 130.

Graves, J. Rouse recovered against Bannister the sum of thirty dollars and forty cents besides costs before a justice of the peace upon certain written undertakings given by Bannister to one Bullock, and the judgment was affirmed in circuit court on *certiorari*. Bannister then brought error. The title of Rouse was by assignment and not endorsement and the claim is made that the papers were negotiable by the law merchant and were not suable therefore in the name of the transferee without endorsement. The instruments sued

on were two of a series of twenty of the same kind given on the purchase of a piano. It was provided in each one that the piano should remain the property of Bullock, the payee, until payment, and that in case of default in payment it should be optional with him to take possession of the piano or collect the note. The money was not therefore made payable absolutely and at all events.

By the contract a way was left open for an eventual option on the part of the payee to hold the piano and refuse the money. In case of failure to make payment by the day, whether voluntarily or otherwise, the agreement becomes one entitling the payee to demand the piano instead of money, and this takes place at the moment the right of action arrives. If transferred after maturity no one can ascertain from the face of the paper whether it is or is not an undertaking for money. It seems to me to be wanting in that certainty which the law merchant deems necessary to give it currency according to commercial usage. If correct in this it follows that the want of endorsement was not a valid objection and that the papers were assignable and suable as choses in action.

It appeared that they were received by Rouse as his commission for selling the piano, and that Bannister promised to pay them to him. But that subsequently and whilst they were owned by Rouse he, Bannister, agreed with Bullock to retain the piano and receive back the eighteen notes in Bullock's hands, and then refused to pay Rouse. He testified that when he so returned the piano it was agreed by Bullock that the papers in suit were valueless, and he contended that Rouse held the papers subject to Bullock's power by agreement with him, Bannister, to destroy their value by rescission of the original bargain. The justice found the fact otherwise.

The ruling in regard to evidence worked no prejudice and requires no special notice.

The judgment should be affirmed with costs.

The other Justices concurred.

Michael Martz v. Mary E. Eggemann.

Proof of delivery of deed.

A person negotiating for the purchase of land was to discharge two mortgages which he held against it and pay a balance due on government certificates of sale. The deed and certificates were left with his attorney for examination, and he left a check with him for part of the consideration but afterwards repudiated the bargain and tried to perfect his mortgage title, and for that purpose, it appears, kept the certificate of sale. *Held* that there was evidence tending to show the delivery of the deed.

Error to Superior Court of Detroit. Submitted Oct. 8. Decided Oct. 20.

Assumpsit by Mary E. Eggemann to recover a balance of the consideration for certain lands sold by her to Michael Martz who held two mortgages upon it which he was to discharge as part of the consideration. There were also part-paid certificates of the sale of the land by the State to a previous owner, the payment of which was to be completed. The deed, certificates and all the papers were left with Martz' attorney with whom also Mr. Martz left a check for the balance due, but he afterwards refused to carry out the sale and he kept the certificates which he claimed were referred to in the mortgages, and which he seems to have supposed he needed to enable him to perfect his mortgage title. Proceedings were begun to foreclose the mortgages, and Martz sought to introduce evidence thereof, claiming that it would have explained why he retained possession of the certificates after repudiating the contract of sale. Plaintiff recovered below and defendant brings error. Affirmed.

Charles M. Swift and *Maybury & Conely* for plaintiff in error.

M. E. Dowling for defendant in error.

Marston, C. J. Mrs. Eggemann brought this action to recover an amount of money due her upon a conveyance of

certain lands to the plaintiff in error. That an agreement of sale was made, a deed drawn and executed in accordance therewith, which passed into the custody of the grantee, and a check drawn by him for the money consideration to be paid, was not disputed on the trial. The important matter in controversy related to the question of delivery of the deed. Was there evidence tending to show a delivery? That there was such evidence given on the part of plaintiff must be conceded, and the subsequent conduct of the grantee in perfecting his mortgage title, under the State certificates, supports the plaintiff's theory, or else shows that the whole transaction was in pursuance of a plan adopted by Martz to enable him to get possession of the part-paid certificates.

An examination of the record fails to show any error committed in the charge of the court, of which plaintiff in error could complain. Nor do we discover any error in the rejection of the foreclosure proceedings. The record does not show when such proceedings were commenced or what part they could play in the question as to whether there had been a delivery of the deed or not, and we are not satisfied that such proceedings could be shown for any purpose in this case.

The judgment must be affirmed with costs.

The other Justices concurred.

ORLETUS P. EATON v. HIRAM GAY AND ARTHUR VAN NORMAN.

Sumptuary contract—Liability for "extras."

Where a man orders a club supper and agrees on the bill of fare and the price for each guest, he has a right to expect that the printed bill of fare will be limited accordingly; and he is not liable for any extras that may be called for by, or supplied to, the guests, nor is he bound to give notice that he will not pay for them.

Error to Wayne. Submitted Oct. 8. Decided Oct. 20.

ASSUMPSIT. Defendant brings error. Reversed.

C. M. Swift and *E. F. Conely* for plaintiff in error.

Moore & Moore for defendants in error.

COOLEY, J. This is a dispute respecting the price of a bill for wine and cigars furnished at a supper which the defendants in error, Gay & Van Norman, had provided for a society known as the Ancient Order of Foresters. It seems that Eaton, the plaintiff in error, had ordered the supper, and it was agreed that the charge for it should be one dollar for each person partaking. The testimony of Maxwell, the business manager for Gay & Van Norman, tended to prove that wine and cigars were not to be furnished at the price named, but that Eaton told him after the agreement had been made, to furnish wine and whatever else was necessary, and that under this direction he did furnish wine and cigars as ordered by the guests, and that these were extra. Eaton, on the other hand, testified that it was expressly agreed between himself and Maxwell that wine was to be furnished as part of the bill of fare at the price agreed upon.

The circuit judge instructed the jury as follows: 1. That if they found that Eaton authorized the furnishing of the wine and cigars by the plaintiffs beyond the regular supper, or agreed to pay for them, then the plaintiffs are entitled to recover the value of the wine and cigars; 2. If Eaton only agreed to pay for the supper one dollar a guest, and the plaintiffs supplied the wine and cigars on their own account, then the defendant is entitled to recover; 3. If there was no contract whatever about the wines, and they were furnished and drunk at the supper, and Eaton knew they were being supplied to the guests at the supper which he had ordered, and made no objection to their being so supplied, then there arose an implied contract on his part to pay what the wines and cigars were reasonably worth, and plaintiffs would be entitled to recover to that extent,—the remainder of the bill having been paid.

We cannot assent to this third proposition. If Eaton

agreed with Gay & Van Norman upon the bill of fare and the price, he thereby limited what could be furnished on his account, and he had a right to expect that any printed bill which should be placed before the guests would be limited accordingly. No guest would then feel at liberty to call for anything not there appearing, and if he did, and it was furnished to him, it would be a matter between himself and the proprietors with which Eaton could have no right to concern himself. It would be an extraordinary rule of law that would compel Eaton, under such circumstances, when he saw the guests partaking of wine, to give formal notice to the proprietors that he should pay no debts of their contracting. He had made his contract in advance and stipulated what his liability should be; and the guests were not his agents for the purpose of increasing this liability. If they ordered what he had not bargained for, he not only had a right to assume that they did this on some understanding, express or implied, with the proprietors, but common courtesy required him to refrain from interfering. The supper as agreed upon was his affair; the furnishing of extras was *inter alios*, and the proprietors could no more call upon him to pay for them, on the basis of implied contract, than upon any stranger.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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WILBUR NELSON v. PHILIP M. GRAFF ET AL.

Certificates of sufficiency of acknowledgment.

Certificates of acknowledgment will be upheld wherever possible, and for that purpose a court will resort if necessary to the instrument to which the certificate is attached.

A deed cannot be excluded from evidence for a supposed ambiguity in the clerk's certificate in authenticating its execution and acknowledg-

ment as follows: "I further certify that the said instrument is executed and *proved or* acknowledged according to the laws of this State." The word "proved" is surplusage, as there is no certificate of proof to which it can apply.

A certificate to attest the proof of execution by a witness explains who the witness is and the fact of his making proof of execution.

Error to Montcalm. Submitted Oct. 8. Decided Oct. 20.

REPLEVIN. Plaintiff brings error. Reversed.

Taggart, Stone & Earle for plaintiff in error. Courts construe certificates of authentication liberally: *Harrington v. Fish* 10 Mich. 415; *Munroe v. Eastman* 31 Mich. 283; *Morse v. Hewett* 28 Mich. 481.

Simonds & Fletcher for defendants in error.

GRAVES, J. The circuit judge excluded the record of a deed offered in evidence, and the question is upon the correctness of this ruling. The deed purported to have been executed in New York in 1874, and to have been there acknowledged at the same time. It bore a clerk's certificate to authenticate the execution and acknowledgment and the clause intended to verify those proceedings was in these terms: "I further certify that the said instrument is executed, and proved or acknowledged according to the laws of this State." The objection on which the circuit judge based his decision that the offered evidence was inadmissible, was that the conjunction "or" between the word "proved" and the word "acknowledged" left it wholly uncertain which was done; and that as a consequence there was no authentication in favor of either.

The inaccuracy of the ruling seems to the court very manifest. The validity of our records is not allowed to depend on such niceties. In the language of the Supreme Court of the United States the "courts will uphold a certificate if possible, and for that purpose will resort to the instrument to which it is attached" (*Carpenter v. Dexter* 8 Wall. 513), and it is only needful to apply this rule, to demonstrate

that the clerk in using the word "proved" where it appears, was simply guilty of tautology. He meant by it precisely what the word "acknowledged" fully and sufficiently expressed. He referred to the certificate of acknowledgment which appeared before him on the deed, and not to a certificate of "proof" which did not appear. There was nothing else to which his authentication could apply, and it is only necessary to refer it as he did to the certificate of acknowledgment to uphold the proceeding.

A certificate to attest the proof of execution by a witness is very differently framed. It explains who the witness is and the fact of his making proof of the execution. Further comment is unnecessary.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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GEORGE C. MCCLATCHIE v. JEHIEL V. DURHAM.

Joint makers of notes—Waiver of statute of limitations—Suit on the note by one joint maker against the other—Judgment on certiorari.

A joint maker of a note, who takes it up after maturity, can sue the other joint maker as for money paid to the latter's use, and if his declaration covers the case, it is immaterial that he also declares specially on the note.

A surety on a joint note, whose liability is barred by the statute of limitations, can waive his privilege if he chooses and take up the note and enforce it against his principal, if the latter has kept it alive against himself.

The Supreme Court can render the proper judgment in a case brought to the circuit court on *certiorari* and taken up on error; but if the plaintiff in error has received too favorable a judgment below, and the other party does not complain, it can only affirm the judgment though it may give costs to the defendant in error.

Error to Mason. Submitted Oct. 7. Decided Oct. 27.

ASSUMPSIT. Defendant brings error. Affirmed.

Wheeler & Bishop for plaintiff in error.

White & McMahon for defendant in error.

COOLEY, J. Durham sued McClatchie in justice's court, declaring generally on the common counts in *assumpsit* and on the following promissory note:

"$64.00 PENTWATER, February 11, 1871.

"For value received I promise to pay to E. Stanhope or bearer the sum of sixty-four dollars on or before the first day of June next.

"GEORGE C. MCCLATCHIE.
"JEHIEL V. DURHAM."

The peculiarity of the claim upon this note is seen to be that defendant was joint maker with plaintiff. The suit was instituted on the fifth day of July, 1879, so that all remedy upon the note would then have been barred for more than two years but for payments which McClatchie had made upon it, and which had satisfied more than one-half of it. There was no showing that Durham had anything to do with these payments, and therefore the note could not have been enforced against him by any holder.

On the trial Durham established an account against McClatchie to the amount of four dollars. He also showed that he signed the note as surety merely for McClatchie, and that in March, 1878, after the note had ceased to be an obligation against himself, he purchased it, giving his own note for twenty dollars in payment. The defendant then produced and offered the twenty-dollar note as a set-off. The justice disallowed the claim of the plaintiff on the first note, on the ground, apparently, that one could not sue on a note of which he was a joint maker. He then allowed the defendant's set-off, deducting therefrom the account of four dollars, and rendered judgment for the balance in favor of defendant. The plaintiff removed the case by *certiorari* to the circuit court, where the judgment of the justice was reversed. The defendant then brought the case here.

We do not think the question whether the plaintiff could sue on the note he had signed for McClatchie was a vital one in the case. He certainly had a right to take up the note, and then to sue McClatchie for the amount paid as money paid to his use. His declaration was suited to the case, and the fact that he had declared specially on the note was immaterial. It is true that he may have had a good defense to the note before he purchased it, but he was under no obligation to plead the statute of limitations, and McClatchie could not complain of his paying the note since McClatchie indisputably was still liable upon it. Plaintiff therefore made out a clear right of recovery for the two sums of four dollars and twenty dollars. But the defendant by producing and tendering as an offset the note of twenty dollars given in purchase of the other, reduced the amount plaintiff was entitled to recover to four dollars. For this he should have had judgment.

On *certiorari* the circuit court is required to give judgment "as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice, which did not affect the merits." Comp. L., § 5477. It should therefore have reversed the judgment the justice had rendered in favor of the defendant, and given one for the plaintiff for the amount he had established. If Durham had brought the case here we might have given him the proper judgment, but as he does not complain of the judgment in the circuit court, and it was only too favorable to McClatchie, we have only to affirm it. Durham will recover costs of all the courts.

The other Justices concurred.

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Frederick Misner v. James H. Darling.

Stenographer's notes in evidence—Value may be shown as bearing upon dispute as to terms of contract.

A stenographer's notes of testimony given on a former trial, are not admissible in evidence if he has not testified to their accuracy or if they are not in some way authenticated.

Testimony given on a former trial by a party whose examination was left incomplete, cannot be introduced in evidence, as a whole, by an adverse party, even though the witness has an opportunity to add to it.

Where the contract price for work is in dispute between the parties to the contract, evidence as to what the work is fairly worth is admissible as bearing upon the probability that one is correct rather than the other.

Case made from Osceola. Submitted October 13. Decided October 27.

Assumpsit. Plaintiff had judgment. Reversed.

Frank Dumon & J. H. Palmer for plaintiff. Admissions made by a party on a former trial adverse to his own interest are admissible against him at a later trial of the same case: *Stewart v. First Nat. Bank* 43 Mich. 257; *McAndrews v. Santee* 57 Barb. 193; *Morrison v. Riker* 26 Mich. 387; *McClave v. Maynard* 35 How. Pr. 313; *Tooker v. Gormer* 2 Hilt. 71; *Pickard v. Collins* 23 Barb. 444; a party cannot be injured by proof that does not go farther than his admissions: *Kost v. Bender* 25 Mich. 520; *Fowler v. Gilbert* 38 Mich. 296; where the parties to a contract disagree as to the price agreed on, evidence as to the value or the usual amount paid, is competent: *Swaine v. Cheney* 41 N. H. 232; *Kidder v. Smith* 34 Vt. 294.

Albert G. Day for defendant. A stenographer's minutes cannot be read in evidence until he has testified to their accuracy: 1 Greenl. Ev. § 166; 1 Whart. Ev. §§ 177, 180, 514;

Chess v. Chess 17 S. & R. 409; *Zitske v. Goldberg* 38 Wis. 217; *Waters v. Waters* 35 Md. 531; nor if the testimony so taken was not complete: *Noble v. McClintock* 6 W. & S. 58; the value of work may be shown where the terms of a contract are disputed; *McGraw v. Sturgeon* 29 Mich. 427; *Moore v. Davis* 49 N. H. 45; Abbott's Trial Ev. 305–6; Whart. Ev. § 1184.

Cooley, J. When this case was first brought to trial in the court below the plaintiff put in his evidence and rested. The defendant then took the stand as a witness and gave evidence, but before he had concluded, the plaintiff was allowed to amend his bill of particulars and the case was continued. When it was brought to trial again it was taken up anew, and the plaintiff, after putting in some documentary evidence, called the official stenographer, and inquired of him if he had the notes of defendant's testimony taken on the former trial. Being answered in the affirmative, the plaintiff offered these notes in evidence. The defendant asked the witness whether the evidence had been completed before the case was stopped, and the reply was that it had not been. The defendant then objected to the proposed evidence, but the court overruled the objection and the notes were read to the jury.

One fatal objection to this evidence is that the notes were in no manner authenticated. The stenographer did not testify that his notes were an accurate statement of the evidence, nor was he questioned on that subject. Their accuracy was assumed from the mere fact that he was the official stenographer. But there is no law making them evidence generally, nor should there be. The witness does not review the notes, and gross injustice may be done him if their accuracy is assumed. Mistakes, we know, are common and are inevitable, especially when the witness is testifying on a subject with which the stenographer is unacquainted.

But we also think that the objection that the evidence was incomplete was fatal to its introduction. It was offered as a whole, as containing admissions against the defendant's inter-

est. We do not say that particular statements which were in the nature of admissions might not be proved to have been made by the defendant while on the stand, though even these ought to be received with caution and reserve under such circumstances; but when the whole of the incomplete evidence is offered the objection is manifest. We cannot assume that explanations and modifications would not have been given and made, materially changing the apparent meaning, and it is no answer to say that the defendant may now take the stand in explanation, for this is putting him on the defense where no defense may have been required but for the disadvantage at which he is taken, and all explanations will come in with an appearance of being after-thoughts. A suspicion will almost inevitably attach to them in the minds of the jury which would not have attended the same explanations or modifications if given as a part of the original testimony and at the same time with it.

Several other errors are assigned, the most of which we think have no merit. One of them, however, is material, and as it may possibly occur again on a new trial, we mention it now. The contract price for the sawing of lumber was in dispute between the parties; one testifying that it was to be four dollars and the other that it was to be three dollars and a half. As bearing upon the probabilities that he was correct rather than the plaintiff, the defendant offered to show what the sawing was fairly worth; but the offer was ruled out. We think the evidence was admissible. *Campau v. Moran* 31 Mich. 280; *Richardson v. McGoldrick* 43 Mich. 476.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

CHARLES PETERSON v. WILLIAM A. ANDERSON.

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Logging contract—Evidence of boom-scale.

Where there are conflicting versions of an agreement, it is for the jury to find which is true, and nothing can be shut out on the assumption that one is correct rather than the other.

A logging contract was rescinded by mutual agreement, but the party who did the lumbering afterwards sued for a balance due him, and the defendant claimed as a set-off the sum of $500, which he said plaintiff was to pay as part of the rescission, *Held*, that in submitting the matter the judge was warranted in assuming that this item was in dispute.

In a suit for compensation for getting out logs the scale by which to determine the quantity of feet got out was disputed, and it was shown that certain purchasers had received the logs from the boom company, and paid according to the boom scale, with the apparent acquiescence of the parties. Evidence to show what the boom scale was, was ruled out on the ground that the witness under examination, who was secretary of the boom company, did not make it. *Held* erroneous, as the material question was whether or not it was the boom company's scale, and it was for the jury to determine, after finding whether the parties had agreed that the purchasers should be guided by it in receiving the logs and in making payments in their interest.

Error to Newaygo. Submitted Oct. 13. Decided Oct. 27.

ASSUMPSIT. Defendant brings error. Reversed.

Albert G. Day for plaintiff in error. The testimony of an officer of a boom company whose duty it is to fill out and deliver the boom scales is proper evidence of the scale itself: *Tewksbury v. Schulenberg* 41 Wis. 584.

George Luton for defendant in error. The scale used by the agent of both parties is the only competent evidence of a disputed amount of lumber: *Vaughan v. Howe* 20 Wis. 497.

GRAVES, J. Anderson brought general assumpsit in August, 1878, to recover among other things for an alleged balance for putting in saw logs, and the jury returned a ver-

dict in his favor for $1116.63. Peterson then brought error on certain exceptions to the proceedings. The record is rendered ambiguous by much unnecessary matter, and by its want of connection and other perplexing defects. Two written contracts are often alluded to as Exhibits "A" and "B," and papers so marked are attached to the bill of exceptions. But it does not distinctly appear that either of them was actually submitted to the jury. Another writing is likewise mentioned as bearing on the controversy, but is not found in the record.

It so happens however that the imperfections suggested are not fatal to the writ of error. The point made on the instructions to the jury relative to the item of $500 claimed by Peterson as set-off does not appear to be well taken. Peterson made a bargain with Esty and Earl for the purchase of certain land for $5500, and it was arranged at the same time between Peterson and Anderson that the latter should have an equal half interest by logging on the lands according to certain terms. Anderson found himself unable to perform according to this arrangement, and it was rescinded by mutual agreement.

It was contended at the trial by Peterson that it was part of this rescission that Anderson should pay or allow him $500 and that he was entitled to be credited for it. Anderson insisted that there was no binding contract in his favor for an interest in the land, and, moreover, that Peterson agreed to pay for putting in all the logs just as though there had been no other contract. The circuit judge was warranted in assuming that this item was in dispute and he submitted the subject fairly.

One of the principal issues at the trial arose upon the number of feet contained in the logs for which Peterson should be held chargeable as between him and Anderson. The latter claimed that it was agreed between them that one Charles H. Clark should scale the logs and that he did so; and the scale account made by Clark was given in evidence. Peterson, however, denied that he undertook to be unconditionally bound by Clark's scale. He swore that

he assented to Anderson's proposition to allow Clark to perform the scaling, but qualified his consent by saying that it would be all right if the scaling was done to satisfaction, and he contended that it was not so done. It was for the jury to pass on these conflicting versions and ascertain which was true, and it was not competent to shut out anything on an assumption that one was correct rather than the other.

The counsel on the part of Peterson, following up his explanation, produced evidence that Lewis & Covell, by authority of these parties, received the logs from the boom company; paid for driving according to the boom scale; sawed the logs and handled the lumber and, out of the proceeds, paid a large demand to Wilcox & Morgan for supplies to Anderson in the course of his putting in the logs, and some other expenses, and paid the residue to Peterson.

He then offered to show the boom scale on which Lewis & Covell had so acted under the alleged approbation of these parties, and also the amount of that scale; and the circuit court ruled out the offer. It was admitted that the witness under examination, who was the secretary of the boom company, did not make the scale, and the ruling seems to have been based on that circumstance. But it was not important who made it. The material consideration was whether it was in fact the boom company scale, and the one the parties acted on as sufficient for their purpose, if such was the case, and it was part of the offer to produce that scale.

It was for the jury to say whether it was true, as Peterson represented, that it was agreed between himself and Anderson that this scale should guide Lewis & Covell in receiving the logs from the boom company and in making payments in the interest of the parties, and if they found such to be the case, or, in other words, found Peterson's version to be the true one, they were then entitled to opportunity to consider the proposed evidence relative to the boom scale on the issue touching the number of feet which ought to be charged against Peterson. *Ortman v. Green* 26 Mich. 209; *Smith v. Kelly* 43 Mich. 390; *Busch v. Kilborne* 40 Mich. 297: *McCreery v. Green* 38 Mich. 172.

In view, therefore, of the opposing theories, the evidence should have been laid before the jury under suitable instructions from the court.

We are not satisfied that the record is shown to contain any error except the exclusion of the evidence referred to.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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NATHANIEL RICHARDS v. JERRY W. PIERCE.

Ejectment by devisee before probate.

The fact that a will has not yet been proved does not prevent a devisee of lands or a party claiming under him from bringing ejectment.

The Michigan statutes of descents applies only to property which is not devised.

A devisee may take his estate as of the death of the testator, except so far as otherwise provided by statute.

Probate of a will for all purposes relating to the existence and transfer of title, relates back to the death of the testator.

The plaintiff in ejectment is not bound, under forms of pleading used in Michigan, to aver the character of his title, except as to its extent.

Error to Shiawassee. Submitted October 13–14. Decided October 27.

EJECTMENT. Plaintiff brings error. Reversed.

Hugh McCurdy and *Oscar Adams* for plaintiff in error.

J. W. Turner for defendant in error.

CAMPBELL, J. Plaintiff brought ejectment for certain lands in Shiawassee county, which belonged to James Wadsworth, of Livingston county, New York, and were devised

by his last will to various persons, from whom plaintiff derives title. These devises were partly in trust, and partly directly, in the same proportions and for the same beneficiaries as would have taken the property by descent. The testator died in 1844, and this will was proved the same year in New York, but was not proved in Michigan until after this action was brought.

The only question argued before us was whether, before probate, ejectment could be brought by devisees or by those to whom their rights had been previously transferred. The general direction given by the court below to find a verdict for the defendant must have been given under misapprehension, as title was made out which would have been valid without a will, to a large share of the estate. But this seems to have escaped the notice of all parties, and is not material as the case stands.

There has never been any question of the right of a devisee to take his estate as of the death of the testator, and our statutes confine descents, and did when this testator died, to property which is not devised. Rev. Stat. 1838 p. 267. That this is so for all purposes, except as otherwise provided by statute, is not doubted. But it is claimed that the declaration of sec. 30 p. 275, Rev. Stat. 1838 (which is substantially the same as in subsequent revisions), that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court," makes every devise take effect from probate and not earlier, and if not for other purposes, does so for purposes of bringing action.

As probate was always necessary to enable one to make proof of title of personalty, this statute cannot certainly impose any greater restrictions on realty than existed before on personalty.

There were undoubtedly some technical rules of common-law pleading which required an executor to make *profert* of his letters in pleading. But for any other purpose the decisions are uniform that probate merely furnished the means of establishing by a peculiar kind of record-evidence the validity

of an existing right; and that for every valuable purpose touching the existence and transfer of title the probate was retroactive, and had the same effect as if it had been had at the time of the testator's death. And so far as the statutes have been applied to devises, there is no material difference. Upon so familiar a rule it would not be profitable to multiply authorities, and a few illustrations will suffice as to the condition of things before probate.

The executor may release a cause of action. Co. Lit. 292 *b*. He may sell goods. *Mayor of Norwich v. Johnson* 3 Mod. 92. He may enter on a term and the entry be good though he die before probate. 3 Dyer 367. He may sell a term of years, though he die before probate, and the sale will stand. *Brazier v. Hudson* 8 Simons 67.

In *Wankford v. Wankford* 1 Salk. 299 and notes, the doctrine is quite fully discussed, and clearly laid down. And the practical result is said in *Brazier v. Hudson* to be that subsequent probate validates all the acts that would be valid after. This may be a somewhat broad statement, but it is certainly true for most purposes, and authorities might be multiplied upon it.

In the United States the rule has been the same. After probate a conveyance previous thereto by a devisee has been held valid. *Spring v. Parkman* 3 Fairf. 127. And in *De Wolf v. Brown* 15 Pick. 462, it was held the estate devised vested immediately both as to realty and personalty on the death of testator, so as to authorize suit for a taking of property connected with a farm before probate. The action then was after probate. Both these cases were under statutes like ours.

We have ourselves passed upon the question as to the immediate interest of a legatee in a mortgage which formed part of an estate in realty and personalty willed to her. In *Sutphen v. Ellis* 35 Mich. 446, we held that an assignment of the mortgage made by the legatee who died before the will was proved was valid. As already suggested, our statute puts realty and personalty on the same footing as to the necessity of probate.

In 3 Redfield on Wills, p. 23, a similar doctrine is laid

down, but it is suggested there as well as in some other authorities that no action will lie before probate, and this seems to be asserted on an idea that in law no action accrues any earlier.

We think this is a misapprehension. The common law authorities upon pleading require *profert* to be made in the declaration, and for this reason it is often said probate must then have been taken out. But we do not find any doctrine requiring probate before action brought, but only before declaring. In 1 Salk. 302, 303, before referred to, it is said that an action may be brought before probate, but plaintiff cannot declare. Several authorities are collected in Comyn's Dig. "Administration" (B 9), to the effect that an action brought before probate is made good by subsequent probate, "for it is sufficient, if the probate appears upon the declaration." In *Thompson v. Reynolds* 3 C. & P. 123, the true doctrine was most distinctly explained. In that case upon an issue made by plea and replication whether the plaintiff was executor in manner and form as averred in his declaration, in which he actually made *profert* of his letters, he was allowed to recover, although the proof showed the letters were not granted until some months after the declaration was filed.

In equity also it has been held that proof of probate before the hearing is sufficient, although occurring during the litigation: *Humphreys v. Humphreys* 3 P. Wms. 349. And see *Comber's Case* 1 P. Wms. 768.

It appears that the only objection that has been urged does not really go to the right of action, but only to the formalities of pleading; and that this forms no exception to the rule that the probate relates back. As under our form of pleading the plaintiff in ejectment is not bound to aver the character of his title except as to its extent, there is no room for the formal objection, which has never even in personal actions been allowed to prevail if the party chose to make proper allegations, whether true or false.

We think the plaintiff had a right to bring his suit. The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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TRUMAN HUNT v. ISAAC M. MIDDLESWORTH.

Variance—Deed intended as mortgage—Set-off.

In an action to recover the balance due upon a foreign judgment, the declaration averred the recovery of judgment for a certain sum "and also the sum of $42.60 adjudged to said plaintiff" etc. The judgment record, introduced in evidence, showed a judgment for the sum named, "besides his costs and charges herein expended," and elsewhere showed that they had been fixed at the sum stated in the declaration. *Held* that there was no fatal variance, and though it was not shown how the costs were taxed the proceedings fixing their amount could not be presumed illegal.

A judgment in Michigan entitles the successful party to costs but does not usually fix their amount. When taxed the action fixing them relates back and they become part of the judgment.

On exchanging real estate one of the parties gave notes secured by a mortgage upon that which he received, but afterwards, being unable to pay them, reconveyed the property on an oral agreement that the other party should sell it, satisfy the mortgage from the proceeds, and pay him the surplus. The latter sold the property but did not pay over the surplus, and the former recovered judgment for it in another State, on which judgment he afterwards brought suit in this State. *Held* (1) that the plaintiff's right to recover in the former suit was based on the fact that the reconveyance was meant only as a mortgage; (2) that defendant's offer in the latter suit to show how the property was paid for when first conveyed, was rendered immaterial by the judgment; (3) that in the later suit the defendant's offer of the reconveyance to show that he was entitled to wheat growing on the land and to the rent of the premises to the date of their sale, the plaintiff having kept possession, was properly rejected, it having been adjudged that the conveyance was only a mortgage and that the mortgagee had received the full amount of his debt.

In a suit growing out of an exchange of property, defendant claimed as offset the amount which had been paid to perfect title to the property, which plaintiff had conveyed to him with covenants of warranty. But it appeared that he had himself quit-claimed the property to his son against whom judgment had been recovered in ejectment. On the trial his grantee had surrendered back the property. *Held* (1) that defendant, having conveyed by quit-claim, was not liable to his grantee, and that it was the latter, if any one, who had any remedy against the plaintiff upon the covenants of plaintiff's deed; (2) that defendant had no claim against the plaintiff for the amount expended

in perfecting title, and the surrender of the property to him could not change the rights of the parties to that action; (3) that as defendant and his grantee had derived some benefit from the property, the consideration for the conveyance would not necessarily be the measure of damages for a breach of covenant, and as the damages would be unliquidated, they could not be the subject of set-off.

Error to Kalamazoo. Submitted Oct. 14. Decided Oct. 27.

DEBT on judgment. Defendant brings error. Affirmed.

T. R. Sherwood for plaintiff in error.

Dallas Boudeman for defendant in error. Covenants of warranty run with the land and can be sued on only by the party owning the land when they are broken: 3 Washb. R. P. (4th ed) 661–73; *Coleman v. Lyman* 42 Ind. 289; *Martin v. Baker* 5 Blackf. 232; and if he deeds to another he transfers his right of action (*Kitchell v. Mudgett* 37 Mich. 81; *Rowe v. Beckett* 30 Ind. 154; *Nicholson v. Caress* 45 Ind. 479) and cannot recover for the same cause of action: *Booth v. Starr* 1 Conn. 244; *Chase v. Weston* 12 N. H. 413. A mortgager is entitled to the use of the premises and the crops grown on them so long as the mortgagee leaves him in possession: 1 Jones Mort. § 670; *Boston Bank v. Reed* 8 Pick. 459; *Mayo v. Fletcher* 14 Pick. 525; *Noyes v. Rich* 52 Me. 115.

MARSTON, C. J. Middlesworth brought this action against Hunt to recover a balance due upon a judgment recovered in one of the circuit courts of the State of Indiana. The defendant in the present action pleaded the general issue and gave notice of set-off.

I. Counsel for defendant objected to the introduction in evidence of the Indiana judgment record, because it showed no judgment for costs and thus varied from the declaration. The latter averred the recovery of a judgment for a certain sum "and also the sum of $42.60 adjudged to said plaintiff," etc. The record showed a judgment for the sum named in favor of the plaintiff therein, "besides his costs and charges herein expended." It appeared from other parts of the

record that the costs had been in some way, but how did not appear, fixed at the sum mentioned in the declaration.

We are of opinion that in this there was no variance that could be considered fatal. In this State the judgment would not usually fix the amount of the costs, although entitling the successful party to costs. And when the amount thereof should afterwards be determined by the proper officer, such act would relate back and make the amount so fixed a part of the judgment, and might be referred to as having been recovered therein. This is the legal effect of the judgment and subsequent proceedings, and although it does not appear what officer taxed the costs, yet we cannot presume the proceedings in fixing the amount were irregular or illegal.

II. The offer by defendant to show how the mill property purchased in 1872 was paid for, was wholly immaterial. The judgment obtained in 1876 rendered that question of no sort of importance in this issue.

III. The offer made by defendant to show the conveyance by plaintiff to him of the mill property was rejected, and this is assigned as error.

This mill property had been conveyed by Hunt to Middlesworth in 1872, for a consideration of seven thousand dollars. In part payment thereof Middlesworth conveyed to Hunt certain hotel property at an agreed price of $3000, and gave his notes, secured by mortgage upon the mill property, for the balance less the value of certain personal property. He afterwards gave a second mortgage upon the mill property. Being unable to meet these mortgages at maturity, Middlesworth reconveyed the mill property to Hunt, the latter retaining Middlesworth's notes thus secured by mortgages, upon an oral agreement that either should be at liberty to find a purchaser for such property, and that when sold, Hunt, out of the proceeds thereof, should deduct and retain the amount owing him upon such mortgage indebtedness, and pay over the balance, if any, to Middlesworth. The mill property was sold and the action brought by Middlesworth in the Indiana court was to recover the amount going to him under that agreement. In that action the plaintiff set forth

clearly and specifically the facts, and alleged that the conveyance by him of the mill property to Hunt was intended as a mortgage. This was denied by the defendant, who claimed that at the time of such conveyance the notes which he held were surrendered up to the grantor and that such conveyance was made in satisfaction of, and to prevent, a foreclosure of the mortgages. The jury found a verdict in favor of the plaintiff in that case, and, in answer to questions submitted to them, found the plaintiff's version to be correct and that defendant's theory was not true.

It has been argued in this case that it was wholly unnecessary in the Indiana case to decide what the effect of the verbal agreement was upon the deed, but we do not think so. The issue seems to have been fairly raised in that case and the plaintiff's right to a recovery to depend upon the fact that such conveyance was intended as a mortgage only. The offer of such deed in this case was to show that the grantee was entitled to certain wheat then growing upon the land, and also to the rent of the mill from the date of the conveyance to the time of the sale, the grantor having remained in possession during such interval.

The offer was properly rejected. It had been judicially determined that the conveyance in question was but a mortgage and that the mortgagee had received thereunder the full amount of his mortgage debts, and when he had once received this amount he could not thereafter claim anything farther. If he was entitled to the rents and profits he should have made that claim in the other case, but in no event can we see any ground upon which he can now claim the same.

IV. It is next claimed that the hotel property was not owned in fee-simple by Middlesworth at the time he conveyed it to Hunt; that the title was afterwards in an action of ejectment adjudged defective, and that the value thereof or consideration paid therefor—$3000—should be allowed as an offset in this case.

To this there are serious objections. The hotel property was conveyed by warranty deed in 1872 and the grantee took possession. In 1876 Truman Hunt, the grantee, conveyed this

property by quit-claim deed to his son Seth Hunt. In the ejectment suit to recover this property Seth Hunt was a party defendant and judgment was rendered against him therefor in 1878.

Truman Hunt having conveyed by quit-claim, was not liable to his grantee. The latter, if any one, had a remedy upon the covenants in the deed from Middlesworth to Truman Hunt, so that at the time this action was commenced Truman Hunt had no claim against his grantor growing out of the conveyance of that property, and the surrender from Seth Hunt, during the trial, could not change the rights of the parties in this action. In the next place both Truman Hunt and his grantee had been in possession of this hotel property for a series of years. They had derived some benefit from the conveyance, so that it would not necessarily follow that the agreed consideration therefor would in an action for a breach of covenant be the measure of damages. In such an action the damages would be unliquidated, and such damages cannot be the subject of a set-off.

We are of opinion that the judgment must be affirmed with costs.

The other Justices concurred.

EDWARD GROSVENOR AND JOHN F. GROSVENOR v. J. WARREN ELLIS AND GEORGE A. FIELD.

Measurement of lumber—Hearsay—Interest as damages—Referee's report.

A contract for sawing lumber provided for its measurement as the work advanced. In an action on the contract, proof was offered of a measurement made more than a year afterwards. *Held* admissible, in the absence of any explanation in the record, as strict compliance with the terms of the contract might have been impossible or been waived. Measurement by either party or by both would have been admissible and proper to guard against mistakes or fraud, and if measurement was not made on delivery it might be made afterwards.

In an action on a contract for sawing logs testimony that a witness had heard something going to affect the correctness of plaintiffs' scale from certain specified persons, is not hearsay.

Evidence that might have been proper must be presumed so, where the record shows nothing to the contrary.

In an action to recover charges for sawing logs defendant claimed an offset of the damages resulting to him from delay in doing the work, and was allowed the interest on the value of the logs for the period of delay. *Held*, that although he was not entitled to interest, the damages might very justly be measured by the rate of interest if the market value of the logs had not changed, and the award was sustained.

A referee's conclusions are presumed to have been warranted by the proofs if the bill of exceptions does not contain all the evidence.

An article that has a market value is presumably salable.

Error to Kent. Submitted Oct. 14. Decided Oct. 27.

Assumpsit. Plaintiffs bring error. Affirmed.

E. S. Eggleston for plaintiff in error.

Taggart & Wolcott for defendant in error.

Cooley, J. The plaintiffs sued to recover their charges for sawing for defendants a large quantity of lumber under a contract, a copy of which appears in the margin.*

*Article of agreement made this seventh day of April, A. D. 1876, by and between E. & J. F. Grosvenor of Nelson, Kent county, Michigan, of the first part, and Ellis & Field of the city of Grand Rapids, county and state aforesaid, parties of the second part, witnesseth: that the said parties of the first part agree to move their steam saw-mill at their own expense on to a spot cleared for the purpose by the second parties, and to manufacture the lumber on lot four (4) and the n. e. ¼ of the s. e. ¼ of section two, town ten north of range eleven west, also the timber cut from O. Smith's land and put into the lake described below, into lumber of such kinds and dimensions as the parties of the second part may direct and in a workmanlike manner, to the entire satisfaction of the parties of the second part (who, if at any time should not be satisfied, shall make it manifest by notifying the parties of the first part), sort the same as it comes from the saw into such lengths, kinds and qualities as the second party may direct, and place it on a car (for that purpose) for $2.50 per thousand feet.

The parties of the first part agree to take all the lumber which may be injured by being badly sawed or handled and pay for it what it would have been worth had it not been damaged.

The parties of the second part agree to pay the parties of the first part

The larger portion of their bill had been paid, and the defense to the remainder was that the lumber was damaged by bad sawing, and also that great delay occurred in doing the work, from which the defendants suffered damages to a considerable amount.

The case was sent by the circuit court to a referee, and comes before us on his findings and on a bill of exceptions. The bill of exceptions is peculiar in that it is silent respecting the proof of the plaintiffs' case. It is of course to be assumed that the plaintiffs made a *prima facie* case, but in the absence of any statement how this was done and on proof of what facts, we are somewhat embarrassed in considering

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$2.50 per thousand feet for sawing, assorting and piling upon car the above-described timber, payable as follows, viz.:

On the first of each and every week, one dollar and fifty cents ($1.50) per thousand feet on all which was sawed the week previous, shall become due and payable; the balance, one dollar ($1) per M. shall become due and payable on the first day of July, A. D. 1877, without interest.

The measurement to be made at expense of said party of first part, by Myron Buck, so long as said measurement shall be satisfactory to both first and second parties, but when not satisfactory to either parties, then all full piles which were sawed the week previous shall be measured by first and second parties (or some one or two appointed by and paid for by each party, paying one-half), and on said amount sawed the week previous (the measurement to be made the first of each week), one dollar and fifty cents ($1.50) per thousand feet shall become due and payable at time of making such measurement; the balance (one dollar per thousand feet) shall become due and payable the first day of July, A. D. 1877, without interest.

The parties of the first part agree to move and furnish the second parties, without charge, the use of their railroad track, switches and trucks, for the purpose of handling lumber and to take the logs from the lake on the south-west corner of lot four, as described above. The parties of the first part, agree to commence sawing on the contract as soon as practicable, and to be in full running order by the first day of June next, and to average sawing not less than twenty thousand feet per day, from said first day of June, A. D. 1876.

Said first parties agree to furnish said second parties, without charge, the use of land and said track at Lockwood station for piling and shipping their lumber, whenever they may desire to do so.

The parties of the first part agree to pay the parties of the second part three dollars and fifty cents ($3.50) per week for board of each man employed on the job, provided the board shall be satisfactory, the board bill payable weekly.

The parties of the first part agree to furnish the parties of the second part, power (without charging) sufficient to work up the slabs coming from said logs, or as many of them as they may wish to cut.

[Signed] ELLIS & FIELD.
E. & J. F. GROSVENOR.

the exceptions of the plaintiffs, who are the party now complaining.

The first exception is to the admission of evidence on the part of defendants that they had made a measurement of the lumber sawed under the contract, which they completed on the Monday preceding the trial; which was on the tenth day of April, 1878, and more than a year after the sawing was completed. A reference to the contract will show that this was not such a measurement as was contemplated by its terms. But in the absence of any explanation we cannot say that this was inadmissible. A strict compliance with the terms of the contract in respect to measurement may have become impossible, or may have been waived; and under such circumstances the parties must arrive at the quantity as best they might. Measurement by either or both as delivery was made would have been admissible, and under any circumstances would have been proper, to guard against frauds or mistakes on the part of the scales agreed upon. And if measurement was not made at delivery, it might be made afterwards.

The second exception relates to the following question put to the defendant Field when on the stand as a witness, and the answer thereto: *Question.* "Have you heard anything which goes to affect the correctness of the scale made by the plaintiffs? when, and from whom?" *Answer.* "From Frank Whittaker and John Newton, within the last three weeks; one within the last ten days." This is said to be hearsay. Had the witness stated what he had heard, it would have been improper, but it might be entirely competent for him to state that he had but recently had occasion to doubt the correctness of the plaintiff's scale. We are without explanation here as we are in respect to the preceding exception; but it is possible for this evidence to have been proper, and we must presume it was.

A third exception, resting on the same ground as the first, requires no further notice.

The referee found that the plaintiffs began the sawing July 6, 1876, and continued it to December 1, 1876, having then

sawed 2,323,356 feet; that they resumed sawing April 14, 1877, and completed the job June 9, 1877.

That defendants found fault with the sawing as it progressed, and that 300,000 feet of this lumber was injured by bad sawing to the amount of $300.

That the defendants suffered damages by reason of the sawing not having been completed as agreed, to the amount of $414.79.

That after deducting from the plaintiff's bill the payments made and the damages suffered as above, there remained due to the plaintiffs $1011.91.

The damages suffered by the defendants from the delay were computed by the referee as follows: Value of time spent in caring for the lumber the second year that should have been sawed the first, $150; additional expenses in moving the lumber to Lockwood, $175; interest on value of logs which by reason of the delay defendants could not have the benefit of the first year, $89.79. All these items are objected to, as is also the evidence upon which the referee computed them. But we do not find in the record any valid objection, either to the evidence or to the conclusions. It is true that, as to this last item, the defendants were not entitled to interest as such, but the circumstances may have been such that the rate of interest constituted a very fair measure of the damages actually suffered. Suppose, for example, the defendants by the delay were deprived for a year of the opportunity of putting their lumber upon the market as they intended and desired, and in the meantime the market price remained stationary, nothing could be nearer exact justice than to award damages equivalent to the lawful interest. The damages will not be interest, but the rate of interest will very justly measure them.

It is urged on behalf of the plaintiffs that it was not made to appear before the referee that defendants could have sold their lumber the first year if they had had it. As to this we do not know how the fact was. The bill of exceptions does not contain all the evidence, and the presumption is that all the referee's conclusions were supported by proofs. More-

over if an article has a market value, it is presumptively salable. Some other objections to the recovery are based upon the supposed absence of sufficient showing, and are equally untenable.

We discover no error in the action of the circuit court confirming the report of the referee, and it must be affirmed with costs.

The other Justices concurred.

ADELIA M. HARRETT, GUARDIAN v. JAMES KINNEY AND HENRY B. CHILDS.

Ejectment—Equitable defenses to action at law.

A guardian suing in ejectment for the benefit of wards claiming by descent makes a *prima facie* case by proving paper title to the ward's ancestor, descent to the ward, and the plaintiff's title as guardian to sue for possession.

The common law rule excluding all defenses in ejectment that are not legal has been abrogated in many parts of the United States, but the federal courts recognize it and it remains in force in Michigan.

A defendant in ejectment cannot interpose to the action at law the merely equitable defense that the plaintiff's title was fraudulently obtained, especially where he himself has only an equitable claim under a contract giving no right to the possession.

A deed collusively given in execution of a land contract, possession of which was surreptitiously obtained in the absence of the party holding it, is not absolutely void in law as for fraud, as it passes the legal title to the grantee named, and the contract purchaser cannot cause it to enure to himself except by showing his equitable right and title as against the grantee; and this showing cannot be made in an action of ejectment.

Error to Kent. Submitted Oct. 14. Decided Oct. 27.

EJECTMENT. Plaintiff brings error. Reversed.

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C. G. & W. W. Hyde for plaintiff in error. The legal title must control in ejectment though acquired by fraud or held in trust: *Clark v. Lockwood* 21 Cal. 220; fraud is not a defense in ejectment unless it renders the legal title absolutely void: *Walker v. Kynett* 32 Ia. 524; *Rountree v. Little* 54 Ill. 323; *Escherick v. Traver* 65 Ill. 379; *Dawson v. Hayden* 67 Ill. 52; *Lombard v. Cowham* 34 Wis. 486; *Crane v. Reeder* 25 Mich. 312; a purchaser of land had notice of a previous contract for it by another, who had paid for it and obtained possession, but who could not show these facts in an action of ejectment brought by the latter purchaser who had received a deed of the land: *Coleman v. Casey* 1 A. K. Marsh. 440; see *Moody v. Farr* 33 Miss. 192; *Collins v. Robinson* 33 Ala. 91; *Nickles v. Haskins* 15 Ala. 619; *Cawsey v. Driver* 13 Ala. 838; *Voris v. Thomas* 12 Ill. 442; *Mitchell v. Robertson* 15 Ala. 412; *Buell v. Irwin* 24 Mich. 145; *Conrad v. Long* 33 Mich. 78; *Page v. Cole* 6 Clarke (Iowa) 153; *Whiting v. Butler* 29 Mich. 125; an equitable title will not defeat a legal title: *Thompson v. Wheatley* 5 Sm. & M. 499; *Jackson v. Pierce* 2 Johns. 221; *Jackson v. Deyo* 3 Johns. 422; *Sinclair v. Jackson* 8 Cow. 543; *Jackson v. Van Slyck* 8 Johns. 487; *Stinebaugh v. Wisdom* 13 B. Mon. 467; *Abbott v. Chase* 13 Iowa 453; *Allyn v. Johnson* id. 604; *Campbell v. Campbell* 3 Head. 325, where an equitable defense is set up to an ejectment suit the parties to the action must be such as would be required to a bill in equity seeking the same relief: *Lestrade v. Barth* 19 Cal. 660; *Call v. Chase* 21 Wis. 511; *Williams v. Murphy* 21 Minn. 534.

W. D. Fuller for defendant in error Kinney. A deed obtained by fraud is absolutely void as against the party defrauded: *Jackson v. Summerville* 13 Penn. St. 359; *Thompson v. Drake* 32 Ala. 99; *Somers v. Pumphrey* 24 Ind. 231; *Montgomery v. Pickering* 116 Mass. 227; *Gage v. Gage* 29 N. H. 533.

GRAVES, J. The wards Arelia and Kittie L. Kinney are the sole heirs at law of William Kinney, deceased, and their

guardian Mrs. Harrett is their mother, she having married Alexander Harrett since the death of their father. Mrs. Harrett in her character of guardian brought ejectment against the defendants for forty acres of land in Kent county. The defendant James Kinney, the father of William Kinney, deceased, was in possession and the defendant Childs claimed title under him. The plaintiff effected a recovery and was put in possession. A new trial was taken afterwards and the defendants prevailed, and the plaintiff claims that the court committed error in allowing the defense.

The plaintiff made out a paper title from the United States to the decedent William Kinney, the descent to the ward, and the title of Mrs. Harrett as their guardian to sue for the possession. The title so established purported to fix the legal right in the plaintiff and was *prima facie* valid and sufficient to entitle the plaintiff to recover. So far as it need be noticed the evidence which the defense was permitted by the court to adduce and make use of to defeat the plaintiff is in substance as follows: In 1855 the land was owned by one John Hamilton and he orally agreed to sell it to the defendant James Kinney for $350; that the latter immediately paid $10 and went into possession and so continued until his dispossession in this case; that he paid Hamilton the consideration, and some time after the oral agreement but before full payment, received from Hamilton a written contract; that this contract was kept by him in a bureau in his house and was never parted with or disposed of with his knowledge or assent; that his son, the decedent, was about sixteen years of age and lived at home but worked around at different places as opportunity presented; that in the fall of 1857 and the winter following, the defendant James Kinney was absent in Wisconsin, and that the decedent in that interval surreptitiously got possession of the land contract, and on a subsequent occasion obtained in execution of that contract the deed to himself from Hamilton which completes the chain of title to decedent; that Hamilton concerted with decedent, and that the deed was given and received in fraud of the rights of the defendant James Kinney.

It is proper to say that this version was not admitted. On the contrary it was strongly controverted. But as the result was against the plaintiff the question is presented whether the court erred in allowing the deed to be defeated by parol evidence that it was fraudulently given to decedent when it was due in fact to the defendant James. The common law rule which excludes all defenses in ejectment which are not legal has been abrogated in many parts of the Union. The courts of the United States, however, still adhere to it. *Fenn v. Holme* 21 How. 481; *Hooper v. Scheimer* 23 How. 235; *Lessee of Smith v. McCann* 24 How. 398; *Johnston v. Jones* 1 Black 209; *Foster v. Mora* 98 U. S. 425. And it also remains in force in this State. *Whiting v. Butler* 29 Mich. 122; *Ryder v. Flanders* 30 Mich. 336; *Conrad v. Long* 33 Mich. 78; *Jeffery v. Hursh* 42 Mich. 563; *Buell v. Irwin* 24 Mich. 145. And if the defense now made against the plaintiff's title must be considered as existing in equity and not in law, the court erred in admitting it; and we think it must be.

If a valid contract relation subsisted between Hamilton and the defendant James Kinney, and the former was bound to convey to him, and was not warranted in conveying to the son, as claimed on the part of the defense, yet the title of James was only in equity. He had no legal title and could not gain one as the identical effect of a grant from Hamilton to young Kinney. His interest was still equitable and not legal. He had never received any legal conveyance or rather any transfer of the legal title, and the contract did not assume to give possession or any right to it, and whatever may have been his due in point of justice he was subject to the force of that consideration. The deed was not positively void. It passed the legal title from Hamilton to young Kinney, and the defendant James has no power to cause it to enure to him except by showing his equitable right and title as against the grantee, and the rule referred to will not permit such a showing in ejectment. The opinions given in *Cleland v. Taylor* 3 Mich. 201 and *Trask v. Green* 9 Mich. 358, 368, and based on the effect of the statute against frauds,

have no application. It is much to be regretted that so much expense should have been incurred in the assertion of a case by the defense which, if valid, could only be set up in another jurisdiction.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

FERDINAND TEIPEL v. VALENTINE HILSENDEGEN.

Action for negligent injury—Prima facie showing.

The *gravamen* of an action for damages for negligent injury is that plaintiff has been damnified by the wrongful and negligent conduct of defendant without having contributed thereto by his own negligence, and as the absence of contributory negligence is part of his case, he should show that he acted with due care. But it is enough if he merely puts in evidence the facts and circumstances attending the injury: and if these show negligent conduct in the defendant from which the injury followed as a direct and proximate consequence, and do not show contributory negligence, a *prima facie* case is established.

In an action for negligent injury, if the proofs are such that reasonable minds may differ as to the fact of contributory negligence, the case should go to the jury; its absence need not be conclusively shown.

A case can be taken from the jury on the facts only when it is susceptible of but one just opinion.

Error to Superior Court of Detroit. Submitted October 15. Decided October 27.

TRESPASS ON THE CASE. Plaintiff brings error. Reversed.

Alfred Russell for plaintiff in error.

Griffin & Dickinson for defendant in error. In an action for negligent injury causing death the evidence must show

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that the deceased took proper care for his own safety: *Lehman v. Brooklyn* 29 Barb. 234; *Cordell v. N. Y. C. & H. R. R.* 75 N. Y. 330; *Reynolds v. N. Y. C. & H. R. R.* 58 N. Y. 248.

Cooley, J. When one sues to recover damages for a negligent injury, the *gravamen* of his complaint is that he has been damnified by the wrongful and negligent action of the defendant without having contributed thereto by negligent conduct of his own. The absence of contributory negligence is therefore a part of his case, and it is quite proper to say that he should show that he acted with due care. *Le Baron v. Joslin* 41 Mich. 313. But this only requires of him that he should put in evidence the facts and circumstances attending the injury, and if these show negligent conduct in the defendant from which the injury followed as a direct and proximate consequence, and do not show any contributory negligence in the plaintiff, a *prima facie* case for a jury is made out. He cannot be required to go further than this in negativing his own fault, and in many cases where there are no eye-witnesses, it would be impossible.

Nor is it necessary that the absence of contributory negligence should be shown beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.

In this case there were no eye-witnesses, and the injury resulted in death. The plaintiff sues as administrator of the person killed. There was some evidence of negligence on the part of the defendant, and there was some ground for an opinion that the intestate was negligent also. But the plaintiff put in such proofs of the attendant facts as were attainable under the circumstances, and from these it was by no means clear that the intestate was in fault at all. There was

room for the conclusion that he was not. We think the case ought to have gone to the jury.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

SAMUEL SCHWAB, RELATOR v. WALTER H. COOTS.

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Public officer—Contempts—Review of order refusing to inflict penalty—Original jurisdiction.

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An order refusing a petition for the punishment of a sheriff for contempt in omitting the performance of his duty is not reviewable by the Supreme Court on *certiorari*.

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A judgment subjecting a respondent in mandamus proceedings to liability to pay money or stand imprisoned for contempt in neglecting to obey the writ, is as final as any other money or final judgment and is reviewable.

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The Supreme Court has power to review in some way all final judgments.

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The provision protecting a respondent in mandamus from all farther liability on paying a fine imposed for neglect to obey the writ (Comp. L. § 7111) does not apply if an order to pay such fine has been denied; and the refusal of the order is not *prima facie* evidence that he has not made himself liable for the results of his omission.

Private remedies for the omission of an officer to execute legal process are not lost by the failure of statutory proceedings against him for contempt; and as the denial of the latter remedy is not a final judgment and appellate jurisdiction is not given in such cases, it would be original action for the Supreme Court to review it, whether the amount of damages could or could not be fixed with certainty.

Damages for a sheriff's omission to serve process are in their nature unliquidated.

It would be original action for the Supreme Court to review the action of a lower court in fixing the elements of a recovery of damages if judicial discretion in doing so is necessary, and has not been exercised.

Certiorari to Superior Court of Detroit. Submitted Oct. 15. Decided Oct. 27.

Don M. Dickinson and *Alfred Russell* for relator. A sheriff is liable for not proceeding on an execution: Freeman on Executions § 252; Crocker on Sheriffs §§ 414, 832; or for injury resulting from his neglect to obey proper directions from the plaintiff in the execution: *Root v. Wagner* 30 N. Y. 16; Crocker on Sheriffs §§ 407, 779; Freeman on Executions §§ 106-8; *Morgan v. People* 59 Ill. 58; *Reddick v. Cloud* 7 Ill. 670; *Tucker v. Bradley* 15 Conn. 46; *Wall v. Trumbull* 16 Mich. 235; *Dawson v. Merchants' Bank* 30 Ga. 664; *Rogers v. McDearmid* 7 N. H. 506; *Richardson v. Bartley* 2 B. Monr. 328; *Patton v. Hamner* 28 Ala. 618; *Poston v. Southern* 7 B. Monr. 289; *Walworth v. Readsboro* 24 Vt. 252; *Shryock v. Jones* 22 Penn. St. 303; Cooley on Torts 466.

Edwin F. Conely for respondent.

CAMPBELL, J. The proceedings in this cause arose under the act for the punishment of contempts in aid of civil remedies. Coots, who is sheriff of Wayne county, was entrusted with an execution from the Superior Court of Detroit on a judgment in favor of the relator against Salmon S. Matthews, and others. This judgment was based on a trespass by Matthews who was United States Marshal and seized as belonging to parties named Schott and Feibish, property belonging to Samuel Schwab the relator. Considerable litigation has arisen in various ways out of these proceedings, which have been before this court once for consideration as to the validity of that judgment: *Mabley v. Judge of Superior Court* 41 Mich. 31, and indirectly in *Hudson, relator v. Judge of Superior Court* 42 Mich. 239.

Without going into full details, it is perhaps enough for the present to say that respondent was charged with intentional and gross misconduct in omitting to do his duty under the execution and in colluding to further the procurement of an injunction from the United States Circuit Court against further proceedings. This injunction was relied on to relieve him from punishment. The Superior Court denied the

application to punish the sheriff, and a *certiorari* is brought to review that action. It is claimed for respondent that no review can be had of this proceeding denying redress, because it would require this court to give what would be substantially an original judgment, which it has no power to render.

Several cases have come before us, which were cited on the argument, in which we have reviewed and affirmed or reversed judgments against respondents whereby they have been subjected to liability to pay money or stand imprisoned. Upon such cases there is no room for doubt. Such judgments are as final as any other money or final judgments, and this court has power to review in some way all final judgments. But the question whether a refusal to give any relief is a final judgment, is different, and must depend somewhat on its effect on the rights of the relator.

The usual methods of obtaining redress for grievances are by actions for damages. There are some cases where a party has an election of remedies, and when the result of the remedy chosen is decisive. In such cases there is no difficulty.

Under the present statutes it is expressly provided that in case an order is finally made adjudging payment of a certain sum by respondent, his payment of it shall preclude any other proceeding to recover for the wrong. Comp. L. § 7111. But we find nothing in the statutes which provides that these proceedings shall in themselves either stay or supersede any other legal remedies which the relator may resort to; and until actual payment nothing seems to be suspended or barred. When the statute contains an express provision concerning the effect of such collateral proceedings it cannot very well be applied under a different state of facts.

This being so, and the usual common-law remedy remaining open, it cannot be held that a mere failure to punish the offender is conclusive or even *prima facie* evidence that he has not made himself liable for the results of misconduct. And it remains to be seen how this affects the present case.

This statute was borrowed from New York, and had been construed when we borrowed it. In the case of *Spalding v. State of New York* 7 Hill 301, it was fully examined and

passed upon, and the decision of the State court was affirmed by the Supreme court of the United States in 4 How. 21. Spalding had violated an injunction and disposed of property against the interest of a creditor, and was fined $3000 and costs. He subsequently was discharged in bankruptcy, whereby his debt was wiped out. On an application to imprison him for non-payment of this sum, which was ordered to be paid to the relator and not a fine in the usual sense, he set up his discharge in bar. His defense was overruled in all the courts, and it was held the fine was not discharged, although the original debt was admitted to be cut off. The New York court through Judge Nelson, who gave the opinion, held that this penalty was not to be treated as a debt in the proper sense of the term, but as punitory, and the fact that it was made payable to the party injured did not make the proceeding a private suit for damages, or alter its character as a criminal prosecution. It was a public prosecution and not a private remedy, although the State had seen fit to direct punishment to take the form of private reparation. Under the English bankrupt laws such penalties were expressly barred, but the United States bankrupt law barred nothing but debts, and this was held to be something else, which was to be reached through the people as aggrieved by a criminal contempt.

This case seems very clear to the effect that although allowed to be conducted by a private prosecutor with a view to ultimate private benefit, the complaint is after all a summary criminal and not civil proceeding. Such cases are not unknown to the law. Indictments for forcible entry and detainer furnish a familiar instance of the use of criminal process for civil purposes. And so of informations for intrusion upon public office, or for corporation usurpations and misconduct in some cases.

The party complaining having lost no remedy of his own, and no appellate jurisdiction having been given to review such cases, it cannot exist unless it comes within some other legal analogies. We think it does not, and that if we were to interfere it would be original and not appellate action.

The mere fact that some certain amount of damages can be reached would not authorize us to take jurisdiction, when in most cases no such rule could be found. But as matter of fact such damages as are claimed here are in their nature unliquidated, and it is by no means certain what precise sum would cover the injury, and it is therefore uncertain what view the court below would have been justified in taking of it if any judgment had been rendered. While it may be that less than the sum now claimed would have been unjust, it is by no means certain that it would have been the exact amount arrived at as large enough under all the circumstances. There were also some disputed facts. There was a necessity of using judicial discretion in determining the elements of recovery, and until it was so exercised, any action on our part would be original action, to reach the proper result.

We think the effect of the action of the Superior Court was not final on the relator in regard to any right which he had to proceed for himself, and that we have no legal means of fixing punishment ourselves.

The *certiorari* must therefore be dismissed as improvidently issued. No costs are awarded.

The other Justices concurred.

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The Board of Supervisors of Cass County v. Charles G. Banks et al.

Dedication of land to the public—Acceptance—Ejectment—Election to take judgment for value.

A dedication of land to the public may be made out without any public record of it; the failure to record is important only as it concerns the naked legal title which the record would have vested in the designated parties in trust for the purposes intended.

A common law dedication of lands to the public must be accepted within a reasonable time or the offer will be considered withdrawn.

The owners of village property platted it, and marked a square on the plat as a "public square," and in an accompanying description declared it to be "designed for buildings for public uses." The square was subdivided by streets, and no public use was ever made of two of the subdivisions, though the public authorities once assumed to convey the land included in the square to private persons "for the uses and purposes for which said square and grounds were conveyed to said county;" they also reserved the right to erect a court house on a specified parcel. *Held*, that the reservation tended to negative the intention to use the rest of the land for public purposes; and that the clause in the deed recognizing the purpose of the offer of dedication, was not an acceptance of such offer.

The institution of a suit by public authorities for the possession of land which had been offered for public uses, was not an acceptance of the dedication.

A county cannot bring ejectment for land which the owners had offered to dedicate for public uses nearly fifty years before, if it has never accepted the offer, and has no intention of using it for public purposes.

Where a grantee's right to a parcel of land is confined to the use of it for a specific purpose, he cannot, on bringing ejectment for it, elect to abandon his claim and take the value of the land.

A donee has no right as against the donor to sell for one purpose what was given him for another.

Error to Cass. Submitted Oct. 15. Decided Oct. 27.

EJECTMENT. Plaintiff brings error. Affirmed.

Edward Bacon for plaintiff in error. Ejectment lies at the suit of the proper municipality to recover against persons wrongfully holding any part of a public square: *Gardiner v. Tisdale* 2 Wis. 153; *San Francisco v. Sullivan* 50 Cal. 603; *Winona v. Huff* 11 Minn. 119; *Mankato v. Willard* 13 Minn. 13; *Dummer v. Selectmen* 20 N. J. L. 86; *M. E. Church v. Hoboken* 33 N. J. L. 13; *Klinkener v. School Directors* 11 Penn. St.; 3 Wait's Actions 7, 34; possession under deeds recognizing the public square is not an adverse holding: *Bridges v. Wyckoff* 67 N. Y. 130; *In re Opening*

Thirteenth St. 73 N. Y. 179; *St. Vincent Orphan Asylum v. Troy* 76 N. Y. 109.

Howell & Carr and *C. A. Kent* for defendants in error. An offer of dedication to the public must be accepted before the rights of the public are fixed: *Wayne County v. Miller* 31 Mich. 447; *Field v. Manchester* 32 Mich. 279; erecting public buildings elsewhere than on land dedicated for that purpose is a refusal of the offer: *Sinclair v. Comstock* Har. Ch. 404; taking possession of part of premises conveyed, and actually claiming the whole, and doing such acts as would be trespass if title was not held, is a possession of the whole even though the deed conveys several contiguous parcels, and possession is taken of one alone: *Williams v. Ballance* 23 Ill. 193.

COOLEY, J. The plaintiffs in error brought suit in the circuit court to recover lands in the village of Cassopolis which were claimed under a dedication by the original proprietors for a public square. The case comes before us on a finding of facts by the circuit judge, upon which he ordered judgment for defendants. The following are the important facts:

By an act to amend an act entitled "An act to provide for establishing seats of justice," approved March 4, 1831, it was provided among other things that the governor, with the advice and consent of the legislative council, should appoint three commissioners to re-examine the proceedings which had taken place in relation to the establishment of a seat of justice for the county of Cass, and to confirm the same, or to make a new location as the public interest, in their opinion, should require. The commissioners were authorized to accept donations of land, etc., for the use of the county; they were to report to the governor and file their decision with the secretary of the territory, and the governor was required thereupon to issue a proclamation announcing the decision and establishing the county seat agreeably thereto. Laws 1833, p. 533; 3 Territorial Laws 898.

Commissioners were appointed as contemplated by this act, and proceeded in the discharge of their duties. On the fifteenth day of November, 1831, E. B. Sherman, A. H. Redfield, Ephraim McCleary, Abram Tietsort, jr., and Oliver Johnson presented for record in Cass county a plat of the village of Cassopolis duly signed by them and acknowledged. On this plat were marked a great number of blocks and lots fronting on streets which crossed each other at right angles, and at the intersection of two of which, named Broadway and State streets, a square 20 rods by 26 was marked and designated "Cassopolis public square." In the accompanying description this square was declared to be "designed for buildings for public uses," and a considerable list of lots was enumerated as "donated to the county to be disposed of by their agent." The register of deeds received this plat, but instead of copying it upon his records as he should have done, he merely attached it by paste to a fly-leaf of one of the record books. Broadway and State streets were each six rods wide, and they were opened and used as public highways across the square, thus dividing the public square into four distinct quarters with streets as boundaries on two sides.

While the subject of locating the county seat was in the hands of commissioners the proprietors of the village plat made offers in writing to donate forty acres to the county provided the county seat should be located thereon. What action, if any, the commissioners took upon these offers is not found, but they reported in favor of such location, and on December 19, 1831, the governor issued his proclamation locating the county seat at a point on the plat which, as near as we can understand by the description, is at or near the center of the public square. 2 Territorial Laws 810.

Previous to March 31, 1831, the meetings of the Board of Supervisors of Cass county had been held at Edwardsburg, but on that day the board adjourned to meet at Cassopolis, after entering upon their record a resolution "that a gaol be built at Cassopolis, the county seat."

On April 15, 1833, the supervisors called for further donations from the village proprietors, and in that year and the

next deeds were made by Tietsort & Sherman conveying lots to the county, and subsequently by other proprietors. On the same day last mentioned the supervisors also designated a lot—not the public square—on which a jail should be built, and one was built accordingly and was used continuously by the county until 1853.

In June, 1833, A. H. Redfield was made agent for the county to sell lots which had been received as donations, and many sales were made by him.

In October, 1835, the Board of Supervisors voted to erect a court-house on a lot designated—not the public square—and one was erected and used until 1841, when a new one was built as hereinafter stated.

August 7, 1839, the county commissioners of Cass county, who had succeeded to the rights and powers of the supervisors, for the nominal consideration of six thousand dollars, gave a deed to Darius Shaw, Joseph Harper, Jacob Silver, Asa Kingsbury and A. H. Redfield of "all that certain tract or parcel of land in said village of Cassopolis; *first*, the public square and public grounds, with their privileges and appurtenances, for the uses and purposes for which said square and grounds were conveyed to said county," reserving the privilege to erect a court-house on the northeast quarter, and *second*, a large number of other lots which had been donated to the county as afore stated. The deed was an ordinary deed of bargain and sale and contained the usual covenants. Simultaneously the grantees in this deed gave to the commissioners their bond in the penal sum of $12,000, conditioned as follows: "Whereas, certain village lots in said village of Cassopolis and certain sums of money were formerly given to said county of Cass by the original proprietors of said village and by others for the purpose of erecting public buildings in said village for the use of the county, and whereas the said commissioners have this day given to us a warranty deed for a certain part of said village lots and property, and also one order upon the treasury of said county for the sum of $2000: Now if we, the said Darius Shaw, Asa Kingsbury, Jacob Silver, Joseph Harper and Alexander H.

Redfield, shall erect or cause to be erected in said village within two years from the date hereof on such ground as the said commissioners shall select a court-house fifty-four feet in length etc. (giving full specifications), then this obligation to be void, otherwise to be and remain in full force and virtue." The court-house was completed in accordance with this undertaking, the northeast quarter of the public square having been designated as the location.

In 1853 a new jail was erected by the county on the same quarter of the public square with the court-house, and in 1860 a building for county offices was erected on the northwest quarter of the same square. These are all the public buildings which have ever been erected on the public square, and they left the south half of the square entirely unoccupied.

When the county ordered the erection of the building for county offices on the northwest quarter of the square, the grantees in the deed from the county commissioners, of August 7, 1839, protested against their action and notified the supervisors that the county did not own all of the public square, but their protest was not heeded. It will be perceived that this action took place twenty-nine years after the plat was made, and after the square was dedicated to the public, if any dedication was made by that plat.

The condition of the square, then, in 1860 was this: The county had placed two public buildings on the northeast quarter and one on the northwest quarter. The other two quarters, which were separated from the occupied parts by streets, were not occupied by the county in any manner, nor does it appear that there was any proposition by the county to make use of them for any public purpose. A deed of the whole square had been given by the county commissioners to the parties who erected the court-house, but what idea respecting its ultimate disposition was in the minds of the parties at the time we are not advised. The uses for which the square was conveyed to the county were alluded to, as if they were to be observed and accomplished, but if the square was to be devoted exclusively to public buildings for county use

and occupation, it seems a very idle and absurd thing to include it in the deed at all. The other lots conveyed were for the benefit and enjoyment of the grantees, to compensate them for their expenditures in erecting the court-house, and a strong inference arises that some personal advantage to the grantees from the conveyance of the square was expected also, or at least was looked upon as possible. It may perhaps have been thought that only a part of the square would be required for public buildings, and have been intended that the remainder would belong to the grantees. It is certain that as early as 1860 these parties began to claim as their own all that had not been previously appropriated by the county for a court-house site.

In 1836 Kingsbury commenced business as a merchant in a store situated immediately south of the south-west quarter of the public square, and used in connection therewith a part of that quarter for the storage of lumber, shingles, barrels and boxes, and with a hitching rack for horses. In 1856 he built a new store, seventy-two feet in length, with stone foundation, one foot of which for the whole length was upon the square. The cellar ways for the store were on the square, and were walled up at the sides with stone. This store with the cellar ways has since been occupied by Kingsbury and his lessees, and use has been made of the south-west quarter in connection therewith. From 1858 to 1869 a tenant had hay scales on the square, set over a walled pit, near the center of the quarter; he moved them in this year last mentioned to another part of the same quarter where he continued to use them.

In 1865 Joseph Harper and Darius Shaw deeded their interest in the public square to Daniel Blackman. Redfield also deeded to Blackman in 1869. In 1870 Blackman deeded to Kingsbury; the heirs of Tietsort gave him a deed in the same year, and Silvers another in 1873. Blackman, it seems, had set up some claims of title to the southeast quarter of the square in 1863, and had erected a building upon it which he rented for a law office until 1878 when it was moved away and a brick store erected in its place. The judge's

finding states that the southeast quarter is now built up and claimed by the applicants. In 1868 Kingsbury platted the southwest quarter of the square into six lots and sold five of them to persons who erected two-story brick stores thereon which they now occupy and claim as owners. Kingsbury also erected a similar building for a banking house. The value of these buildings is $35,500; the value of the six lots without the buildings $2200. The buildings were completed in 1869 and 1870; they have been taxed to the occupants and the taxes paid ever since 1868.

In addition to the foregoing, it seems important to mention only the following facts: In 1842 the board of supervisors by resolution requested the prosecuting attorney to examine the records of the county and ascertain whether there was on record any deed or deeds from the original proprietors of the village of Cassopolis conveying to the county the whole or any part of the county square for the purpose of erecting the necessary county buildings, and, if so, whether sufficient or not, and if not, what means should be employed to perfect the title. The records of the board do not appear to show any response to this resolution. In March, 1865, the board passed a resolution reciting that certain individuals had put buildings or other fixtures on the public square which the board had theretofore permitted to remain without rebuke; therefore the board "do hereby give notice to all such persons to remove said fixtures and buildings from said public square on or before the first day of October next." It does not appear that any attention was paid to this notice by the parties concerned. In 1877 Kingsbury conveyed to the county two parcels of land on the northeast quarter of the public square, for each of which the county paid him fifty dollars. One of these was the ground on which the jail had been erected.

On these facts the question for our determination is whether there has been any dedication to the county and acceptance by it of the land claimed in this suit. To dispose of this it seems only necessary to re-state briefly a few of the leading facts. The laying out of the plat in 1831 was a distinct

offer to dedicate the whole of the public square for public buildings. The failure to record the plat was important only as it concerned the naked legal title, which in case the record had been made would have been vested in the county in trust for the purposes intended. 2 Terr. L. 577. But a dedication may be made out without any public record whatever. *Lee v. Lake* 14 Mich. 12; *Baker v. Johnston* 21 Mich. 319. One difficulty with this offer was, it was not in terms made to the county, nor was there any indication what sort of public buildings it was intended for. The offer being made in connection with a gift of lands to secure the location of the county seat upon the plat, the inference is very strong if not conclusive that the wants of the county were to be provided for, and if the county had proceeded to appropriate the whole square to its needs, for county buildings, this, we think, would have been a good acceptance of the offer, and would have perfected the dedication. The county authorities saw fit, however, before any use whatever had been made of the public square, to convey it to Kingsbury and his associates, reserving only to the county "the privilege to erect a court-house on the northeast quarter of the public square;" and though the conveyance is recited to be made "with the privileges and appurtenances for the uses and purposes for which said square and grounds were conveyed to said county," yet as the conveyance is made by a deed which also conveys a large number of village lots to the grantees for their own use and benefit, it seems scarcely open to doubt that the intent was that all right of control on the part of the county was meant to be conveyed to the grantees. And up to this time the only distinct act of acceptance that appears on the part of the county is the reservation contained in this deed of the privilege to erect a court-house on the northeast quarter.

Assuming that the offer to dedicate still remained open, notwithstanding this conveyance, public buildings for the use of the township or village would seem to be as much within it as public buildings for the county. But no proposition to erect such buildings appears, and it is more than twenty

years after the making of the plat, and more than twelve years after this conveyance before the county took any further steps in the direction of acceptance. A jail was then erected on the same quarter with the court-house, but it seems that Kingsbury disputed the right to do this, and the county subsequently purchased the land of him. The next step in the direction of acceptance took place in 1860, when the building was erected for county offices. This was twenty-nine years after the original offer, and twenty years after the grant to Kingsbury and his associates, and the building was put up against their protest.

When this suit was instituted, forty-eight years had elapsed since the original offer of dedication was made, and thirty-nine since the county had given a deed which purported to convey away the premises. Meantime the county has never made use of the land now in dispute; never offered to erect any public buildings upon it, and never, so far as we are informed, expressed an intention to do so at any time. If it were not separated from the lands occupied for county buildings by public streets, we might suppose the purpose was to reclaim it for yards in connection with those buildings, but the deed of 1840, which made a reservation on the northeast quarter only, would tend to negative any such supposition: *Sinclair v. Comstock* Har. Ch. 404. Meantime the county, though protesting on one or more occasions, has suffered valuable buildings to be erected on the grounds, under a claim of right, to be occupied for nine years, and taxes collected upon them. The first distinct and unequivocal act evincing a purpose to appropriate the land for county purposes is the bringing of this suit, and as has already been intimated, this is not accompanied or preceded by any resolution or announcement indicating an intent to make use of the land for public buildings.

Has then a dedication been perfected? We think not. A dedication must be accepted within a reasonable time or the offer will be considered as withdrawn. *Baker v. Johnston* 21 Mich., 319; *Wayne County v. Miller* 31 Mich., 447; *White v. Smith* 37 Mich. 291. The mere recognition of the

purpose for which the offer was made, in a conveyance to third persons, is no acceptance, for it is not a step in the direction of occupation and use in the manner proposed. The offer implies that the proprietor has an interest in the intended purpose being accomplished, and the consideration which completes the transaction is not mere words of recognition or of acceptance, but an actual appropriation of the property within some reasonable time for the use designed. The proprietors waited for this for more than thirty years, and then formally withdrew their offer by deeds of conveyance to Kingsbury. Even then the county gave no evidence of an intention to put the lands to any such use as was designed. It can hardly be necessary to add that the mere institution of a suit is no acceptance of an offered dedication.

One view which may be taken of this case is the following: The proprietors of the village plat made the broad offer to donate the square, twenty rods by twenty-six, for public buildings generally, without designating whether they should be buildings for state, county, township or village purposes, or for purposes of corporations of a semi-public character, such as churches, library societies, etc. The county accepted for its purposes a site for a court-house, and at the same time transferred to trustees any power of control it might have or be supposed to have in respect to the remainder. By this acceptance and transfer, and by the subsequent conveyance by the proprietors to Kingsbury, the dedication to the county must be deemed to have been restricted to the actual acceptance of a court-house site, as being adequate to the county wants, and the county could not, therefore, claim as of right any further land for its uses. If the trustees to whom the county assumed to convey had permitted the erection of other public buildings at any time after receiving the commissioners' deed, the county could have had no possible ground of complaint; and if they assumed that such land as was not actually occupied by the county, and not actually taken or proposed to be taken for public buildings of any sort within a reasonable time after receiving the commissioners'

deed was their own, we cannot see why they were not fully warranted by the circumstances.

But let us contemplate for a moment the real nature of this suit. It is an action of ejectment, in which the county claims a title in fee to the land in dispute. But the county never at any time had the title. Neither did it ever have possession. Its authorities once assumed to convey the title, by deed of warranty, to persons under whom the defendants claim. The only possible claim the county can set up to the land is that it needs it for public buildings, and there is not even a suggestion that the county now or at any future time proposes to put it to any such purpose. It could not use the land for public buildings until private buildings on it were removed, and as these were built under a claim of right many years ago, the county must first pay the owners their value. But this value far exceeds any possible value the land can have to the county for public buildings. If, on the other hand, the county shall elect to abandon the land to the claimants in possession and demand payment for the land without the improvements, it will demand that for which it has no substantial claim whatever. The value of the land is assessed at $2200; but this is for the fee; and the county at most has only a right to occupy with its buildings; and when it waives this right, it has no other to be paid for. See *Bertram v. Cook* ante p. 396.

To accept the assessed price would be equivalent to a sale, and the county never had anything which was the subject of sale. The law no doubt has some anomalies, but none so great as would be the right, as against a donor, to sell for one purpose what he has proposed to give for another. In short, there seems to be no possible aspect in which the plaintiff's claim can be viewed that can give to it even the semblance of plausibility.

The judgment must be affirmed with costs, and the record remanded.

MARSTON, C. J. and GRAVES, J. concurred.

CAMPBELL, J. If as my brethren think there was nothing more than a common-law dedication, I concur in holding there can be no recovery. I reserve my opinion as to the character of the dedication by the plat.

TAWAS & BAY COUNTY RAILROAD COMPANY, RELATOR v. THE CIRCUIT JUDGE FOR IOSCO COUNTY.

Mandamus to vacate injunction to restrain use of road-bed by railway company—Identity of corporations—Final order in equity—Transmutation of debtor's assets—Jurisdiction in mandamus.

A firm of loggers agreed to build a tram railway and contracted with the corporation controlling it to carry their lumber at certain rates. The corporation afterward assigned, and its assets went into the hands of one of the parties with whom the agreement to build was made, and through him became the property of a railway company in which he was a principal stockholder. This company refused to fulfill the agreement for transportation, and the loggers sued out a preliminary injunction restraining it from running over so much of the road as they had built except on condition of carrying their lumber at the rates agreed on. *Held*, that the agreement was no more than an ordinary executory contract, was not enforcible in equity, and gave complainants no more control than other contractors over the road-bed; that the preliminary injunction was a final order and void, and that mandamus would lie to set it aside.

The transfer of the assets of one corporation to another does not establish any legal identity between them.

A judgment creditor only can inquire into the transmutation of his debtor's assets; and then he can only reach assets equitably belonging to his debtor.

Any decree or order divesting possession or rights on a preliminary inquiry is illegal and void; and when made in equity is a final order and appealable, though an appeal is not necessary to rescind it.

Mandamus is a prerogative writ designed to afford a summary and specific remedy where the party applying for it would otherwise be subjected to serious injustice.

The jurisdiction of the Supreme Court in mandamus cases is not statutory but plenary. The Constitution gives it supervision over all inferior

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tribunals and enjoins the abolition as far as possible of the distinction between legal and equitable jurisdictions. The writ may therefore issue even where other remedies exist, if they are not sufficiently speedy to prevent material injury.

The fact that there is a specific remedy in equity does not necessarily oust the jurisdiction of a common law court, but only appeals to its discretion, which may be exercised where the circumstances call for prompt interference by the courts.

Mandamus lies to vacate an illegal injunction where the party affected thereby would otherwise have to submit to serious injury, or to the risk of proceedings for contempt in disregarding it.

MANDAMUS. Submitted Oct. 19. Granted Oct. 27.

Hatch & Cooley for the writ.

Holmes, Collins & Stoddard and *W. T. Mitchell* against.

CAMPBELL, J. An application is now made, after cause shown, for a peremptory mandamus to compel the respondent to set aside an order granting an injunction, which is claimed to be beyond his authority, and which he has refused to disturb. As the grounds of the motion do not rest on the mere impropriety but upon the illegality of this order, and as some points of jurisdiction are raised both as to that of the respondent and our own, a brief reference to the nature of the controversy is necessary. It will not be important to go into particulars very far.

The injunction was issued in a suit in equity brought in the circuit court for the county of Iosco, by Dewitt C. Welch and J. Frederick Behr against Charles M. Prescott and Charles M. Averill and the Lake Huron & Southwestern Railway Company, and the Tawas & Bay County Railroad Company. The grievance complained of was the refusal of the latter company to carry logs and lumber for complainants at rates and in the manner agreed upon in a contract made in April, 1878, by a firm named Hall, Shook & Co., of which complainants were members, and to whose rights they claim to have succeeded. The grievance is alleged to have arisen out of the following state of facts:

Hall, Shook & Co., having purchased the lumber on certain lands not very far from Tawas City, contemplated making a private tramway to that place for their own convenience. Prescott and some other persons persuaded them to give up their private scheme and aid in another for the construction of a longer tramway reaching beyond their lumber grounds, to be in the hands of a corporation organized under the General Laws relating to tram railways. Hall, Shook & Co. declined taking stock but agreed to build a few miles of the road for considerations moving in part from Prescott and other parties, and in part from the corporation. The agreement they made with the corporation required the latter to carry their lumber of specified kinds, taken from the lands referred to, at seventy-five cents a car load of four tons—the cars to be loaded by Hall, Shook & Co. and drawn to Tawas by the corporation. No time was fixed within which the lumber carriage was to be completed, except that it embraced the lumber from certain lands. The road was completed.

The bill after showing this, sets out that debts were created, and in course of time an assignment made by the corporation under which Prescott became purchaser of the assets and through him they passed to the Tawas & Bay County Railroad in which he is principal stockholder. This corporation is a railroad and not a tram road company and its road is considerably longer than the other. There are allegations of frauds on the part of Prescott against the interests of the original corporation in managing to absorb the assets.

It is then averred that the new company refuses to carry out the old agreement and requires large prices, and otherwise violates its supposed duty to complainants.

The circuit judge enjoined the relator by preliminary injunction from running over so much of the road as was built by complainants, except on condition of carrying logs and lumber on the terms agreed upon in April, 1878.

There are two considerations to be noticed on the merits of this hearing—*First*, whether the circuit court could take jurisdiction of such a case at all; and *second*, whether it had power under any circumstances, to issue such a preliminary

injunction. Upon the first question we shall only refer to a few of the general outlines of the case. The second will be dealt with separately.

This agreement was not of such a nature as to give complainants any more claim against the property and road-bed than would be possessed by any other contractors. If the price had been payable in any other way, and no lien reserved, the road would not be bound in any such way as would allow such a bill as the present to enforce a specific claim on it. The contract to run the lumber of complainants is the same in all respects as if made with anybody else, and is no more than an ordinary executory contract. If there had been no change of owners it is difficult to see how equity could have anything to do with enforcing it.

But there can be no room for claiming any legal identity between the two corporations. And before any creditor can assume to inquire into the transmutation of assets he must put himself upon the footing of a judgment creditor. In that capacity he could do no more than reach assets equitably belonging to his debtor. In any other capacity he has no concern with his debtor's doings.

It does not now occur to us in what possible way equity could relieve complainants on the facts averred.

But the present case is one where the court has undertaken to dispose of the merits without a hearing in the ordinary course of justice. The interlocutory order, as it is called, gives all the substantial relief that is prayed for. It has been decided repeatedly that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void, so that no one need respect or obey it. *People v. Simonson* 10 Mich. 335; *Port Huron & Gratiot Ry. Co. v. Judge of St. Clair* 31 Mich. 456; *Salling v. Johnson* 25 Mich. 489; *McCombs v. Merryhew* 40 Mich. 721; *Arnold v. Bright* 41 Mich. 207.

Any such order made in an equity case is a final decree and appealable as such. *Barry v. Briggs* 22 Mich. 201, and above cases. But as before suggested it is more than erroneous, and is absolutely void. An appeal, though admissible,

is not necessary to rescind it. But an appeal, if resorted to, will not give speedy redress, and parties who are interfered with in such a summary way ought if possible to get some quicker relief and be saved from being obliged to take the risk of any further vexation by defending against contempt proceedings in case they disregard the injunction, as was done in *People v. Simonson* and *Brewer v. Kidd* 23 Mich. 440.

The question thus arises whether mandamus is the proper remedy. We have already practically settled this in *P. H. & G. Ry Co. v. Judge of St. Clair*, where the point was presented and decided. But it may be proper to refer to some of the reasons for so holding.

The jurisdiction of this court in mandamus cases is not statutory, but plenary, and supervision is given over all inferior tribunals by the Constitution, Art. 6, sec. 3. Under the constitution legal and equitable jurisdiction is united in the circuit courts, and it is enjoined that distinctions between the two jurisdictions shall be removed as far as possible. Sec. 5. In granting this remedy, courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. We had occasion in *La Grange, relator v. State Treasurer* 24 Mich. 468, to consider this jurisdiction quite fully and we think the views there expressed are in accordance with the soundest authority. Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subjected to serious injustice. As pointed out by the eminent authorities there cited, it is from its very nature a remedy that cannot be hampered by any narrow or technical bounds. The right coupled with the necessity of such a vindication of it supports the jurisdiction, and the court in using its discretion, while careful not to use this writ when it is not essential, will apply it where it is.

As the English Chancery was not inferior to the King's Bench, that is reason enough why there are no precedents for the writ in chancery cases. But as explained in the cases

just cited it is well settled that the existence of a specific remedy in equity does not oust the legal jurisdiction, but only appeals to the discretion of the common law court. Mr. Spence in his treatise on Equitable Jurisdiction refers to the jurisdiction in mandamus as one which if freely exercised might have rendered much of the interference of equity needless. 1 Spence Eq. Jur. 704. In a majority of cases the usual remedies are sufficient, and the necessary delays attending them are not so serious as to require any extraordinary remedy.

But in the present case the whole business of the corporation is stopped unless the company submits to conditions which the court has no power to impose. If the officers disobey the writ they have to decide for themselves whether it can safely be done, and few persons are willing or should be compelled to act under such a pressure. An appeal always involves considerable delay, and during the interval there is room for new controversies. The case therefore is urgent, and as there is no doubt of the illegality of the order complained of, it should not be continued to menace the persons engaged in the enterprise. They should not be driven to the alternative of seeming to defy the authority of the courts.

We think a mandamus is a proper remedy and should be granted, with costs against the complainants in chancery.

The other Justices concurred.

The People v. Charles Stewart.

Information for burglary—Charge of larceny.

An information for statutory burglary is defective if it does not charge the intent with which the breaking and entering was done.

An information for larceny must allege the ownership of the goods taken.

Exceptions before judgment from the Superior Court of Grand Rapids. Submitted October 20. Decided October 27.

INFORMATION for breaking and entering a store not adjoining a dwelling. Respondent was found guilty. Reversed and prisoner discharged.

Attorney-General *Otto Kirchner* for the people.

Godwin & Earle and *E. S. Eggleston* for respondent.

MARSTON, C. J. The information is clearly defective in this case. It does not allege a statutory burglary, as the intention with which the breaking and entering was done was not charged. It also fails to charge a larceny in not alleging ownership of the property taken.

The judgment must be reversed and prisoner discharged.

The other Justices concurred.

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JOHN GORDON v. THE PEOPLE.

Excessive sentences—Repeals by implication.

Comp. L., § 7569 (Rev. Stat. 1846, ch. 154, sec. 18) authorizing one year's imprisonment for a grade of larceny cognizable by a justice, is modified by Comp. L. § 5566 (Act 258 of 1849, § 14) which limits to three months the imprisonment that may be inflicted on conviction of any offense covered by ch. 94 of the Revised Statutes of 1846, which gives to justices their criminal jurisdiction. Act 239 of 1879, in amending Comp. L. § 7569 in another particular, retains the provision allowing one year's imprisonment. *Held* that it does not affect Comp. L. § 5566, nor restore the penalty of a year's imprisonment.

The constitutional provision requiring amended sections of the laws to be enacted in full (Const. art. iv., § 25) does not give the amendment any greater effect upon other portions of the section than it would have if only the actual changes in it were indicated; the nominal re-enactment of other portions of the section does not affect its exist-

ing relations to statutes *in pari materia* unless that intention clearly appears.

Repeals by implication should not be established without satisfactory reason to believe the Legislature intended them.

Error to the Recorder's Court of Detroit. Submitted October 20. Decided October 27.

INFORMATION for larceny. Respondent was found guilty. Reversed, and prisoner discharged.

Hawley & Firnane and *A. C. Angell* for respondent.

Attorney-General *Otto Kirchner* for the people.

CAMPBELL, J. Gordon was charged in the Recorder's Court of Detroit with statutory burglary, but was acquitted of all but simple larceny of property under twenty-five dollars. He was thereupon sentenced to a year's imprisonment; and brings error.

The recorder seems to have thought that the former decisions of this court in *Nelson v. People* 38 Mich. 618, and *Brown v. People* 39 Mich. 57, were no longer operative. It was there held that the general statute for the punishment of larceny and some other offenses, which fixed a maximum punishment beyond three months, was controlled by the statute of 1849 which restricted the punishment of cases within the jurisdiction of justices to three months' imprisonment. It was held that both must be read together as referring to a certain grade of offenses in which the law fixing a maximum penalty had been so altered as to lessen it without changing the definition of the offense.

In 1879 the section fixing the punishment of larceny was amended—not by changing the maximum or minimum of fine or imprisonment, but merely by providing effectually and distinctly what should be done where a party is fined and does not pay his fine. In this respect the old law had been defective, and attention had been called to it in the decision of *Brownbridge v. People* 38 Mich. 751. The amendment

of 1879 is confined in terms to a change to this effect in § 7569 of the Compiled Laws (Pub. Acts 1879, p. 221).

We must either hold that the law of 1849 is entirely displaced by the act of 1879, or else that it remains in full force. That statute is the only one which applies to fix the authority of justices to give criminal sentences. The amendment, if applicable to that act, gives justices full power to impose the sentence which was originally fixed by the Revision of 1846, of one year's imprisonment. Of course it might be possible to do this. But when a law has been once passed for the express purpose of reducing the term of imprisonment under an old law, any implied restoration, which would operate to repeal an important statute not referred to, must have clean marks upon its face of such an intention. No one would claim for a moment that if § 7569 had been amended as was formerly the custom—not by republishing it as changed, but only by showing for what part the new clause was substituted—any effect would be produced on the remainder of the section. The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the merely nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since its first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized. Repeals by implication should not be established without satisfactory reason to believe such was the legislative will. The whole tendency of the strict provisions of the Constitution of 1850 was to prevent the mischief of blind legislation, and to require every change to be made clear to the legislature. We are bound to follow this purpose unless compelled to do otherwise.

We think the law of 1849 governs this case and that the sentence was excessive. As the full time allowed by law has

passed, the judgment must be reversed and the prisoner discharged.

The other Justices concurred.

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The People v. Edward Dowd.

Objections to criminal complaint—Exclusion of evidence.

Objections to a criminal complaint or warrant cannot be raised for the first time when the respondent is called upon to plead to an information for the offense charged therein, if he was examined upon the charge contained in them without objection before being bound over.

A motion to strike out evidence is properly denied if it covers any that is competent.

Exceptions before judgment from the Recorder's Court of Detroit. Submitted Oct. 20. Decided Oct. 27.

Information for receiving stolen property. Respondent was convicted below. Exceptions overruled.

Attorney-General *Otto Kirchner* for the people.

Maybury & Conely and *Miller & Clarke* for respondent.

Marston, C. J. Whether the respondent in this case could have interposed a valid objection in the police court to the complaint and warrant under which he was arrested, or either of them, either in form or substance, we need not determine. An examination was had without objection and the respondent held for trial, and we are of opinion that he could not for the first time raise such objections when called upon to plead to the information, as the charge contained in the information was embraced in the complaint and warrant and covered by the examination.

The motion made to strike out the testimony of certain of

the witnesses was properly denied, as the evidence given, in part at least, was competent as against the respondent, and the motion to strike out included this also. The court also properly refused to withdraw the case from the consideration of the jury.

We discover no error in the record and it must be so certified to the Recorder's Court.

The other Justices concurred.

THE PEOPLE v. CHARLES SCHOENETH.

Disagreement of jury—Jurisdiction not affected by verdict.

When a jury in a criminal case cannot agree, it is the judge's duty to discharge them; and the prisoner is not thereby relieved from prosecution.

An instruction that the evidence on an information for statutory burglary is not sufficient to convict of the breaking and entering, is not equivalent to an acquittal on that part of the charge; and if the jury disagree, the whole charge remains in force.

Jurisdiction in a criminal case is measured by the offense charged in the information, and is not lost by a verdict for a minor offense included therein.

Exceptions before judgment from Recorder's Court of Detroit. Submitted Oct. 20. Decided Oct. 27.

INFORMATION for breaking and entering a store, etc. Respondent was convicted below. Exceptions overruled.

Attorney-General *Otto Kirchner* for the people.

Miller & Clarke for respondent.

GRAVES, J. This case comes up on exceptions before judgment. Without conceding that the points suggested by

the defense are legitimately raised, they will be disposed of briefly.

The prisoner was charged by information in the Recorder's Court of the city of Detroit with having in the night-time broken and entered a store in that city, not adjoining to or occupied with a dwelling-house, with intent to steal goods and chattels therein, and with having then and there feloniously stolen, taken and carried away the same of the value of $7.50.

He pleaded not guilty and being put on his trial before a jury, the recorder, when the testimony was concluded, among other things charged that the evidence was not sufficient to convict of the breaking and entering, and that it was for the jury to find whether the prisoner was or was not guilty of the larceny. The jury proceeded to deliberate upon the case, and were "unable to agree" and were discharged.

His counsel then moved in effect that he be no further prosecuted: *first*, because he had once been in jeopardy for the breaking and entering; *second*, because the court has no original jurisdiction over the offense of "petit larceny"; and *third*, because the police court of the city has exclusive jurisdiction. The court overruled the motion, and sometime after the prisoner was put on trial before another jury. The same objections were then made and again overruled.

There is no claim, and the record affords no ground for saying, that the recorder did not act with due discretion in discharging the jury without a verdict. The statement is express that they were "*unable*" to agree, and if that was true it became the judge's duty to discharge them, and the prisoner was not thereby relieved from further prosecution. The doctrine is too well settled to justify discussion.

The instruction given to the first jury that the evidence was insufficient to convict of the breaking and entering, if entirely correct, was not equivalent to an acquittal of that part of the charge. The legal accusation remained just the same, and no part was eliminated for the purpose of another trial. The charge was matter of advice to the jury on the

evidence, and it ceased to have influence after the final disagreement.

The jury on the second trial found the prisoner guilty of the larceny charged and nothing more. The accusation was sufficient to give the recorder's court jurisdiction, and it could not be lost by a verdict for a minor but included crime. It is not to be imagined that a court is to go through a trial on the merits of an accusation down to a verdict to find out from the latter whether it had jurisdiction to try at all.

The exceptions are overruled and the court below is advised to proceed to judgment.

The other Justices concurred.

GEORGE W. BRIDGMAN AND DAVID BACON v. CHARLES A. JOHNSON, ADM'R OF MARTHA S. CLARK.

Foreclosure for instalments due—Discharge of mortgage and release of indorser by giving warranty deed of mortgaged premises.

Where a mortgage is foreclosed for an instalment only, it remains in force as to notes secured by subsequent instalments; and indorsers of such notes may look to the security for indemnity if called on to pay them.

If a mortgagee bids in the premises on foreclosure sale for an instalment due, and afterwards gives a warranty deed of the land, the warranty deed discharges the mortgage and releases indorsers of such notes as may be secured by subsequent instalments thereof.

Error to Berrien. Submitted Oct. 20. Decided Oct. 27.

ASSUMPSIT. Defendants bring error. Reversed.

George W. Bridgman and *Edward Bacon* for plaintiffs in error. A mortgagee who has bid in the land on foreclosure subject to another instalment to fall due on the mortgage cannot afterwards enforce the debt against the mortgager

except on condition that the latter is subrogated to his rights under the mortgage: *Shermer v. Merrill* 33 Mich. 284; *Ledyard v. Phillips* 32 Mich. 18; double proceedings by mortgagees to enforce the mortgage lien and the personal liability against mortgagers are discountenanced: *Equit. Life Ins. Co. v. Stevens* 63 N. Y. 345; *Scofield v. Doscher* 72 N. Y. 493.

O. W. Coolidge for defendant in error. A mortgagee can maintain a personal action against the mortgager for instalments to fall due, though the land has been sold on foreclosure for preceding ones: *Bliss v. Weil* 14 Wis. 35; *West Branch Bank v. Chester* 11 Penn. St. 282; *Poweshiek Co. v. Dennison* 36 Ia. 244; *Minor v. Hill* 58 Ind. 176; *Porter v. Pillsbury* 36 Me. 278; *Watson v. Hawkins* 60 Mo. 550; *Globe Ins. Co. v. Lansing* 5 Cow. 380; 2 Jones Mort. § 1938; 4 Kent's Com. 184.

CAMPBELL, J. Bridgman and Bacon were sued as successive endorsers of a note made by Anderson Russell and Henderson Russell, in December, 1873, payable to Bridgman or order with interest at ten per cent. three years from date. This was one of three notes payable at different times and secured by mortgage. Bridgman transferred them all with the mortgage to Bacon, endorsing the notes, and Bacon endorsed and transferred them to Mrs. Clark.

In August, 1875, the mortgage was foreclosed on the first note by advertisement and the property bid in by Mrs. Clark. She subsequently conveyed the premises by warranty deed to one Cæsar Lenhart for $1050. Having done this, she sued the third note, and recovered upon it. Error is brought by the two endorsers.

The mortgage was foreclosed for nothing but the first instalment. No portion of the one now in suit was due or included in the sale. The result is that after that foreclosure as decided in *McCurdy v. Clark* 27 Mich. 445, and *Miles v. Skinner* 42 Mich. 181, the mortgage remained in force as to this note and the parties who endorsed it had a right, if

called on to pay it, to look to the security for indemnity. By her warranty deed Mrs. Clark discharged the mortgage and released the endorsers.

As the subject was fully considered in the cases referred to it is not necessary to enlarge upon it. The judgment must be reversed as to the plaintiffs in error with costs of both courts.

The other Justices concurred.

AARON C. FISHER ET AL. v. JAMES C. HALL, JAMES CARR ET AL.

Judgment creditors—Bill in aid of execution—Obligation to submit to garnishment.

A bill in aid of execution against lands sold by a judgment debtor cannot be maintained against the purchaser if the evidence does not show that he purchased fraudulently.

One who has in good faith contracted to buy land, and has no notice of any claims existing against the other party, nor any knowledge as to his ability to meet them, is not bound to await process on being afterwards notified that the latter's creditors wish to garnish him, but may complete the purchase and pay over the consideration without reference to the creditors.

Appeal from Kalamazoo. Submitted October 20. Decided October 27.

BILL in aid of execution. Dismissed below on proofs. Complainants appeal. Decree affirmed.

Clapp & Reynolds and *George M. Buck* for complainants. One who aids a judgment debtor to escape payment, by purchasing his property, is a proper defendant to a bill in aid of execution even though he paid full price: 1 Story's Eq. Jur., § 369; *Clements v. Moore* 6 Wall. 299; *Swinford*

v. Rogers 23 Cal. 234; *Robinson v. Holt* 39 N. H. 557; *Chapel v. Clapp* 29 Iowa 191; so is a contract purchaser who has notice of complainants' equities before the purchase is completed, although he may have paid a portion of the consideration: Bump. Fr. Conv. 483; *Thomas v. Stone* Walk. Ch. 117; *Dixon v. Hill* 5 Mich. 404; *Warner v. Whittaker* 6 Mich. 133; *Blanchard v. Tyler* 12 Mich. 339; *Stone v. Welling* 14 Mich. 514; *Jewett v. Palmer* 7 Johns. Ch. 65; *English v. Waples* 13 Ia. 57.

O. S. Clark and *Henry C. Briggs* for defendants.

MARSTON, C. J. Complainants, claiming to be judgment creditors of defendant Hall, filed their bill in this case in aid of an execution levied upon a certain piece of land which they claimed had been fraudulently conveyed to defendant Carr. The evidence relied upon by complainants, if standing alone, would not entitle them to the relief sought, as it fails to show Carr a fraudulent purchaser; besides it is in the most important portions contradicted by that of the defendants. While we do not consider it at all necessary to discuss questions of fact, we may briefly refer to one or two leading points in this case.

It appears beyond dispute that Hall had for some time prior to the sale been endeavoring to sell this property and had placed it in the hands of a real estate agent for such purpose, and of this no secret was made. It farther appears that Carr some months prior to the purchase had moved with his family into the vicinity of the farm and was seeking such a place for purchase; that he had been negotiating with Hall and his agent for some weeks for the purchase of this land, and on the 10th day of January, 1878, a bargain was made. The price agreed upon was $2200, and no one questions the fairness of this; the amount of a mortgage thereon, $1200, with interest and taxes, was to be deducted and assumed by the grantee, and the balance paid in cash. A deed was made out, executed and placed in the hands of an attorney; ten dollars cash was paid, the title was to be examined the next day

and if found satisfactory the deed was then to be delivered and the full cash consideration to be paid. On the 11th the title was examined and the parties then agreed to meet at the attorney's office the following morning at ten o'clock to pay over the money and receive the deed.

The attorneys for complainants on the evening of January 11th ascertained that a sale, as above set forth, had been made and that the consideration was to be paid the next morning, and then made arrangements to sue Hall and garnishee Carr. On the next morning while such judicial proceedings were being commenced, an officer was sent to notify Carr that they desired to garnishee him; and complainants claim, but this Carr denies, that Carr agreed to meet the officer at a certain time and place to give an opportunity for service of the garnishee papers, but that, instead of so doing, he went to a different place, met Hall and paid him, and then represented to the officer that he had received his deed when in fact he had not. This last fact Carr does not dispute. That the money was paid over and the deed delivered on that forenoon is not questioned. The garnishee proceedings were then abandoned, and attachment against Hall sued out and a levy made upon this land. This bill is filed in aid of the execution levy upon the judgment recovered in the cause so commenced by attachment.

It is worthy of notice that the first intimation Carr had that any person had a claim against Hall was on January 12th. This was after he had made an arrangement to purchase this place, had made a small payment thereon, and was then ready to pay the balance in the course of an hour or two and receive his deed.

That Carr up to this time had been acting with entire good faith no one doubts, and, under such circumstances, how far he could be considered under any legal or moral obligation to assist Hall's creditors in the collection of their debts, by giving him an opportunity to put him to the trouble and expense of a garnishee suit, we are unable to see. If a person intending in good faith to purchase land can be thus prevented from closing up the transaction according to his

agreement, or subjected to litigation or to have his title questioned thereafter, serious results and embarrassments would follow. If under such a state of circumstances Carr owed a duty to any one, it was to carry out and conclude his agreement with Hall by paying the balance of the consideration and receiving his deed, and not by collusion or agreement with Hall's creditors assist them in collecting their debt.

But there is no evidence tending to show that Carr at any time had any knowledge whatever of Hall's pecuniary responsibility, while there is direct evidence that he had no such knowledge. Carr could not and would have no right to assume that Hall was making this sale to hinder, delay or defraud his creditors in the collection of their debts, or that he had not abundant means to pay all his debts, or that he did not design out of the consideration received for this land to pay the debt in question.

While the evidence tends to show that Hall did not own other real estate, it does not clearly appear that he did not own personal property, but without reference to this it is clear that Carr had no such knowledge.

We need not pursue farther this matter. The decree dismissing the bill must be affirmed with costs.

The other Justices concurred.

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CHARLES E. BEURMANN v. MARTIN VAN BUREN.

Trover for goods seized on attachment—Charge as to evidence.

In trover for goods seized on an attachment the defense gave evidence as to the state of the debtor's bank account. *Held* that on rebuttal the debtor could be asked how much he had checked out of the bank within the period under examination, as it was pertinent to a portion of his affairs examined into by the defense.

It is proper to direct the jury's attention to important evidence in such terms as to explain the case and aid them to give their attention to essential points, if it is done without misleading them or withdrawing their attention from other important evidence. But when the question is one of fact, and is therefore for the jury alone, it is not error to refuse instructions singling out particular facts, and expressing the opinion that if they should be proved, they would decide the issue.

A purchase of goods from a debtor, with the sole purpose of obtaining payment of an honest debt, does not make the sale void as to other creditors even though the debtor intended thereby to hinder or defraud them, if the purchaser did not share his fraudulent intent.

A sale by a debtor to a creditor in payment of a debt is to be considered as a whole; and if there is a balance due the debtor for which the purchaser gives his notes, it is not for that reason alone to be set aside to that extent in favor of other creditors.

An action by vendor for payment is in affirmance of the sale and precludes him from denying it.

Error to Livingston. Submitted October 20. Decided October 27.

TROVER. Defendant brings error. Affirmed.

H. F. Higgins and *Waddell & Montague* for plaintiff in error.

Cruickshank & Warren and *D. Shields* for defendant in error.

GRAVES, J. The plaintiff in error, being sheriff of the county of Livingston, seized under attachments against Daniel A. French certain merchandise as French's property, and the defendant in error, the father-in-law of French, brought trover. He claimed to have bought the property of French, before the levy of the attachments, for $1600, and that a little more than $1000 of the consideration consisted of a sum French was owing him for money loaned and the interest on it, and that the remainder was represented by three promissory notes he made to French running two, four and six months, respectively, and being negotiable. The defense set up was that this sale was fraudulent against creditors. The jury

sustained the sale and the case is brought up on exceptions.

The parties seem to have prudently acquiesced in the propriety of a full investigation, and the record discloses only one objection to evidence. A witness for the defense had testified to the state of French's bank account, and, in the course of the rebutting case, French stated that he had the means of knowing how much he checked out of the bank from June 14th to November 1st, 1879—that he could tell by looking at his check book. He was then asked to state how much, and it was objected that the question was immaterial. But the court allowed him to answer. Though not important the evidence was pertinent. It belonged to a portion of his affairs which had been inquired into by the defense.

Complaint is made because the circuit judge refused a series of requests. By a number of them the judge was requested to pick out certain enumerated circumstances and convey his opinion to the jury that if they were proved they were signs of fraud on which the issue might be decided. The question to be settled was one of fact and exclusively within the province of the jury, and it was their right and their duty to construe the evidence and decide upon its drift and force to produce belief in their minds. The judge was not bound to suggest specific incidents and communicate his judgment upon their inherent strength as evidence.

We do not mean to say, however, that it is error to direct the attention of the jury to important pieces of evidence, and in such terms as to explain the case and assist them to apply their attention to the essential points, but without misleading them or withdrawing their minds from the due consideration of every item of evidence possessing value. That is not improper and is sometimes important. In this case the circuit judge went far enough certainly in this respect, and the plaintiff in error has no proper ground for complaint.

Instructions were requested to the effect that if French in making sale to Van Buren did so with intent to defraud his creditors, it was void as against them whether Van Buren was or was not a party to the fraud. These requests were refused

and the judge ruled in substance that if Van Buren purchased in good faith in payment of an actual debt from French to himself and gave to French for the difference between the debt and the price of the goods his three negotiable promissory notes as alleged, he got a good title as against creditors even though French may have sold with intent to defraud them. This was correct. Where a person buys for the sole purpose of obtaining payment of an honest debt, the circumstance that the seller intends to hinder or defraud his creditors does not make the sale void. It must be made out that the buyer participated in the fraudulent intent. *Hill v. Bowman* 35 Mich. 191; *Loomis v. Smith* 37 Mich. 595; *Jordan v. White* 38 Mich. 253; *State Bank v. Chapelle* 40 Mich. 447; *Dudley v. Danforth* 61 N. Y. 626.

The sale was an entire thing, and it was either good or bad. It was not divisible so as to leave so much as the prior indebtedness represented, good, and so much as the notes represented, bad. And the requests to charge based on that theory were correctly refused. As the notes were negotiable and given on time, they might be enforced against the maker and there was ground for regarding them as payment.

The requested instruction to the effect that a seller may rescind where the buyer knows he is insolvent and purchases with the intention to withhold payment, was not applicable. The doctrine had no relation to the real controversy. The contention was whether the sale from French to Van Buren was fraudulent as against the attaching creditors, and not whether the sale by the creditors to French was void in consequence of his fraud committed against them when he became their debtor. Moreover their suits in which the goods were seized, were in affirmance of the sales to French, and so long as they occupy that position they cannot very well set up the contrary.

The circuit judge in the opening of his charge noticed that the attaching creditors, and not the sheriff, were the real parties. The accuracy of the statement is not questioned, and it is not to be presumed that the jury were not sufficiently intelligent to infer the fact before the charge was given.

The objection that the judge's remark, by suggesting that the parties in interest resided out of the county and in the city of Detroit, awakened prejudice against them in the minds of the jurors, is not worthy of comment.

The record shows no connection between Van Buren or French with the replevin suit of Johnson & Wheeler against Beurmann for the four chests of tea, and there seems to be no proof that the same tea there in question was included in the sale to Van Buren or in the list of articles alleged to have been converted. The parties during the trial agreed upon the value of the property in question in this action, and the request for a contingent ruling that the value of the tea replevied by Johnson & Wheeler of the plaintiff in error should be deducted, was properly refused. There were no facts to support it, and it is not worth while to inquire into its soundness in theory.

The views expressed dispose of all the objections which are urged and no ground is shown for disturbing the result in the circuit court.

The judgment should be affirmed with costs.

The other Justices concurred.

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CLARENCE Q. TAPPAN v. SCHOOL DISTRICT NO. 1 OF CARROLLTON.

Graded schools—Hiring teachers.

The trustees of graded public schools can make binding contracts for teaching; and the provisions in the Primary School Law whereby the voters and the district board shall have full control of the schools during the entire school year do not apply to graded schools and cannot affect any contract for teaching made by the trustees before the year opened.

Case made from Saginaw. Submitted Oct. 22. Decided Oct. 27.

ASSUMPSIT. Defendant had judgment. Reversed.

Tarsney, Tennant & Weadock for plaintiff.

Flanders & Wilber for defendant.

GRAVES, J. August 31, 1878, the defendant's trustees entered into a written contract with Tappan to hire him to teach defendant's school for the term of forty weeks beginning on the first day of the school year, September 2d, at $50 per month and board himself. The school was organized as a graded one in 1873 and so remained. He began teaching under the contract on the second of September and continued two days. He was then dismissed by defendant's trustees, but no cause was expressed. September 24, 1879, he brought this action for damages. The circuit judge heard the case upon the facts and refused to allow a recovery.

It is said that the trustees who contracted with Tappan were not empowered to hire for any time beyond the current school year to expire on the arrival of the annual meeting, September 2d, and that the contract so made on the 31st of August was not binding on the district after September first. The view taken is that the statutes mean that either the voters of the district or the board shall have full power to control the school during the whole school year, beginning on the first Monday of September, and exclusive of any hindrance or interference from contracts made previously; and reference is made to the authority for hiring teachers conferred by § 3616, and § 3604 as amended in 1875 (Pub. Acts 1875, pp. 281–282), and § 3605.

Section 3616 provides for hiring teachers under the general law regulating primary schools, and § 3604 provides what may be done and transacted at annual meetings, and declares among other things that the qualified voters shall determine whether the school shall be kept "by male or female teachers, or both" during the "ensuing year," and § 3605 provides that in case this is not determined at such meeting the board shall be empowered to determine it.

These provisions it is contended can only leave room to operate according to the intent by leaving the selection of teachers during each school year to the exclusive control of the board for that year except in so far as the annual meeting exercises lawful direction.

There is much force in this reasoning, but whether it is sound or not when confined to those primary schools which are not subject to the specific provisions intended for graded and high schools, it is not needful to discuss, because the essential provision on which it proceeds, so far as the present case is concerned, is not applicable to graded schools like the defendant's. The hiring of teachers for these schools is not left to the general statute. It is taken out of it and specially provided for by a distinct provision. By § 3744 the trustees of graded schools are empowered to employ all teachers necessary, and what teachers are necessary is left to be decided by their sound discretion.

The context and general purview equally require this construction and the general sense of the regulation is repugnant to the notion that the voters at annual meetings may decide what kind of teachers shall be employed.

In the case of graded schools the trustees are not annually renewed. The Legislature has seen fit to give the board more permanence. One-third only or two out of six go out yearly. A purpose to secure an administration for these branches more stable and efficient in the interest of education than is very common under the general law, is plain enough, and there is no implication of a design that the power of the board should be so fettered that no teaching to commence on the first day of the school year could be lawfully contracted for until the annual meeting on that day should be closed. On the contrary, it may be fairly argued that the Legislature contemplated that these schools would generally open on the beginning of the school year, and that the teachers would have to be contracted with in season therefor, and that some time would be necessary to enable the trustees to perform with due care the important duty of selecting and hiring. It is scarcely necessary to enlarge upon the question. The con-

tract appears to have been within the power of the trustees, and the record discloses nothing to impeach it. Neither the trustees nor the voters at the annual meeting had power to impair its obligation. Whether they resolved or not that none but female teachers should be employed is not important.

The finding contains no basis for a judgment here, and therefore it becomes necessary to reverse the judgment and order a new trial, the plaintiff in error recovering his costs of this court.

The other Justices concurred.

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CHARLES S. HAZELTINE v. MATILDA J. GRANGER.

Mortgage of lands—Inequitable stipulations—Ex parte receiverships.

Courts of equity cannot appoint receivers except when such appointment is allowed by law (Comp. L. § 5070) and there is no statute authorizing them to make *ex parte* orders appointing a receiver to take possession of real estate under foreclosure, even though the parties themselves agree thereto by the terms of the mortgage.

Act 62 of 1843 (Comp. L. § 6263) forbids ejectment by a mortgagee before foreclosure absolute. *Held*, that this prevents a mortgagee from obtaining under his mortgage any interest beyond that of a security to be enforced only by a sale on foreclosure, and that it debars him from any right of possession.

Any provision in a mortgage of lands which permits ejectment on a mere default in payment, or allows an *ex parte* order for a receiver of rents and profits, or destroys in advance the equity of redemption is contrary to equity and a court of chancery will not enforce it.

Appeal from the Superior Court of Grand Rapids. Submitted October 22. Decided October 27.

FORECLOSURE. Defendant appeals. Reversed.

McLaren & Carroll for complainant.

Harvey Joslin for defendant. A provision in a mortgage depriving the mortgager of possession by an *ex parte* proceeding on default in paying interest, is unconscionable and will not be enforced in chancery: *Chambers v. Livermore* 15 Mich. 381; *Beecher v. M. & P. R. M. Co.* 40 Mich. 307; *Arnold v. Bright* 41 Mich. 207.

CAMPBELL, J. Hazeltine filed his bill to foreclose a mortgage for $3400 due in five years from March 1, 1878, with interest at 7 per cent. payable semi-annually. One instalment of interest having, as is claimed, remained unpaid, the bill sets forth an election to have the whole sum become due, it being averred that this was provided for in the mortgage, as well as a fee of fifty dollars on each proceeding to foreclose. It also avers that the mortgage secured to the mortgagee a right to the rents and profits after default, and the right to have a receiver appointed without notice. It appeared that the property was occupied as Mrs. Granger's dwelling.

The Superior Court of Grand Rapids, when the bill was filed, made an *ex parte* order at once on such filing, appointing a receiver to take possession of the premises, and dispose of the rents as therein directed. Defendant at once made a motion to set aside this order, which was refused, and she appeals.

We think the court had no power to grant the order, which is unprecedented even under the old practice, both for requiring no security and for having no basis of facts to authorize it.

The courts in equity have no power to appoint receivers except "when such appointment is allowed by law." Comp. L., § 5070. There is no statute which authorizes the court to carry out *ex parte* any private agreement of parties outside of the usual course, or which would render its action valid in any case if it deprived a person of property or its control without such a hearing as is required to determine

the right. Under the old practice existing at a time when the possessory right was deemed covered by a mortgage, a court of equity would not interfere to grant a receiver unless two conditions coincided: *first*, that the premises were scanty security; and *second*, that the mortgagor was insolvent. *Brown v. Chase* Walk. Ch. 43.

Even this was regarded as contrary to public policy by our Legislature, and in 1843 the old law was changed so as to secure the mortgagor in his possession until a foreclosure had become absolute. The effect of this, as we have several times decided, was to prevent the mortgagee from obtaining under his mortgage any interest beyond that of a security to be enforced only by sale on foreclosure, and to debar him from any right of possession. *Hogsett v. Ellis* 17 Mich. 363; *Baker v. Pierson* 5 Mich. 456; *Caruthers v. Humphrey* 12 Mich. 270; *Crippen v. Morrison* 13 Mich. 23; *Ladue v. D. & M. R. R. Co.* 13 Mich. 380; *Van Husan v. Kanouse* 13 Mich. 303; *Newton v. Sly* 15 Mich. 391; *Humphrey v. Hurd* 29 Mich. 44; *Newton v. McKay* 30 Mich. 380; *Wagar v. Stone* 36 Mich. 364.

The statute does not say that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common law form contains words whereby, if applied as they read, possession would belong to the mortgagee and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture and not to allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction for the protection of mortgagors against agreements which, as literally drawn and as theretofore expounded, were deemed dangerous, and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than the previous words of grant, and is really narrowed. It was no doubt intended to go further and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in

enlarging the jurisdiction of equity to appoint receivers, which we held, in *Wagar v. Stone*, had been abolished. Any such attempt to create a forfeiture is contrary to equity and equity will not enforce it. The same principle which makes all original agreements void which destroy the equity of redemption in advance, must cover a partial as well as complete destruction. In *Batty v. Snook* 5 Mich. 231, it was held that where an agreement was in fact a mortgage, an executory agreement to give up the equity of redemption on default was void, and would violate the doctrine which had annulled the common law forfeiture. If mortgagees can evade the law by requiring a forfeiture of something a little less than the entire freehold, but nevertheless covering its usufruct, the beneficial effect of the modern legislation and to a considerable extent of the previous equitable doctrine will be wiped out.

We think the mortgage cannot be so enforced in equity as to deprive defendant of possession. As this is a mortgage of nothing but real estate, it is free from any questions which may possibly be mooted concerning other securities.

The order appointing a receiver must be reversed with costs of this court and ten dollars costs of motion in the Superior Court. If the receiver has got into possession it must be restored and all rents repaid without any deduction.

The other Justices concurred.

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JAMES D. WEIR v. THE MICHIGAN STOVE COMPANY AND JEREMIAH DWYER.

Wills—Construction of residuary clause.

A testator devised *all* his property to his wife, who was to pay his debts. The next clause was as follows: "The half of the residue after her decease *to be paid* to my two sisters in Scotland, share and share alike; if either should die before my wife's death, then the other to have

the full half; if both should be dead, then let it be divided between their nearest heirs; the other half to be disposed of as my wife may direct." *Held* that the widow took the entire estate; and that the testator contemplated that if she sold it and did not use all the proceeds during her life, one-half of the residue should be paid to his sisters or their heirs, and the other should be disposed of as the widow should direct.

Error to Superior Court of Detroit. Submitted Oct. 22. Decided Oct. 27.

EJECTMENT by Weir for premises quit-claimed to him December 21, 1877, by Janet (Young) Hyndmarsh of Glasgow, Scotland, but claimed by defendants under a warranty deed given December 9, 1865, by Euphemia Young to Benjamin F. Morton, trustee, who conveyed them by warranty deed, July 19, 1866, to the Michigan Stove Works. Euphemia Young was the widow of Hugh Andrew Young and Janet Hyndmarsh was his sister, and both claimed the premises under his will. The widow died in January, 1877, and devised all her property, which consisted of the proceeds of that which was left by Hugh A. Young, to Janet Hendrie and Hannah Robertson, leaving nothing to her husband's sisters. Defendant had judgment below and plaintiff brings error. Affirmed.

Romeyn & Romeyn for plaintiff in error.

George V. N. Lothrop for defendant in error, the Michigan Stove Works, cited as analogous cases *Jones v. Jones* 25 Mich. 401; *Ide v. Ide* 5 Mass. 500; *Jackson v. Bull* 10 Johns. 19; *Jackson v. De Lancy* 13 Johns. 552; *Perry v. Merritt* L. R. 18 Eq. 152; *Parnall v. Parnall* L. R. 9 Ch. Div. 96; *Hughes v. Ellis* 20 Beav. 193; but see *In re Stringer* L. R. 6 Ch. Div. 1.

MARSTON, C. J. The construction of the will of Hugh A. Young, of which the following is a copy, is the question presented in this case.

"In the name of God, amen.

"I, Hugh Andrew Young, of the city of Detroit, county of Wayne and State of Michigan, of the age of 55 years, and being of sound mind and memory, do make, publish and declare this my last will and testament in manner following, that is to say, I give and bequeath all my property, of whatsoever nature, to my wife Euphemia, she paying all my just and lawful debts. The half of the residue after her decease to be paid to my two sisters in Scotland, share and share alike; if either should die before my wife's death, then the other to have the full half; if both should be dead, then let it be divided between their nearest heirs; the other half to be disposed of as my wife may direct, as I hereby appoint her my sole executrix of this my last will and testament.

"In witness whereof I have hereunto set my hand and seal this 15th day of March, in the year of our Lord one thousand eight hundred and fifty-eight.

[Signed] "H. A. Young." [L. S.]

What estate did his wife take under this will? Taking the entire instrument and ascertaining the intention from the language used, I have no doubt but that Mrs. Young took the entire estate, and that the Stove Company under her deed of December 9, 1865, acquired all the title the testator had immediately preceding his death.

We have a statute which declares that every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate. 2 Comp. L. § 4323.

The language of the testator in the bequest to his wife is clear and unqualified and unless restricted by what follows would not be open to question. Does it clearly appear by what follows thereafter that the devisor intended to convey less than his entire estate to his wife? If there are doubts, then under the statute they must give way to the otherwise clearly-expressed intention. It seems to me that the testator contemplated the fact that his wife might sell and dispose of his estate, but might not use during her life-time the entire proceeds thereof, and in case she did not, one-half the residue of such proceeds should be paid, after the decease of his wife,

to his two sisters, and the other half as his wife should have directed. The language used cannot I think be held to clearly indicate a division of real estate *and nothing else* after the death of his wife.

In my opinion this is the proper construction and the judgment below should be affirmed with costs.

The other Justices concurred.

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GEORGE WILSON v. HENRY MARTIN.

Replevin against constable—Invalid judgment.

A purchaser of goods replevied them from a constable who justified under an execution against the vendor, but it was found that the judgment supporting the execution was invalid. *Held* that there was no basis for showing that the sale to plaintiff was fraudulent.

Error to Genesee. Submitted Oct. 22. Decided Oct. 27.

REPLEVIN. Plaintiff brings error. Reversed.

E. M. Thayer for plaintiff in error.

Long & Gold for defendant in error.

MARSTON, C. J. Wilson brought this action of replevin to recover possession of certain stave bolts which the defendant, while acting as constable, justified taking upon an execution issued upon a judgment rendered in favor of *Samuel Clemens v. David Center*. Upon the trial, on cross-examination of the plaintiff and his witnesses, counsel for defendant sought "to show that the transfer from Center to Wilson was a fraud on creditors and on Clemens as such creditor," and for such purpose the court admitted testimony, although properly objected to, having such tendency. The judgment under which the defendant justified was afterwards received in evi-

dence, but finally ruled out, not being considered a valid judgment.

The judgment having been held invalid, there was no foundation for any one to attack the sale from Center to plaintiff as fraudulent, and the first and second requests* of plaintiff to charge should have been given.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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Ebenezer L. Jackson v. Ezra Evans.

Parol transfer of land and crop is void—Mortgage cancelled by conveyance to mortgagee—Measure of damages for conversion.

A mortgagee cannot remain so after acquiring the fee unless the mortgage needs to be kept alive to protect his rights.

A son bought a farm from his mother and gave her a mortgage on it to secure part of the purchase price. They afterwards agreed that she should take back the farm, and in consideration of the wheat growing on it should endorse its value on the mortgage. *Held* (1) that the transfer of the wheat was without consideration, as the reconveyance of the farm cancelled the mortgage; (2) that the reconveyance of the farm and the transfer of the wheat, as inseparably connected with it, were void for not being in writing.

Damages for the conversion of a quantity of wheat were adjudged at its value at the time of conversion less the cost of threshing and delivering it in market.

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* The first and second requests were:

"1st. The court having held that the judgment and execution under which the defendant justified in this case, is void, the defendant is not in a position to attack the transfer from Center to Wilson, if the jury believe there was such a transfer.

"2d. The question of fraudulent intent in the transfer from Center to Wilson cannot be passed on by the jury in this case, as the defendant is not a judgment creditor or entitled to attack the transfer on account of fraud."

Error to Calhoun. Submitted Oct. 22. Decided Oct. 27.

TROVER. Plaintiff brings error. Reversed.

L. D. Dibble for plaintiff in error, cited Comp. L. §§ 4699, 4703–4; 1 Greenl. Ev. § 262; *Alderton v. Buchoz* 3 Mich. 326; *Sexton v. Wheaton* 1 Am. L. Cas. 18; *Twyne's Case* 1 Sm. L. Cas. 33; *Bailey v. Ogden* 3 Johns. 399: 3 Am. Dec. 509; *Clow v. Woods* 5 S. & R. 275: 9 Am. Dec. 346; *Mason v. Baker* 1 A. K. Marsh. 28: 10 Am. Dec. 724; *Babb v. Celmson* 10 S. & R. 419: 13 Am. Dec. 690; *Peabody v. Carrol* 9 Mart. (O. S.) 295: 13 Am. Dec. 305.

Clapp & Reynolds for defendant in error. Sale of a growing crop is not a sale of an interest in land: 7 Wait's Actions 54; 1 Greenl. Ev. § 271; *Crapo v. Seybold* 36 Mich. 444.

COOLEY, J. This was an action of trover to recover the value of a certain field of wheat. The trial was without a jury, and the finding of facts is as follows:

That on February 4, 1870, Isabella Cleveland was the owner in fee of certain premises; that on June 13, 1874, she conveyed the same to Frank Cleveland, her son; that upon said sale Frank Cleveland assumed the payment of a mortgage upon said premises, and a note for $1000 given by Isabella Cleveland to Moses W. Wheelock; that he also gave to Isabella Cleveland a mortgage and note for $2500; that no payment of principal or interest had been made upon either prior to September 20, 1878; that on January 1, 1878, a judgment was obtained by the plaintiff against Philander and Frank Cleveland, before one Russell, a justice; that on February 16, 1878, execution was issued to one Briggs, a constable, and on April 18, 1878, returned *nulla bona;* that on September 23, 1878, *alias* execution was issued, and levied on Frank Cleveland's interest in certain wheat growing upon said premises and on the farm of one Burrows; that on January 12, 1879, the interest of Frank Cleveland in said wheat was sold to plaintiff at constable's sale for $50; that on Sep-

tember 20, 1878, it was verbally agreed between Frank Cleveland and Isabella Cleveland that she should take back the farm, and he should give her the wheat in question to apply on her mortgage at a valuation of $200, and the same was then and there endorsed on said note and mortgage, which endorsement was made in the presence and with the knowledge and consent of Frank Cleveland; that Frank Cleveland exercised no control over the wheat after the arrangement was made; that on June 25, 1879, Isabella Cleveland sold and by bill of sale conveyed this wheat to defendant, which bill of sale was filed in the proper town clerk's office June 30, 1879; that on July 30, 1879, defendant converted the wheat; that there was of the wheat 245 bushels, worth 95 cents per bushel, and that it was worth 10 cents per bushel to thresh and deliver the same to the Battle Creek market at the time of conversion; that the highest market price since was $1.35 per bushel; that the transaction between Frank and Isabella Cleveland was in good faith, and not with the design of defrauding creditors.

And as a conclusion of law, that said transaction amounted to a sale of his interest in the wheat by Frank Cleveland to Isabella Cleveland, and that the levy and sale were void as against her, and that her interest having been conveyed to the defendant, said levy and sale were void as to him, and judgment should be entered in his favor.

To this conclusion that defendant was entitled to judgment the plaintiff excepted.

The exception is well taken. It is not necessary to consider the question whether the contract, if otherwise valid, required to be evidenced in writing, as it is manifest it was wholly without consideration.

The finding of facts is that the wheat passed from the son to the mother in the arrangement whereby she took back the farm, and that the consideration was that she should endorse $200 on the mortgage. But the taking back of the farm of itself, if a complete transaction, cancelled the mortgage, and it was wholly immaterial to either party whether any endorsement whatever was or was not made upon it. She could not

remain mortgagee of the lands after acquiring the fee; at least in the absence of any showing that keeping the mortgage alive was necessary for her protection against the claims of others.

The counsel for the plaintiff endeavored on the argument to distinguish between the arrangement whereby the farm was taken back and that by which the value of the wheat was applied on the mortgage; but the finding leaves no room for the argument. A critical examination of the finding might also enable one to say that it does not show that the note of Frank Cleveland was to be surrendered when the farm was taken back; and if not, an endorsement which reduced this would be sufficient consideration for the wheat. But we think the fair construction of the finding is that the land trade was rescinded. Besides, the finding only says the endorsement was made on the mortgage; and therefore subjecting it to technical criticism could not aid the defendant.

Another and equally conclusive view of the case is that the land trade from the son to the mother was void for want of writing. If that part of this negotiation was ineffectual, the transfer of the wheat, being inseparably connected with it, was void also.

The plaintiff is entitled to judgment for the value of the wheat, which, less the cost of threshing and delivering, was at the time of conversion, eighty-five cents a bushel. He is also entitled to costs of both courts.

The other Justices concurred.

CHARLES A. WATSON, RELATOR v. JAMES A. RANDALL, CIRCUIT COURT COMMISSIONER.

Circuit court commissioner may tax costs.

A circuit court commissioner may tax costs in proceedings under the Fraudulent Debtor's Act, and issue execution for their collection; and mandamus lies to compel him to do so.

MANDAMUS to require a circuit court commissioner to issue execution for costs already taxed by him in proceedings under the Fraudulent Debtor's Act. Submitted October 26. Granted October 27.

Wisner & Speed for the writ.

George S. Hosmer against.

MARSTON, C. J. If the question were now for the first time presented to this court as to the judicial power which could, under our Constitution, be conferred upon circuit court commissioners, we might hesitate. Under the cases which have recognized such a power as being properly conferred, we are of opinion that the commissioner did have authority to tax the costs and issue execution for the collection thereof. This is certainly no greater than the authority exercised in issuing commitments. The question was a proper one to be passed upon by this court, and while the writ will issue as prayed, no costs will be allowed.

The other Justices concurred.

FERDINAND W. TILDEN, RELATOR v. WAYNE CIRCUIT JUDGE.

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Appeals—Extension of time for filing case.

Where proofs were taken in open court, an extension of time for filing a case on appeal can be applied for after sixty days from the date of the decree, and may be granted if the time allowed does not exceed the statutory period of three months.

MANDAMUS to vacate an order extending the time for settling a case. Submitted October 26. Denied October 27.

Julian Williams for the writ.

A. C. Baldwin against.

MARSTON, C. J. Where proofs have been taken in a chancery cause in open court and a decree rendered therein, the circuit judge has power after sixty days from the date of the decree, under Act No. 26 of the Public Acts of 1877, to grant an extension of the time for making and filing a case, provided the time so allowed does not exceed the statutory period of three months. The application need not necessarily be made within sixty days.

The other Justices concurred.

LOUIS H. EVERTS ET AL. v. ABRAM C. FISK.

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Return of summons—Computation of time.

A justice's summons returnable not less than two days from its date is defective if made returnable on the second day after it was issued.

Error to Branch. Submitted Oct. 26. Decided Oct. 27.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

Hiram Kimball for plaintiffs in error. One day is included and the other excluded in computing time for the service of papers: Cowen's Treatise 295; *Small v. Edrick* 5 Wend. 138; *Arnold v. Nye* 23 Mich. 286; *Warren v. Slade* id. 1; *Eaton v. Peck* 26 Mich. 57; a six day summons returnable on the morning of the 8th may be served on the afternoon of the 2d: *Road v. Haywood* 10 Wend. 422; *Allen v. Mills* 26 Mich. 123; *Allen v. Stone* 9 Barb. 60; *Taylor v. Corbiere* 8 How. Pr. 385; it is only when service is required to be a certain number of days before a specified day that both the day of issue and the day of return are excluded: *Sallee v. Ireland* 9 Mich. 157; *Dayton v. McIntyre* 5 How. Pr. 117.

John R. Champion for defendant in error. Time does not begin to run on legal process until the day on which it is issued is passed: *Bigelow v. Willson* 1 Pick. 485; *Cornell v. Moulton* 3 Den. 12; *Farwell v. Rogers* 4 Cush. 460; *Oatman v. Walker* 33 Me. 67; *Dousman v. O'Malley* 1 Doug. (Mich.) 450.

GRAVES, J. It is provided in the statute concerning courts held by justices of the peace, that if the plaintiff shall be a non-resident of the county, a summons may be made returnable not less than two nor more than four days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein. Comp. L. § 5264. The plaintiffs in this case being non-residents began the action by summons issued June 25, 1879, and returnable on the 27th and served on the 25th, and the justice sustained the proceeding notwithstanding the defendant's objection seasonably made. The circuit court on special appeal ruled that the process was erroneous and reversed the judgment. This was correct. *Sallee v. Ireland* 9 Mich. 154; *Warren v. Slade* 23 Mich. 1; *Powers' Appeal* 29 Mich. 504.

The judgment is affirmed with costs.

The other Justices concurred.

Asa Finch v. William F. Brian.

Trespass for eating meat not paid for.

Trespass does not lie for eating a portion of some meat furnished by a dealer but not paid for, and returned, so far as unimpaired, on account of a disagreement as to the price.

Case made from Kent. Submitted October 26. Decided October 27.

Trespass. Defendant Brian was arrested on a justice's warrant issued upon the affidavit of Finch, who declared orally for trespass in taking and carrying away a quantity of beef and leaf tallow, and for damages in time spent by him in carrying the beef to and from defendant's home, and for other wrongs. It appeared that plaintiff had announced to some of his neighbors that he was going to kill some beef which he wanted to sell, and asked who would have some. A number of them including defendant, promised to take quarters, and on asking what the price would be, defendant was told that it would be the same as they got from other folks—or whatever the market price was at the time of delivery. Finch soon after delivered a quarter of beef at Brian's house in the latter's absence, and Brian ate some of it for his supper. But next day Finch charged him six cents a pound for the beef, and having discovered that the highest market price was only four cents, he notified Finch to take it away.

Defendant did take away what was left, and sold it, abating fifty cents from the price because it had been cut, and throwing in three pounds of other beef and tallow at six cents a pound. The abatement of fifty cents and the value of the beef and tallow constitute the pecuniary damages suffered. He recovered his damages and costs in the justice's court, and on appeal to the circuit recovered a verdict of seventy-four cents damages. The judge refused certain requests to charge based on the theory that trespass would not lie for an injury to property out of plaintiff's possession, and told the

jury that it was for them to determine whether there had been a sale on credit which would pass the title to the beef, or whether there had been any sale whatever; in response to a request from defendant's counsel to charge the jury as to who must have done the act complained of, he said: "I think the defendant must have committed the act, or advised it to be done, and I think further that if he, knowing that this beef had been cut off, and it was served up to him, and he proceeded to masticate a portion of it, I think that is trespass itself, provided of course, the ownership was as heretofore stated." Judgment was rendered for plaintiff for the amount of damages assessed with costs of suit. Reversed.

S. S. Chipman for plaintiff in error. Trespass lies for damage done to property by a bailee: Cooley on Torts 439; Benjamin on Sales, § 2; *Hunt v. Wyman* 100 Mass. 196.

Frank L. Carpenter for defendant in error.

MARSTON, C. J. Under the facts in this case the plaintiff was not entitled to recover. No extended discussion is necessary.

The judgment must be reversed with costs of both courts.

WILLIAM DUNNING v. TOWNSHIP DRAIN COMMISSIONER ET AL.

Proceedings to lay out township ditch—Notice.

Proceedings to lay out a township drain should not be set aside except for substantial defects; and where a person interested has had actual notice, and has taken part up to the time when a jury was struck for the purpose of condemning land and assessing the costs, he cannot be supposed to have been taken by surprise.

Certiorari to Drain Commissioner and Township Clerk. Submitted October 20. Decided November 9.

A. Stout for plaintiff in *certiorari.*

COOLEY, J. This is a proceeding instituted to set aside the action of the respondent as township drain commissioner of Essex in Clinton county, and of the jury summoned by him, in laying out a township drain, taking land for the purpose, and assessing the costs. All the errors assigned relate to the finding of the jury and the previous proceedings, and with the exception of those which relate to the giving of notice to the parties concerned and the filing of proof thereof, are somewhat technical. It appears from the return that plaintiff in *certiorari* had actual notice and took part in the proceedings before and at the time when the jury was struck, and there is no reason to suppose he has been taken by surprise in any of the proceedings. We are not inclined to reverse such proceedings except for very substantial faults, and the present case, in our opinion, does not call for our intervention.

The writ of *certiorari* will be quashed.

The other Justices concurred.

LOUIS H. EBERTS AND HIRAM E. ABBOTT v. ISAAC M. SELOVER.

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Book agent—Liability on subscription—Contemporaneous written agreement.

A subscription agent, canvassing for a local history to cost $10, had a book for signatures containing a printed contract therefor, a warning to patrons not to be induced to sign unless they expected to pay the price charged, and a "rule" that "no promise or statement made by an agent, which interferes with the intent of printed contract, shall be valid." A justice of the peace consented to sign the subscription book on condition that his office fees from that time to the time of delivery should be taken in payment, and he received from the agent a written memorandum to that effect. *Held* that this must be considered together with the signature to show upon what

point the minds of the contracting parties met, and that if the agent's principals ratified the contract they must accept the terms agreed on, while if they repudiated it they could decline to deliver the book. But they could not repudiate the actual agreement and hold the subscriber.

Error to Branch. Submitted Oct. 26. Decided Nov. 9.

Assumpsit. Plaintiff brings error. Affirmed.

Hiram Kimball for plaintiff in error. A collateral agreement is not to be considered with an absolute subscription as forming part of the contract: *Brownlee v. O. I. & I. R. R.* 18 Ind. 68.

John R. Champion for defendant in error. Contemporaneous agreements relating to the same transaction must be considered together: *Norris v. Hill* 1 Mich. 202; *Paddack v. Pardee* 1 Mich. 421; and a part of the agreement cannot be repudiated without repudiating the whole: *Hutchings v. Ladd* 16 Mich. 208.

Cooley, J. This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence it appears that when Schenck, the agent, solicited his subscription the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to the time of delivery

of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving at the same time from the agent the following paper:

"COLDWATER, April 29, 1878.

Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

EBERTS & ABBOTT, per Schenck."

The plaintiffs claim that the history was duly delivered, and they demand the subscription price, repudiating the undertaking of the agent to receive anything else, as being in excess of his authority and void. The defendant relies on that undertaking, and has brought into court $4.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

It may be perfectly true as the plaintiffs insist, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendant's liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson v. Green* Wal. Ch. 56; *Dudgeon v. Haggart* 17 Mich. 275. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that plaintiffs should accept his justice's fees for the period named

in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part.

When plaintiffs discovered what their agent had done, two courses were open to them: to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.

The judgment must be affirmed with costs.

The other Justices concurred.

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JOHN T. R. BROWN v. PETER VANDERMEULEN, MARY A. VANDERMEULEN, ROBERT H. BROWN ET AL.

Judgment creditor's bill—Transfer of property to wife—Costs on separate appeal—Disposition of claims of third parties.

Where a judgment creditor's bill is filed to set aside voluntary conveyances made by a man to his wife long before he became indebted to complainant, the latter must show that they were made with intent to defraud either existing or subsequent creditors.

Where a man, while solvent, makes provision for his wife that is not extravagant in view of existing circumstances, and does so in good faith and not in anticipation of reverses, it cannot be set aside on a bill in aid of execution for a debt incurred afterwards.

Where a judgment creditor's bill to set aside a conveyance to a wife impleads as defendant a person holding securities belonging to her but sought by complainant, and he takes a separate appeal from a decree in her favor, costs on affirmance as against him are allowed to the wife.

On an appeal from a decree dismissing a judgment creditor's bill, the Supreme Court can determine the claims of a person impleaded as

holding securities belonging to a principal defendant, but claiming them in complainant's interest and against the owner's will and with no lien upon them.

Appeal from Wayne. Submitted October 28. Decided November 9.

JUDGMENT CREDITOR'S BILL. Dismissal affirmed.

Charles F. Burton and *Alfred Russell* for complainant. Transfers fraudulent as to existing creditors are so as to subsequent ones: *Herschfeldt v. George* 6 Mich. 463; *Trimble v. Turner* 21 Miss. 348; *McConihe v. Sawyer* 12 N. H. 396; *Smyth v. Carlisle* 16 N. H. 464: 17 N. H. 417; *Wadsworth v. Havens* 3 Wend. 411; *Hester v. Wilkinson* 6 Humph. 215; *King v. Wilcox* 11 Paige 589; *Clark v. French* 23 Me. 221; *Reade v. Livingston* 3 Johns. Ch. 481.

Willard M. Lillibridge, John R. Webster and *Charles I. Walker* for defendants. A conveyance may be void as to existing creditors without actual intent to defraud, as where a debtor conveys all of his property or so much as to impair his ability to pay his debts: *Fellows v. Smith* 40 Mich. 689; *Cutter v. Griswold* Walk. Ch. 638; *Parish v. Murphree* 13 How. 98; the doctrine that if a party is indebted at the time of a voluntary settlement, it is presumed fraudulent as to such debt, and no circumstances will permit it to be affected by the settlement or repel the presumption of fraud (*Reade v. Livingston* 3 Johns. Ch. 500; *Jackson v. Seward* 5 Cow. 67; *Wood v. Savage* 2 Doug. (Mich.) 325) was afterwards overruled: *Seward v. Jackson* 8 Cow. 434: 6 Paige 65: 18 Wend. 375; *Babcock v. Eckler* 24 N. Y. 162; *Dygert v. Remerschnider* 32 N. Y. 636; *Holden v. Burnham* 63 N. Y. 76; *Pomeroy v. Bailey* 43 N. H. 118; *French v. Holmes* 67 Me. 186; 1 Story's Eq., § 357; and the overwhelming weight of authority is that a voluntary conveyance by a person indebted at the time, but who is neither embarrassed nor insolvent, and who reserves ample means to pay his debts, is not void as against existing creditors: 1 Story's Eq.

365; *Cook v. Hopper* 23 Mich. 517; *Smith v. Vodges* 92 U. S. 183; *Salmon v. Bennett* 1 Conn. 525; *Thacher v. Phinney* 7 Allen 150; *Winchester v. Charter* 12 Allen 606; *Pratt v. Curtis* 2 Lowell 87; *Pomeroy v. Bailey* 43 N. H. 118; *Hook v. Mowre* 17 Iowa 201; *Haston v. Castner* 29 N. J. Eq. 536; *Gale v. Williamson* 8 M. &. W. 405; *French v. Pope* L. R. 5 Ch. App. 520; *Kent v. Rilly* L. R. 14 Eq. Cas. 196; a voluntary conveyance is valid as to later creditors unless made with an actual intent to defraud existing or future creditors: 1 Story's Eq. §§ 356, 361–2; 1 Am. L. Cas. 40; *Burr v. Veeder* 3 Wend. 412; *Lockhard v. Beckley* 10 W. Va. 87, 106; *Rose v. Brown* 11 W. Va. 122, 136; *McConihe v. Sawyer* 12 N. H. 397, 402; *Dart v. Stewart* 17 Ind. 221; *Hook v. Mowre* 17 Iowa 195; *Sexton v. Wheaton* 8 Wheat. 242; *Hindes v. Longworth* 11 Wheat. 199; *Ridgeway v. Underwood* 4 Wash. C. C. 137.

Cooley, J. This is a judgment creditor's bill. The object is to set aside certain conveyances made by Peter Vandermeulen, one of the judgment debtors, to or for the use of Mary A. Vandermeulen, his wife. The fact of the conveyances and that they were voluntary is admitted, but they were made some years before complainant became a creditor, and it therefore became a necessary part of his case that he should show the conveyances were made with intent to defraud either existing or subsequent creditors. *Herschfeldt v. George* 6 Mich. 456; *Keeler v. Ullrich* 32 Mich. 88. In his attempt to make such proof the complainant has signally failed. The evidence abundantly shows that Vandermeulen was solvent when the transactions took place, and there is no good reason to infer from the surrounding circumstances that he then anticipated the calamity which afterwards visited him and which was precipitated, if not caused, by the fraud of a partner. The provision he made for his wife was not extravagant in view of his existing circumstances, and we do not doubt its having been made in good faith. The decree of the court of chancery will therefore be affirmed with costs.

An incidental question arises respecting certain allowances to be made against the defendant Mary A. Vandermeulen in favor of Robert H. Brown, a brother of the complainant, and who was made a defendant because of holding certain securities which the complainant sought to reach. We have only to say of this part of the case, as we have said of the other, that we think the decree actually rendered was substantially just. The defendant Brown having taken a separate appeal, the decree as to him will be affirmed with costs to the defendant Mary A. Vandermeulen.

The record is exceedingly voluminous, and as the questions are all questions of fact, a review of them in this opinion is not important. The defendant Brown does indeed question the right of the court to determine his claims in this suit, but the right is clear. He was holding in complainant's interest securities belonging to Mrs. Vandermeulen against her will and without any lien; and if any one could complain of the decree, it would be the owner of the securities. She, however, does not complain.

The other Justices concurred.

GEORGE W. PRESCOTT v. MINER PATTERSON AND THOMAS E. REED, HIGHWAY COMMISSIONERS.

Laying out highway—Appeal to township board—Notice.

Appealing from the action of highway commissioners to the township board, whose decision is made final by Comp. L. § 1264, is a waiver of previous defects and irregularities.

The action of township boards on appeal from the highway commissioners cannot be sustained if it does not appear that the party injured by it had notice of their meeting, even though the return shows that it was held at his house.

The fact of notice of a meeting of township boards to review the action of highway commissioners, is jurisdictional and must appear of record.

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Exceptions from Kent. Submitted October 28. Decided November 9.

TRESPASS. Defendants had judgment. Reversed.

Frank F. Kutts and *D. E. Corbitt* for plaintiff.

Fred. A. Maynard for defendants.

COOLEY, J. This is an action of trespass brought by the owner and occupant of land against the highway commissioners of the township for removing his fences under the claim that they were opening a public highway. It appears that proceedings had been taken for laying out a highway which would include the locality of the alleged trespass, and the sole question is whether these proceedings were effectual. The case was referred to a referee, who reported the facts. From these it appears that the proceedings of the highway commissioners in their attempt to lay out the highway were wholly ineffectual, for reasons which are now immaterial, and need not be stated. Prescott, however, did not rely upon their invalidity but took his appeal to the township board—or rather township boards, for it was a town-line road. This appeal to a board whose decision the statute (Comp. L. § 1264) declares shall be final, was a waiver of previous defects and irregularities. *Brody v. Township Board of Penn.* 32 Mich. 272.

The township boards convened and proceeded to a consideration of the appeal, and affirmed the action of the commissioners. Unfortunately, however, it does not appear that Prescott had any notice of their meeting. This was a jurisdictional fact, and must appear. It is true the record states that they met at Prescott's house, but there is neither proof nor recital that he was present, though it does appear that other persons interested met with the board. We must assume that if he had been there he would have been mentioned. Comp. L. § 1263. The defect is fatal. The referee is of opinion that there were other grounds of invalidity, but we do not need to consider them.

The judgment of the circuit court was given against the views of the referee, and it must be reversed with costs and a new trial ordered.

The other Justices concurred.

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MARTINUS B. KIMM ET AL. v. GEORGE G. STEKETEE ET AL.

Injunction bond valid though bill is dismissed.

Where an injunction is allowed on condition that the petitioner therefor give the defendants a bond to indemnify them for any damage which the injunction may cause them, the bond remains valid and will sustain a recovery even though the injunction bill is dismissed for want of jurisdiction.

Error to Superior Court of Grand Rapids. Submitted October 29. Decided November 9.

DEBT on bond. Plaintiffs bring error. Reversed.

Miller & Voorheis for plaintiff in error. A voluntary bond given to obtain an injunction is based on sufficient consideration to support it as a common law obligation, whether the court which granted the injunction had or had not jurisdiction: (*Stevenson v. Miller* 2 Litt. 310; *Hoey v. Rogers* 3 Mon. 226; *Hanna v. McKenzie* 5 B. Mon. 314; *Loomis v. Brown* 16 Barb. 325; *Cumberland Coal etc. Co. v. Hoffman Steam Coal Co.* 39 Barb. 16; *People v. Falconer* 2 Sandf. 81; *Pritchett v. People* 6 Ill. 530; *United States v. Linn* 15 Pet. 291; *United States v. Tingey* 5 Pet. 115; *Morse v. Hodsdon* 5 Mass. 315; *Thomas v. White* 12 Mass. 368; *Thompson v. Buckhannon* 2 J. J. Marsh. 416; *Sewall v. Franklin* 2 Port. (Ala.) 493; *Hester v. Keith* 1 Ala. 316; *Butler v. O'Brien* 5 Ala. 316; *Meredith v. Richardson* 10 Ala. 829); and though no such bond could be required:

Supervisors v. Coffenbury 1 Mich. 355; *Ballingall v. Carpenter* 4 Scam. 308.

Harvey Joslin for defendants in error. A bond to indemnify defendants, required by a court as a condition to granting an injunction is void if the court has no jurisdiction, and will not sustain an action: *People v. Sturtevant* 9 N. Y. 266; *Brookman v. Hamill* 48 N. Y. 554; *Poole v. Kermit* 59 N. Y. 554; *Caffrey v. Dudgeon* 38 Ind. 520; *Moore v. Allen* 3 J. J. Marsh. 621; *Hicks v. Mendenhall* 17 Minn. 475; *Benedict v. Bray* 2 Cal. 251; *Palmer v. Oakley* 2 Doug. (Mich.) 491; *Townsend v. People* 14 Mich. 391; *Biddle v. Wendell* 37 Mich. 454; the defendants might have disregarded the injunction: *Jenkins v. Parkhill* 25 Ind. 474; *Sullivan v. Judah* 4 Paige 466.

Marston, C. J. Where a court of competent jurisdiction allows an injunction upon condition that complainants execute a bond to defendants, conditioned to pay any damages they might sustain by reason thereof, and the bill is subsequently dismissed for want of jurisdiction, is the bond so given absolutely void? Such is the question presented in this case, and we must answer that in our opinion the bond is valid.

It is optional with the complainants to give the bond or not. By giving it they put the law in motion and enjoin the defendants from farther prosecuting their business, thus necessarily causing them to suffer damage. The fact that complainants did not state such a case by their bill as would authorize the court to give them the relief prayed for, should not deprive defendants of their right to protection. Even a temporary injunction may in some cases afford complainants all the redress they seek, and if they can obtain such upon filing a bond to pay the damages, and afterwards escape responsibility upon the plea here urged, then the worse the case stated in their bill the safer they are. By being careful and stating a case not within the jurisdiction of the court, they escape liability, while had they gone farther and set

forth a good cause and yet for some reason failed, they would become liable. We cannot assent to this reasoning. There can be no really good reason, not purely technical, for such a distinction, and the authorities cited by counsel for plaintiffs in error sustain the right to recover upon the bond and should, we think, be followed as more in accord with right and justice.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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JACOB BELLER v. WILLIAM SCHULTZ.

Liability for injury to property under gratuitous bailment.

A man lent a flag to his employer, helped him to hoist it, and left it flying when he went away. It was afterwards damaged by a hail-storm. *Held* that the employer was not liable for the damage done, without proof, at least, that he had failed to take due care of it.

A borrower of property is not an insurer of it even when it is gratuitously lent.

An action does not lie for the value of property gratuitously lent, on a showing merely that the lender had sent for it and had not received it back; it is not presumable without proof that the borrower wrongfully withheld it.

Error to Wayne. Submitted Oct. 29. Decided Nov. 9.

ASSUMPSIT. Defendant brings error. Reversed.

George H. Prentis for plaintiff in error.

Van Dyke & Brownson for defendant in error.

GRAVES, J. Schultz went to work for Beller and took two flags with him, a large one and a small one. He lent the large one to Beller and helped to put it up on Beller's building. He went away without taking the small one, and per-

mitted the other to remain flying where he had assisted in placing it. Subsequently a hail-storm injured it. He sent for both flags and received the small one but failed to receive the other. It was worth $20. He sued in *assumpsit* before a justice for the value and on these facts was allowed to recover, and the Circuit Court on *certiorari* affirmed the judgment.

There was no cause of action on the facts. Even where the loan is gratuitous the borrower is not an insurer. The thing is subject to the kind and mode of use for which it is designed, and the risk of such losses as are fairly incident thereto is with the owner unless the bailee has failed in his duty to anticipate and guard against the danger. The thing here was made on purpose to be used as a flag, and the propriety of exposing it as one in the very position and in the very season selected cannot be questioned by Schultz; because in fact that exposure was in substance his own act. The bailment is not shown to have been abused. There is no proof that Beller failed in his duty. If there was any want of such care to guard the flag against injury from storms as the law would consider due, which is not probable, it was for Schultz to give evidence to prove it. He gave none whatever, and it is not to be presumed that Beller was in fault.

The failure to get the flag back is not traced to Beller. The case goes no further than to say that Schultz sent for it and did not receive it. Where the fault lay, if there was any, does not appear and cannot be inferred. Certainly it cannot be imputed, without proof, to Beller. It may have been obtained from him in answer to Schultz's request, and been miscarried or otherwise disposed of thereafter without his, Beller's, agency. Or it may be that no request was made to Beller to deliver or surrender it. There were no facts to affect Beller with liability in any form and it is needless to inquire whether *assumpsit* might have been maintained in case the evidence had shown an abuse of the alleged bailment.

The judgment must be reversed with the costs of all the courts.

The other Justices concurred.

CAROLINE L. CAMERON, TRUSTEE AND GUARDIAN v. TIMOTHY CULKINS, ANN CULKINS ET AL.

Presumption of genuineness from due acknowledgment of conveyance—Forgery—Evidence.

A genuine certificate of acknowledgment is presumptive evidence of the genuineness of the document to which it is attached.

The acknowledging officer is bound to inform himself of the identity of the parties acknowledging a conveyance.

The defense to a foreclosure was that the mortgage was forged. But it appeared that the persons actually and nominally interested as mortgagees were both dead; that the mortgager and his wife were the only persons living who knew the real facts; that the witnesses to the acknowledgment, one of whom was the acknowledging officer, were reputable and upright men, and that their signatures were genuine; that the signature purporting to be that of the mortgager and alleged to be forged, resembled that attached by him to his answer in the foreclosure suit, and both were in an easy handwriting unlikely to be feigned; that the defendant had tried to misrepresent the spelling of his name, and his explanation of the circumstances of an alleged payment for the mortgaged land were unsatisfactory and were not corroborated, and his manner as a witness was evasive. *Held* that in view of the facts and circumstances the defense was not sufficiently made out.

Appeal from Calhoun. Submitted Oct. 29. Decided Nov. 9.

FORECLOSURE. Defendants appeal. Affirmed.

John C. Patterson and *Wm. H. Brown* for complainant.

Jas. H. Campbell and *W. H. Porter* for defendants.

CAMPBELL, J. The bill in this cause was filed to foreclose a mortgage for $1848.54, accompanied by two notes, one for $1600, and the other for $248.54, dated September 5, 1870, made by Timothy Culkins and Anna Culkins, his wife, to John Cameron or bearer, and payable in five years with annual interest, the large note at 7 and the small note at 10

per cent. The papers are claimed to have been executed and delivered to Charles Cameron, the real party in interest, but made in his brother John's name, as the latter held title to more or less of the property of Charles. It is claimed that $1600 was a balance of principal due on a land contract for the same premises made about two years before, and the smaller note was for accrued interest compounded once at ten per cent. according to the terms of the contract.

Charles Cameron died a few weeks after this mortgage was dated, and the papers were found with other securities among his documents and turned over by his administrator to complainant as guardian of his children. John Cameron had previously assigned them to her in trust for the same purpose.

The defense is that these documents are forged, and that Culkins paid for the land and took a conveyance within a period of a few weeks from the date of his contract. He produces a deed acknowledged about that time, but not recorded till immediately upon Charles Cameron's death.

The mortgage was left for record January 26, 1874, but was not put in the record books for some years thereafter, Culkins having filed an injunction bill to restrain the record, which was discontinued January 26, 1877. This bill was filed against the administrator of Charles Cameron and complainant and her children, as well as the register.

The circuit court for the county of Calhoun held the mortgage genuine and granted a decree of foreclosure. Culkins and wife are the only parties who appeal.

Only one question is presented, and that is whether the mortgage is genuine. If it is, the decree is correct. If not, there is no ground of equity.

John Cameron, who is not supposed to have had any personal knowledge of the transaction, died in April, 1874. Charles Cameron died in October, 1870. There is no person living except Culkins and wife who know anything of the real facts, and this was the case when Culkins filed his bill in 1874.

The testimony consists of the examination of these parties, and various documents and pieces of expert testimony,

and the evidence of one of the subscribing witnesses to the mortgage. Beyond this there is not much that throws light on the subject, except some proofs as to business transactions of more or less circumstantial value.

The original mortgage bears the signature of Francis W. Shearman, as witness and acknowledging officer. The other witness was William Jewell, who was sworn and positively identified his own signature, and remembered the signing by himself, but had no distinct recollection beyond this except that Shearman called him into his office for the purpose of attesting. Mr. Shearman having been a gentleman very generally known, his signatures were established with equal positiveness by several witnesses, and it is practically conceded they are genuine.

This, under our statutes, makes the acknowledgment presumptive evidence of genuineness (Comp. L. §§ 4233, 5930), without reference to the common law doctrines relative to subscribing witnesses. And the presumption that two reputable and upright citizens would not have attested a false instrument is very strong. Whatever may be said of the possible ignorance of parties by one of the witnesses, the acknowledging officer is bound to inform himself of the identity of the parties, and Mr. Shearman's position was such as to render it likely that he did know them, aside from the obligation of official duty. *Hourtienne v. Schnoor* 33 Mich. 274. No innocent explanation is given for any mistake of Mr. Shearman, and, if his certificate is untrue, he must have been very careless or the victim of a conspiracy of which no proof, circumstantial or otherwise, is given, beyond the testimony of defendants.

The handwriting, which is denied by Culkins, his wife not being educated apparently, has been testified to by persons who had dealt with him. There are three other documents in the case, with which comparisons have been made, and on which there is the usual contrariety of opinions. The signatures of Culkins to the notes and mortgage are those of a very fair penman, and in a reasonably easy handwriting. They are natural and have none of the marks of feigned sig-

natures. The answers filed in the present cause, in which the defense of forgery was set up, is signed with small letters instead of capitals beginning the first and second names. But the handwriting is altogether too easy to accord with such ignorance. The signature to the bill filed in 1874, bears a remarkable general likeness to the disputed signatures, and is substantially identical in some of the details; so is that of a deed made just before the contract of 1868, to Mr. Styles. We think the evidence of genuineness of handwriting quite as satisfactory as we usually find it. If forged, it is the work of a very expert forger. But in considering it, we cannot overlook the fact that Culkins in his testimony has undertaken to give palpably false statements concerning the manner of spelling his name, as Calkins, in which he is completely discredited by the general course of his dealings and by his wife's testimony. The method of signing his answer indicates a fraudulent intent to create false appearances.

We are no more favorably impressed by his explanations. He purchased the land in question on executory contract in 1868, on seven years' time, paying two hundred dollars down, and stipulating for annual interest. He now says that within two months thereafter he paid up the entire purchase money and got his deed. The deed was unquestionably dated and acknowledged in October and November, 1868. But there is no claim that Culkins had any idea of paying in full until sometime in November, and there is no reason for supposing the deed was made in October for any such purpose. Its record in October, 1870, corresponds with the theory of complainant that it was delivered when the mortgage was taken, and was made soon after the sale to enable Charles Cameron, the real party in interest, to have the means of conveying title. No satisfactory theory occurs to us why on defendant's theory the deed was antedated to October, 1868.

This however is not conclusive either way. But in order to show payment, complainant narrates his means of payment and when he obtained them. According to his story he had kept $900 in gold for seven years, and made his payment with that and other means, all of which he had on hand when

he made the executory contract. No sensible explanation is given why he did not pay the price in the first place, and the history of his accumulations is very misty and unsatisfactory. His story seems improbable, and there is nothing in the bank or other transactions of Mr. Cameron to corroborate it. The only paper found is his endorsement on the executory contract containing the exact computation of the sum inserted in the mortgage, and a memorandum referring to the exchange of papers on the day of its date.

Defendant's bearing on the witness stand, so far as evidenced by the answers to questions, was evasive and does not impress us favorably. As the circuit judge, who saw all the witnesses, came to the conclusion that his story was untrue, we feel the less hesitation in coming to that conclusion.

On a mere question of fact it is impossible to give all the reasons which produce conviction. But we feel convinced that the defense is not founded in truth.

The decree must be affirmed with costs.

The other Justices concurred.

JOHN SPOON AND WILLIAM THOMPSON v. HERMAS GILBERT AND BENJAMIN WHITNEY.

Part-paid certificates for primary school land.

A bill was filed to compel the re-assignment of primary school land certificates wrongfully withheld, and it was claimed in defense that as complainants had obtained these lands from the State by fraud in filing an affidavit that they were chiefly valuable for agricultural purposes when they were really valuable for pine timber, they were not entitled to relief. *Held*, that defendants could not avail themselves of such an objection; the question of value only concerned the State which appeared to be abundantly secured.

Appeal from Muskegon. Submitted Oct. 29. Decided Nov. 9.

BILL to compel re-assignment of certificates of purchase assigned to defendants, and to restrain them from conveying the property. The bill alleges that complainants Spoon and Thompson were joint owners of a part-paid certificate of purchase of a lot of primary school lands on which there was considerable pine timber; that defendant Gilbert applied to O. A. Rowland, their agent, to purchase these lands and they notified him that their price was $320, reserving such timber as was suitable for lumber and the right to enter and remove it; that Gilbert wrote them the following letter: "TRENT, June (Jan. ?) 4th, 1875. *Mr. William Thompson:* O. A. "Rowland informs me that you would not take less than $320 "for the land my brother offered to pay only $300; but I "advised him to take it and he is anxious to know what he is "going to do as he has another place in view; if he gets this "he wants to move right away, but don't want to move until "he is sure; he is not very anxious, but I want him to take "it, so I have drawn a contract and if you will sign and return "I will get him to sign and leave it with O. A. Rowland. "Please attend to this immediately and oblige me, HERMAS "GILBERT;" that the contract enclosed in the letter did not contain a clause reserving the timber and that when Gilbert's attention was called to the omission he wrote as follows: "TRENT, January 19th, 1875. *Mr. William Thompson:* "Sir:—Yours of the 14th came to hand to-night in regard to "a contract. I can see that it does not bind him, but as he "intends to pay for it I did not think that he need be bound, "but it is all right that he should be bound. Now we will "give you a joint note against Jacob and Hermas Gilbert of the "township of Chester for $300 and my note for $20 due "first of next January, then all the contract you will want "is to reserve the pine, but we would like to have some time "specified that the pine should be taken off in. I think two "years would be time to take it off in. I suppose that note "is as good as money in the bank. Conklin of Ravenna told "my brother that any time he got hard up for money to let "him know how hard up he was and he would cash the note. "If those terms will suit you please let me know by return

"mail and we will make the contract when you come up. "Yours truly, HERMAS GILBERT;" that complainants accepted this proposition, received the notes and assigned the certificate to Gilbert, who afterwards refused to make a contract securing them in the right to the timber, whereupon they tendered back the notes and demanded a re-assignment of the certificate, which was refused; that defendant Whitney, however, had obtained an assignment to himself without consideration and had conspired with Gilbert to defraud them of the property. The bill asks that they be compelled to re-assign the certificate and be enjoined from selling the land or removing the timber therefrom. A decree was granted in favor of complainants, and defendants appeal. Affirmed.

Lowing & Cross for complainants.

Andrew T. McReynolds for defendants.

MARSTON, C. J. That complainants were to have the pine timber upon the lands described in the certificates assigned to defendant Gilbert, and that the latter was to give them a written agreement to that effect, we have no doubt. The value of the lands with the timber thereon, the consideration paid, the letters written to complainant Thompson, and the omission to produce his letters in reply thereto, as well as the oral testimony on both sides, clearly establish the fact of reservation.

It is not shown that defendant Whitney is a *bona fide* purchaser. His purchase would seem to be colorable merely, but whether so or not, he has not proved the payment of any consideration or attempted so to do.

It is said that complainants in purchasing these lands from the State committed a fraud, in reference to the pine timber in dispute, and that they cannot therefore obtain relief in this case. The fraud, if any, consisted in Thompson's making and filing with the Commissioner of the State Land Office an affidavit that these were not pine lands and were valuable mainly for agricultural purposes.

Under the statute the minimum price of school lands was

fixed at four dollars per acre—one-quarter payable in cash and the balance on time. If the land was valuable mainly because of the timber growing thereon, a difference would be made in the time of payments, or security be required. Comp. L., §§ 3817, 3823. The price per acre of the land was not increased, and the additional payment or security was required for the protection of the State.

In this case it is not questioned by any (and an agent of the State was examined) but that the land, even stripped of the pine, was ample security for the unpaid balance to the State, and besides, the complainants offered to secure the State against all loss. The State therefore is not injured and seems to be satisfied, and defendants cannot under such circumstances take advantage of this objection.

The decree must be affirmed with costs.

The other Justices concurred.

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Chicago & Northeastern Railroad Company v. Augustus L. Sturgis.

Labor debts—Declaration—A contractor is not a "laborer," but a laborer's team may be—Time-checks in evidence—Nature of defendant's liability.

In sueing a railroad company for a labor debt under Comp. L., §§ 2393–5, a declaration on the common counts in *assumpsit* with mere allusions to the statute and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred.

A statute, even when it is remedial, must be followed with strictness where it gives a remedy against a party who would not otherwise be liable.

A statutory right of action against a corporation for labor done and materials furnished follows the assignment of the claim; otherwise it would be determined by the claimant's death, and perhaps by his insolvency.

Contractors and sub-contractors are not "laborers" within the meaning of the statute giving a right of action for labor debts.

Under an act giving a right of action for labor debts, a laborer may sue for work done by his team, where no right arises from its service to any other person.

Time-checks issued by a sub-contractor to laborers are in the nature of hearsay, and inadmissible against objection in an action for a labor debt.

A suit against a railroad corporation for a labor debt is to fix it with a liability resulting from its ownership of the road, and will not admit of the theory that defendant is merely an agent of the owner.

Error to Ingham. Submitted Oct. 29. Decided Nov. 9.

ASSUMPSIT. Defendant brings error. Reversed.

S. F. Seager for plaintiff in error.

Jno. C. Shields and *H. P. Henderson* for defendant in error. A claim for a labor debt may be assigned: *Kent v. N. Y. Cent. R. R.* 12 N. Y. 628; and will cover work done by the laborer's team: *Swift v. Kingley* 24 Barb. 541; *Warner v. H. R. R. R. Co.* 5 How. Pr. 454.

GRAVES, J. The circuit judge ruled, against objection, that the declaration was sufficient for the defendant in error to prove a case against the corporation under the act "to provide for the protection of laborers and persons furnishing material for the construction and repairing of railroads in this State." The statute is compiled as §§ 2393, 2394, 2395. The ruling was erroneous. The declaration consisted of the common counts; two being repeated with allusions, and nothing more, to the statute, with an added statement of the plaintiff's title by assignment.

A party must set forth his case if he have one, and where his title to sue is statutory and the right of action depends on a special construction of facts defined in the statute, the declaration, if left to the reasons of the common law, must aver the existence of such facts. Unless this is done the defendant may insist that the cause of action relied on is not

pleaded and cannot be used as a ground of proof and recovery. The charge brought against him is not the charge the plaintiff is endeavoring to urge and there is no foundation on the record for it. The general counts in *assumpsit* have no application. They disclose no such cause of action and the law refuses to regard them or any of them as amounting to a symbol of it. *Howser v. Melcher* 40 Mich. 185; *Delashman v. Berry* 21 Mich. 516; *Butterfield v. Seligman* 17 Mich. 95; *Benalleck v. People* 31 Mich. 200; *Austin v. Goodrich* 49 N. Y. 266; *Churchill v. Onderdonk* 59 N. Y. 134; *Bartlett v. Crozier* 17 Johns. 449; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24; *Inhabitants of Bath v. Inhabitants of Freeport* 5 Mass. 325; *Drowne v. Stimpson* 2 Mass. 441, 444; *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Barron v. Frink* 30 Cal. 489; *Smith v. Curry* 16 Ill. 149; *Moore v. Wade* 8 Kan. 390; *Hunt v. Hunter* 29 E. L. & E. 195; *Hopkins v. Mayor etc. of Swansea* 4 M. & W. 620. The law may be remedial as to laborers and persons furnishing materials, but it gives the remedy against the corporation, which otherwise would not be liable to them at all, and must therefore be pursued with some degree of strictness.

So long as the claims preserve their original character of demands for labor and materials, and the sole change is one of ownership, no reason is perceived for denying to the new owner, although he may have become such owner by assignment, the right to enforce the demands against the corporation in as ample a manner as the first owner might have done. A contrary construction would often prove very embarrassing, and in certain cases would defeat the purpose of the statute. In case of the first owner's death, the right would be determined, and possibly also in cases of insolvency and bankruptcy.

The "protection" provided for is confined to "laborers for and persons furnishing materials to contractors and subcontractors." A distinction is clearly marked between those who contract for labor and materials and the persons who actually perform labor and actually furnish materials. The

law limits its protection to the one who labors, and does not extend it to the one who merely hires out the labor of others. But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute. No right arises to any one out of its service except to him. Persons in his employment have distinct rights of their own.

The circuit judge permitted the introduction of certain papers which a sub-contractor had issued to laborers as tokens of their service. They are spoken of as time-checks. Their admission against objection was error. According to the record they were hearsay and not evidence against the company.

The suggestion that the road belonged to Bancroft * and that the company was merely an agency of his is hardly appropriate. It is repugnant to the theory of the action. The case is against the company, and is brought to fix it with a liability supposed to have resulted from the very fact of its being the owner and builder of the road. If the view which is shadowed forth in this respect is correct, there is ground for contending that the action is misapprehended. It is probable that the intimated relation is not in any strictly legal sense accurate.

The case calls for nothing more. The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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* It was admitted in the case that Bancroft was ostensibly the contractor for building the entire line of defendant's road.

William Bottomley v. The Port Huron & Northwestern Railway Company.

Labor debts—Limitation of liability—Pleadings.

A corporation is not liable for labor to persons hired by a contractor or sub-contractor except so far as it is indebted to the latter.

Where a declaration sets forth separate causes of action, one of which is statutory and the other at common law, neither can be established if facts needed to make out either are wanting.

An unwritten promise by a railroad corporation to a contractor, to pay the latter's obligations to his laborers, will not sustain an action.

Where a railroad contractor has assigned his contract to the superintendent of the company and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt does not rest on Comp. L., §§ 2393–5, but is at common law on a special contract; and the declaration must so aver the cause of action.

Error to St. Clair. Submitted Oct. 29. Decided Nov. 9.

Assumpsit. Plaintiff brings error. Affirmed.

Wm. M. Cline and *A. E. Chadwick* for plaintiff in error.

Chas. R. Brown for defendant in error.

Graves, J. One Glavin, a contractor on defendant's road, procured the plaintiff to perform labor from the 18th or 20th of October to the 18th or 20th of December following. The latter obtained $20 of his wages and was entitled to the further sum of $87.48. His right to this the contractor admitted, but never paid it. April 17, 1879, Glavin assigned his contract and all rights under it to one James McCrea who was then and subsequently defendant's superintendent. The plaintiff solicited payment of the company and it was refused. He brought this action on the statute of 1871 made for the protection of laborers and others. He alleged his claim in a special count and added the common counts. The company made no point on the sufficiency of the special count, and

there was no evidence to establish any case under either of the others. The circuit judge directed a verdict for the company and the plaintiff excepted.

As the defendant found no fault with the special count it should be deemed a good one upon the statute.

The main question, if not the only one, is whether any case for the jury was made out. The statute makes it an essential condition of liability by a corporation that there is something due and owing to the contractor or sub-contractor as the case may be, and unless that condition exists the corporation is not answerable over. Now it expressly appeared at the trial, from the plaintiff's own witness, and was not contradicted, that there was nothing due or behind on the contract from October 1, 1878, to April 17, 1879, at which date Glavin's chance to be a creditor ceased, and there was no evidence tending to show that any indebtedness to Glavin arose after the date last mentioned. The case therefore failed as one on the statute. The circumstances in evidence were somewhat mixed. There were some facts favoring a liability outside the statute.

But even where separate causes of action are well set forth, of which one is on the statute and the other at common law, neither can be established except by facts proper to it. If facts proper to each are wanting, the defect cannot be aided by accumulating on one or the other of the causes of action the entire evidence both pertinent and impertinent to it.

There was some evidence tending to show that the company made a collateral promise of payment. But no such cause of action was counted on. Moreover, the agreement, if any, was to answer for Glavin's debt, and seems to have been unwritten. The plaintiff appears to have a theory that Glavin's assignment was in substance an assignment or surrender to the company and that the transaction carried with it an assumption by the assignee, and therefore by the company, of $1717 of Glavin's debts to laborers, and amongst them that of plaintiff, and that the company thereby became bound to Glavin to pay the debt. Let it be admitted that there was evidence favoring this theory and that the agree-

ment between Glavin and McCrea on considerations to which the plaintiff was not privy, would support an action for him, yet the case is not shaped for it. If the company became liable on the supposed hypothesis, it was not a liability on this statute, but at common law under a special contract, and no such cause of action is laid. The case affords reasons for belief that plaintiff was encouraged to expect that the company would pay him, and if the record is not misleading he has a claim which the defendant on grounds of moral justice ought to pay without hesitation.

But as the court below reached the proper legal result on the case as presented, the judgment must be affirmed with costs.

The other Justices concurred.

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William Fay v. Mary E. Swan.

Assault with intent to ravish—Evidence—Exemplary damages.

The plaintiff in an action for an assault with intent to ravish showed that the outrage was attempted in an upper room of a certain hotel, and that defendant had told her that he was in the habit of going there with women; that the keeper of the house expected him, and that it would be of no use to make any noise. *Held* that the testimony of another witness that defendant had tried to get her to go with him to the same house and had then told her that he was in the habit of taking girls there, and that all was arranged there, was relevant and admissible as corroborating plaintiff's story and showing that her danger was real and not feigned.

In an action for damages caused by an assault with intent to ravish, the plaintiff's physician was properly allowed to testify that after the assault he found her in a condition for which he could not account until he heard of the attempted outrage, and that he was satisfied that if the fact was true, it would account for her state.

A wrong doer is liable for the natural results of his trespass, and the jury may take into account the disgrace as well as the physical suffering caused by it.

Error to Genesee. Submitted Oct. 29. Decided Nov. 9.

TRESPASS on the case for damages. Defendant brings error. Affirmed.

Wisner & Johnson and *A. C. Baldwin* for plaintiff in error. In a prosecution for an infamous crime an admission by the prisoner that he had committed such an offense at another time with another person, and had a tendency to such practices, ought not to be received in evidence: *Rex v. Cole* Mss., 1 Phil. Ev. (5th Am. ed.) 765.

Newton & Howard for defendant in error.

CAMPBELL, J. Mrs. Swan recovered damages against Fay for an assault upon her, committed with much violence, and with a felonious intent to ravish her.

On the trial several questions arose upon the admission of evidence, which were ruled against Fay, on which he brings the case to this court. In order to understand them it will only be necessary to refer to a very few facts as testified to on the trial.

The assault was committed in a hotel in Flint. Mrs. Swan had applied to Fay at her husband's request for a small loan which he said he would pay her if she would call there. On going there she was on some pretext desired to go to a room up stairs, where Fay at once fastened the door and made the attempt in question, which Mrs. Swan resisted successfully. To prevent her from giving an alarm Fay among other things told her that he was in the habit of going there with women, and the keeper of the house expected him and there was no use of making any noise. There were circumstances going to indicate that this was quite likely, as Mrs. Swan's subsequent experience before getting out, tended to indicate.

Among the witnesses sworn, one Dolly Chase was allowed to testify to an attempt made by Fay to get her to go with him to the same house, when he told her that he was in the

habit of taking girls there, and that all was arranged there. Exception was taken to this as irrelevant.

It is undoubtedly true that proof of one wrong has no legal tendency to prove another. But the point to which this testimony was directed was not the act which Fay meditated committing with Miss Chase, but his admitted habit of visiting the house for such purposes.

Mrs. Swan's statement of the condition of things at that house would have been a very remarkable one if the house was kept as a decent hotel should be, and the statements of Fay that he was in the habit of resorting there with some understanding with the keeper were very important facts as explaining the reason why an alarm would be of no use. Such a circumstance was not only an aggravation of his act, but also a fact bearing on the probabilities. It seems to us that Miss Chase's testimony was not irrelevant but went legitimately to corroborate this part of Mrs. Swan's story. It showed the danger was real and not simulated. There was no error in admitting it.

The second error assigned is that Dr. Murray, the physician who attended Mrs. Swan, was allowed to give his opinion to the jury of the cause of her sickness, based on her statement of the attack on her.

Dr. Murray testified to having had her under treatment for some years for a malady which he described and with the character and progress of which he was well acquainted. Immediately after the assault he was called in and discovered a condition which was unexpected and for which he could not account, after a careful examination, until he was informed of the grievance, and was at once satisfied that if true it would account for her changed state. We cannot see what objection there can be to this testimony. He did not attempt and was not allowed to tell the jury that in his opinion Mrs. Swan's sufferings were due to the attack. He merely said in substance that such an assault would account for them. The fact of the assault was left to them on the proofs.

The court did not err in allowing the jury in estimating damages to take into account the disgrace as well as physical

suffering caused by it. Fay was liable for any of the natural results of his trespass.

The judgment must be affirmed with costs.

The other Justices concurred.

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ROBERT LAIDLAW v. CATHERINE L. MORROW.

Judgment in garnishment—Justice's jurisdiction on substituted service—Intervenors.

A justice cannot give judgment against a garnishee until after he has rendered a valid judgment against the principal defendant in a cause in which he had jurisdiction.

A justice acquires no jurisdiction over a defendant who does not appear, where the return to the summons only shows that it was served at his last place of residence upon a specified person described as a person of suitable age and discretion, but not as a member of the family, and does not show that it was served in the presence of some one of the family.

The rights of intervenors are in some degree protected in garnishment proceedings in courts of record, but not in justices' courts; and justices have no discretionary authority to interfere in their behalf.

Judgment was rendered against a garnishee by a justice who had never acquired jurisdiction in the principal case, though he had rendered judgment therein, but the garnishee paid the judgment, and being afterwards sued by the assignee of another claim against the principal debtor, interposed her payment of the judgment in garnishment as a defense. *Held*, that as the judgment in the principal case was void, the defense could not be allowed.

Error to Wayne. Submitted Oct. 29. Decided Nov. 9.

ASSUMPSIT. Plaintiff brings error. Reversed.

S. E. Engle for plaintiff in error. A justice has no jurisdiction to render judgment on the return day of a summons which has been served only by copy and to which defendant

has not appeared: Comp. L. § 5263; *Vliet v. Westenhaver* 42 Mich. 593; *Smalley v. Lighthall* 37 Mich. 350; *Alverson v. Dennison* 40 Mich. 180; *Denison v. Smith* 33 Mich. 158; *Ellis v. Fletcher* 40 Mich. 321; *Wells v. Walsh* 25 Mich. 344; *Wight v. Warner* 1 Doug. (Mich.) 384; *Brown v. Cady* 19 Wend. 477; *Wheeler v. Lampman* 14 Johns. 481; *Thayer v. Tyler* 10 Gray 164; judgment in garnishment cannot be given without a valid judgment against the principal defendant: Drake on Attachment, §§ 460, 658 *a* 692, 696, 711, ch. 37; *Railroad Company v. Todd* 11 Heisk. 555; *People v. Wayne Circuit Judge* 26 Mich. 100; *Gaines v. Beirne* 3 Ala. 114; *Leigh v. Smith* 5 Ala. 583; *Lowry v. Clements* 9 Ala. 422; *Blair v. Rhodes* 5 Ala. 650; *Bostwick v. Beach* 18 Ala. 82; *Case v. Moore* 21 Ala. 761; *Proseus v. Mason* 12 La. 16; *Rose v. Whaley* 14 La. Ann. 374; *Seawell v. Murphy* Cooke (Tenn.) 479; *Clough v. Buck* 6 Neb. 343; *Cota v. Ross* 66 Me. 166.

Maybury & Conely for defendant in error.

GRAVES, J. Mrs. Morrow was indebted to one Hancock in the sum of $109 for goods sold and delivered, and Laidlaw, claiming to have acquired the demand by assignment from Hancock, sued Mrs. Morrow therefor. She resisted on the ground that she had been garnished by two of Hancock's creditors and had been compelled in those proceedings to pay the demand on their claims. The circuit judge allowed this defense, and the main question relates to its validity.

The principal cases directly against Hancock and the cases of garnishment incidental to them were before a justice of the peace, and the recorded proceedings in all were adduced in evidence on the trial of this action. The service on Hancock in the principal cases was by leaving a copy of the summons at defendant's last place of abode, and there was no other process or service and he never made appearance. On the return day and on the strength of this service the justice proceeded to hear the cases, and immediately rendered judgments against Hancock.

The summons in garnishment were returnable on the same day as those in the main cases, December 27, 1879; and the only evidence of service was a written admission to which was subscribed the name of Mrs. Morrow. She did not appear before the justice, but on being called on at her place of business by the attorney for the plaintiff she there subscribed and made oath to a disclosure which the attorney filed with the justice. She acknowledged in this paper that she was indebted to Hancock in the sum of $113 at the time she was served with process.

A summons to show cause in each case was then issued, returnable December 30th, and the only evidence of service was a written admission bearing her name. She did not appear and no evidence was offered to prove the genuineness of the signature attached to the admission. The usual declarations were made, and thereupon the justice rendered judgment against her on the admission in the disclosure. She never took any objection to the proceedings, and on the 7th of January following the justice issued execution, and Mrs. Morrow on demand by the constable paid the debt to him.

Whether the proceedings in the garnishee suits proper might not be upheld in favor of the garnishee against this collateral attack need not be considered. The court would struggle to save a garnishee acting fairly and in good faith from paying a debt twice.

The law which regulates this proceeding contains many defects, and not the least among them is the want of suitable express provisions for guarding and protecting the rights of garnishees in respect to interests belonging to or claimed by parties other than the garnishee debtor, and for guarding and protecting the rights of parties claiming adversely to the various parties litigating. The act concerning this remedy in courts of record contains a provision bearing on this subject (Comp. L. § 6492), but it is quite partial and imperfect. But those courts from their inherent authority to make rules and apply their power to prevent injustice may to some extent perhaps, supply omissions and ward off mischiefs. The law applicable to justices' courts has no such provi-

sion, and from their constitution and limited authority those tribunals are incapable of any such discretionary power.

In the present case a difficulty appears which cannot be surmounted. The judgments against Hancock, the principal debtor, were void upon their face. They were given on the return of summons served by copy left at defendant's abode, and without any appearance. For the purpose of jurisdiction to render judgment there was no service at all, and there being no appearance, the right depended on service and that exclusively. §§ 5262, 5263, 5350.

The cases against Hancock became discontinued, and the plaintiffs therein have never become his judgment creditors. This appeared on the face of the docket when Mrs. Morrow allowed the proceedings to go on against her and without objection. In permitting this and in subsequently paying the demand she acted at her peril. The law denies jurisdiction to the justice to give judgment against the garnishee when the principal suit has become discontinued and the plaintiff has not become judgment creditor of the principal defendant. There is then no basis for the further prosecution of the case in garnishment. It is only incident to the main case and it must fall when that falls. § 6449.

No further consideration is necessary. The judgment must be reversed with costs and a new trial granted.

CAMPBELL, J., concurred.

MARSTON, C. J. No valid judgment can be rendered in justice's court against a garnishee defendant until after a judgment has been rendered against the principal defendant in a cause wherein the justice had jurisdiction. 2 Comp. L. §§ 6446–6449; *McCloskey v. Judge of Wayne Circuit Court* 26 Mich. 100.

In the principal cases the justice acquired no jurisdiction over the defendant, there being no appearance, because of a defective service of process, as appeared by the return of the

officer. The return, a copy of which is given in the margin,* does not show that Howell was one of the family, or that the copy was left at the defendant's last place of abode, in the presence of some one of the family as the statute requires. § 5262. It may be, had sufficient facts been set forth in the return, that Howell was one of the family within the meaning of the statute, but this we cannot presume.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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WILLIAM H. EBERTS ET AL. v. AARON C. FISHER ET AL.

Partition—Averments of interests.

A bill for partition averred that the land was devised to eleven heirs who were named; that seven had assigned to defendant, who holds seven-elevenths of the property, and that complainants, who represent four of the heirs, claim the rest. *Held*, that it sufficiently averred defendant's interest and would be good for a union of four-elevenths in complainants, if it did not, indeed, show that each held one-eleventh.

Each of several devisees, standing in the same relation to the devisor, is presumed to hold an equal interest with each of the others if his interest is not expressed.

The holder of an inchoate lien for paving taxes, in the shape of a redeemable lease, need not, under Comp. L. § 6274, be made a party defendant to a bill for the partition of the property; it is proper however to make him so, and in case of non-redemption the lien may be made chargeable on the defendants, as the final form of relief may make suitable.

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* STATE OF MICHIGAN, COUNTY OF WAYNE, SS:

The defendant not being found, I served the within summons on the twentieth day of December, A. D. 1879, at the city of Detroit, within the said county, by leaving a copy thereof at the defendant's last place of abode, with C. P. Howell, a person of suitable age and discretion, who was informed by me of the contents.

W. W. WITHERSPOON, Constable.

"An estate in possession" within the meaning of the statute for partition (Comp. L. § 6268) means merely an estate in present enjoyment, whether occupied by defendants' tenants or entirely unoccupied.

Where a tenant in common of land in partition is also a lessee of the land, it saves circuity of action to consider all of his claims together; but the jurisdiction does not depend on so doing.

Allegations in a bill for partition, as to the rights and obligations of tenants of the defendant, could only be a ground of demurrer by the tenants themselves; and being only collateral to the regular issues in partition, there is no legal objection to averring or establishing any facts that would determine the relative interests of all parties. Any facts bearing upon the termination of the lease by forfeiture or otherwise are pertinent, as the object of the bill is not properly to enforce a forfeiture, but to determine the right to a partition and the extent of the property to be partitioned.

There is no rule that equity will not recognize a forfeiture when it is only one of the incidents of a past transaction.

Where defendants in partition desire to rely on a lease made by them they must include such averments in their answers as will enable them to maintain their interests, so that, whether the land is partitioned or sold, equities may be adjusted in it or in its proceeds.

Appeal from the Superior Court of Detroit. Submitted October 29. Decided November 9.

BILL for partition. Dismissed on demurrer. Reversed.

Alfred Russell for complainants.

Charles M. Swift and *E. Y. Swift* for defendants.

CAMPBELL, J. This is a bill filed for partition. As some questions are presented touching various classes of interests it will be necessary to refer to the substantial averments of the bill as bearing upon each. The court below on demurrer dismissed the bill absolutely.

It avers as to the fee of the land, that it was owned by Phillis Eberts who died testate and devised the land to the children of her three brothers. Those children are all named, and are eleven in number. Four of them are represented by the complainants, and seven are alleged to have assigned to Aaron C. Fisher, who is said to hold seven-elevenths.

The objection that this showing is not definite enough is of no force. Where a devise is made to several persons, all standing in the same relation to the devisor, they are presumably equal holders. As the bill distinctly states that Fisher holds seven-elevenths, his interest is sufficiently averred independently, and as complainants claim the rest, the bill would be good for their interest as a union of four-elevenths, even if not otherwise full. But we think each is shown to hold one-eleventh.

S. Dow Elwood is averred to claim a lien for city paving taxes in the shape of a redeemable lease which, if not redeemed, will create a lease for years of a part of the lot. It remains inchoate until 1881. The bill shows that if the lien is valid, defendants are bound to pay it.

The statute does not require the holder of such liens not yet absolute to be made parties. Comp. L. § 6274. It is nevertheless admissible and proper to bring him in, and in case of non-redemption it can be made chargeable to defendants on the final arrangements in such manner as the ultimate form of the relief given may render proper.

The only other matter referred to is a lease, which defendant Aaron C. Fisher in his own right, and Aaron C. Fisher and John H. Van Schoick as executors of Elam Fisher, once owned and still claim to own, of the whole premises. Upon this some distinct points are presented.

In the first place it is insisted that if there is such a lease outstanding, complainants have not "an estate in possession" in the land as required by § 6268 of the statute. It is to be borne in mind that the lease, if existing, is a lease in which they are landlords, and not strangers.

There is no authority for holding that an estate in possession means an estate occupied in person and not by tenant. It means merely an estate in present enjoyment, and whether occupied by tenants or entirely unoccupied is equally within the statute. In *Campau v. Campau* 19 Mich. 116, it was explained that the statute was not intended to introduce new rules of partition. In a great majority of the early partition cases the estate included many tenants, and in several in-

stances one or more entire manors. It has been held that so far from being obstacles in the way of partition, it is not always necessary to make tenants under leases parties at all. *O'Reilly v. Vincent* 2 Malloy 330; *Agar v. Fairfax* 17 Ves. 533. It is not important now to consider how far it would be proper or necessary to refer to the lease if it had been in the hands of strangers. As one of the tenants in common is also one of the lessees—if not the only one—it is more convenient for all parties, and will save circuity of action, to consider all of his claims together. But it cannot be maintained on any principle that the jurisdiction depends upon it.

Inasmuch as the rights and obligations of the tenants under the lease are collateral to the regular issues in partition, the allegations on that subject, whether correct or incorrect, cannot be the ground of demurrer except on the part of the tenants themselves, and Aaron C. Fisher in his own right had no footing to take such objections to the partition. But being collateral there can be no legal objection to averring or establishing any facts which would determine the relative interests of all the parties. And in this point of view any facts which bear upon the termination of the lease by forfeiture or otherwise are pertinent, because the object of the bill is not in any proper sense directly to enforce a forfeiture. It is to determine the right to a partition and the extent of the property to be partitioned. There is no rule that equity will not recognize a forfeiture, when it is only one of the incidents of a past transaction.

We do not, however, regard the bill as even seeking to reach this end. As we read it, the questions of forfeiture are superfluous. It shows a lease on various conditions and that some of those conditions were broken and entitled the lessors to re-enter. But the lease expired by its own limitation before the bill was filed. Unless renewed it has lost any efficacy. The bill claims it has never been renewed and shows no facts to the contrary. It may therefore be considered, taking the whole bill together, and until something else appears, that this lease is out of the case for most, if not

for all purposes, except that of charging the Elwood lien on Fisher's share.

If defendants desire to rely on the lease it will devolve on them, therefore, to make by their answers such averments as they think necessary to maintain their interests, so that, whether the property is partitioned or sold, all the equities may be adjusted in the land or its proceeds.

The demurrer was improperly sustained. The decree dismissing the bill must be reversed with costs. The case must be remanded to the court below that the defendants may answer on payment of costs within twenty days after notice of this order, in accordance with Rule 26, unless further time is granted by the court below.

The other Justices concurred.

ALLEN F. HOLMES v. CAROLINE HOLMES.

Divorce—Desertion and cruelty.

A husband is not entitled, even upon a cross-bill, to a divorce as for desertion where his wife, after refusing for more than two years to leave her parents and live with him finally returned, and her husband lived in the same house with her for years and exacted her services as cook and housekeeper without payment, before filing his bill in answer to one filed by her for cruelty and refusal to continue their marital relations.

Extreme cruelty cannot be alleged as a cause for divorce from a wife for conduct which could only be cruelty in wounding the feelings of a faithful husband, where the husband himself is at the same time denying the wife's right to any consideration.

Appeal from Wayne. Submitted Oct. 29. Decided Nov. 9.

BILL for divorce. Dismissal affirmed.

B. T. Prentis for complainant.

Maybury & Conely for defendant.

CAMPBELL, J. This case is one wherein originally the bill now remaining for disposal was filed as a cross-bill. Mrs. Holmes in 1874 seems to have filed a bill for divorce on the ground of cruelty and refusal of her husband to continue marital relations or to speak to her though living for several years in the same house.

The husband answered and filed a cross-bill in which he admitted nearly all that was charged against him, but claimed that his wife deserted him in 1866 by refusing for more than two years to leave her parents in Pennsylvania and come to Detroit. That afterwards—two years and four months from her first refusal—she came out and he hired a house where they both lived, and have continued to live, but without resuming marital relations, he having always refused to condone the old desertion.

He then sets out a series of domestic annoyances of various kinds including coldness and neglect of domestic affairs, refusal to consult his taste in cookery, disarranging his books and papers and clothing, putting some poisonous and irritating substance in his clothing and bed,—charging him with incontinence and misconduct with another woman whom she accused of influencing him by a disgusting species of love-powder. He further set out his fears that his wife would try to gain back his affections by similar means, and that the fear had turned his stomach so that he could not eat food which she prepared, and had therefore left the house.

The parties by consent allowed the original bill to be dismissed without prejudice, and the case proceed under the cross-bill as an original suit.

Only one witness was sworn, who is an aunt of Mr. Holmes, and who testified more or less of her own knowledge concerning the alleged desertion and household arrangements and the love-powder story, and to some hearsay statements concerning other matters.

The bill was dismissed, and we think justly, as the case is a very absurd one. No desertion was made out, and if there had been, originally, it is very certain that the statute never was meant to cover a case where the wife returned and was

willing to resume her duty before any steps had been taken to proceed against her. And the idea that a husband can receive her back, rent a house and go to housekeeping with her, live in that way seven or eight years and exact her unpaid services, and still treat her all the while as having lost her rights by desertion, is too preposterous to bear discussion. It is equally ridiculous for a man to talk about extreme cruelty, which if cruelty at all could only be made such by the wounded feelings of a faithful husband, when he was all the while denying the rights of his wife to any consideration whatever. He appears to have found relief from all these annoyances by ceasing to live with her, and as he had always —according to his own story—repudiated her claims as a wife, that relief on his theory should have been sufficient.

The testimony does not make the wife act as a very lovely or refined character. But as complainant professes that he wished her to return until the two years were fully completed, and as he subsequently lived several years with her in his own house, and availed himself of her services as his cook and housekeeper, it is not likely that he was ignorant of her coarseness. We are not impressed by the testimony that she was the party who had least reason to complain.

The decree must be affirmed with costs.

The other Justices concurred.

JULIUS WRIGHT v. ALONZO J. ROWLEY, DRAIN COMMISSIONER AND FRANKLIN R. GOOD, TOWNSHIP CLERK.

Proceedings to lay out drain—Return as to notice—Laches.

A drain commissioner's return to a writ by *certiorari* that he "gave the notice required by the statutes to the parties interested in said water course" is insufficient to sustain his proceedings in laying out a ditch.

Where a notice of proceedings to lay out a drain has not been given in strict compliance with the statute, subsequent proceedings are void

as to those who do not waive notice or are otherwise estopped from objecting.

Whether a year's delay in making a plat of a proposed ditch to be laid out under proceedings taken by a drain commissioner, would not make subsequent proceedings void for want of jurisdiction—Q.

The right to complain of proceedings to lay out a ditch is not lost by delay where the cause of complaint does not develop itself until after the work is done and paid for; as where the opening of a ditch converted a lake bordering on plaintiff's land into a sickening mud-hole though he had been authoritatively assured that it would not lower the water.

Certiorari to the drain commissioner and clerk of the township of Fredonia in Calhoun county. Submitted October 29. Decided November 9.

Oscar T. Tuthill for plaintiff in *certiorari*.

Wm. H. Porter and *Miner & Stace* for defendant in *certiorari*. *Certiorari* to review local improvements must be applied for immediately; it should be refused if the applicant has delayed so that the assessment has been made and collected: *Matter of Lantis* 9 Mich. 324; *Matter of Tompkins Square* 17 Abb. Pr. 324 *n.*; *Swift v. Poughkeepsie* 37 N. Y. 511; *Elmendorf v. New York* 25 Wend. 693; *Fract. School Dist. No. 1 of Owosso v. School Inspector* 27 Mich. 3; *Roberts v. Highway Com'rs* 24 Mich. 182; *People v. Com'r of Taxes* 43 Barb. 494; *People v. Reddy* 43 Barb. 539; *People v. Fredericks* 48 Barb. 173; *People v. Fredericks* 33 How. Pr. 150; *Ex parte Miller* 4 Mass. 565; *Ex parte Baring* 8 Greenl. (Me.) 137; *Tipton v. Anderson* 8 Yerger (Tenn.) 222; *Erwin v. Erwin* 3 Dev. (N. C. L.) 528.

MARSTON, C. J. *Certiorari* to review the proceedings of a drain commissioner. May 3d, 1878, an application was made to the drain commissioner to establish and open a water course through certain lands. The 7th day of May, 1878, at a certain hour and place, was fixed for examination of the application, and the commissioner returns he "gave the notice

required by the statutes to the parties interested in said water course." This we have repeatedly held was insufficient, and rendered all subsequent proceedings void as against parties not waiving notice or otherwise estopped.

It farther appears from the return that no survey or plat of the proposed ditch was made until April 22d, 1879, nearly a year after the initiation of the proceedings, and no cause or excuse for the delay is given. November 13th, 1879, the parties through whose lands the ditch was to run executed a release for all claim of damages. It may be very questionable whether such a delay would not of itself render void for want of jurisdiction all the proceedings thereafter, but it is hardly necessary to pass upon this question at present.

The writ in this case was sued out August 12th, 1880, and although the work seems to have been done, taxes collected therefor and paid upon contract some months previous thereto, yet we are of opinion the plaintiff should not be deprived of his remedy in this way. Plaintiff's real cause of complaint is that the opening of this ditch has lowered a lake upon the waters of which his lands fronted, changing what was a thing of beauty and afforded a safe and easy place for watering stock and other conveniences into an unsightly and sickening mud-hole, unsafe and dangerous, and that during the progress of the work he was assured the opening of the ditch would have no such effect. Under such circumstances he did not lose his rights by the delay.

The proceedings must be quashed and held for naught.

The other Justices concurred.

Rosella Wright v. Enoch Smith.

Costs on affirmance by equal division.

Costs may be withheld on the affirmance of a judgment or decree by the equal division of the court.

Appeal from Livingston. Submitted April 21–22. Decided Nov. 10.

Bill to set aside deed. Dismissal affirmed.

Rollin H. Person for complainant.

H. H. Harmon, M. V. Montgomery and *D. Shields* for defendant.

Cooley, J. In this case the judges have been unable to come to an agreement respecting the matters assigned for error, and the decree of the circuit court will therefore stand affirmed but without costs.

The other Justices concurred.

James Ludington v. David A. Melendy.

Error to Mason. Submitted April 28. Decided Nov. 10.

Attachment. Defendant brings error. Affirmed.

White & McMahon for plaintiff in error.

C. G. Wing and *Geo. H. Noyes* for defendant in error.

Cooley, J. In this case the judges have been unable to come to an agreement respecting the matters assigned for error, and the judgment of the circuit court will therefore stand affirmed but without costs.

The other Justices concurred.

AMANDA SILSBEE v. HENRY STOCKLE ET AL.

Tax titles.

A township tax levy for highway purposes is properly included with the regular highway tax when spread upon the assessment rolls, and need not be placed in the column for township taxes.

Where a general levy for highway purposes exceeds five mills per cent. on the township valuation, it will defeat any tax sale made for an aggregate of taxes of which it forms a part.

The equalization of assessment rolls by the board of supervisors is not defeated by the fact that the report of equalization was not in writing and that there was no written resolution adopting it.

A board of supervisors in equalizing assessment rolls, determines whether the relative valuations of real property are disproportionate, and makes the necessary additions or deductions to or from the whole taxable property of the township.

A county tax is not defeated for want of proper action by the board of supervisors in determining the amount of money to be raised, where the record of the clerk of the board shows the acceptance of a report of the finance committee and the adoption of a resolution to raise the sums reported.

A township tax exceeding the amount voted by the township may be sustained on the presumption that the township board had exercised its statutory right to increase the amount, if there is no showing to the contrary.

Where the validity of a tax in aid of a county agricultural society depended on whether or not a certificate by its officers that the society had raised $100 for the year had been presented to the board of supervisors, and the county clerk could find no such certificate in his office, it was *held* presumable that the proper certificate had been presented, and that the presumption could not be rebutted by the testimony of a supervisor that he had no recollection whether it had been or not.

Omission to equalize the assessment rolls at the October session of the board of supervisors as required by Comp. L. § 993 did not defeat a tax where the same board had already made at its June session the equalization required every fifth year by Comp. L. § 303.

A surveyor's tax included in a levy is presumably lawful, as such a burden upon particular parcels of land is allowed in some cases to meet the cost of their survey. Comp. L. § 595.

A tax is invalid if the supervisor's certificate to the assessment roll, in stating that he has estimated the real estate set down therein at what

44 561
66 218

44 561
68 12

44 561
75 322

44 561
81 329

44 561
84 354

44 561
90 318

44 561
96 155

44 561
104 42

44 561
105 319

44 561
109 389
109 697

44 561
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44 561
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he believed to be the true cash value thereof, does not add in effect, "and not at the price it would sell for at a forced or auction sale."

The statutory provisions that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown (Comp. L. § 1129) are unconstitutional so far as they sustain sales for taxes which are in part illegal.

It is a presumption of law that the land demanded for a delinquent tax bears some proportion to the sum to be paid, and that if the tax is in part illegal some portion of the land sold to pay it is taken to satisfy an illegal demand.

Tax sales are made in Michigan by the county treasurer, but in most cases he is in no way connected with irregularities; where he has received from the Auditor General a list of the lands with the charges upon them and has made the sale and accounted for the moneys to the authorities apparently entitled to them, he cannot be held liable for illegalities not chargeable to himself; and there can especially be no remedy against him where the lands are struck off to the State for want of bidders, for no money passes through his hands on State bids. The remedy, if any, is in following the illegal levy and finding the person, officer or municipality finally appropriating the money thereby obtained.

Penalties for the non-payment of taxes within a fixed time cannot lawfully exceed legal interest.

Error to Huron. Submitted April 28. Decided Nov. 10.

EJECTMENT. Plaintiff brings error. Reversed.

H. H. Hoyt for plaintiff in error.

Winsor & Snover and *H. B. Carpenter* for defendants in error.

COOLEY, J. This case was once before in this court, and the opinion then given resulted in a new trial. *Stockle v Silsbee* 41 Mich. 615. It is ejectment to recover lands the original title to which is held by the plaintiff. The lands were returned for the non-payment of taxes of 1869, 1870, 1871 and 1872, and were bid in for the State in each of those years. Afterwards the State sold them, and defendants hold the State conveyance. The plaintiff claims that the tax levy

was void in each of the four years; and the controversy turns wholly upon this allegation. The land consists of one hundred and twenty acres lying in one body in the township of Fair Haven, Huron county. The objections to the tax levy are numerous, and some of them we think too plainly frivolous to require even a mention. The others are the following:

I. The highway tax for 1869 is said to have been excessive. The valuation of the land for that year was $180, and a highway tax of $3.15 was levied. The regular highway assessment is in labor, but this, when not performed, becomes a money tax, which under the statute cannot exceed one per cent. of the valuation. Comp. L. §§ 1228, 1241. But the township has authority to vote a general levy for highways; and this seems to have been done for the year in question, and the sum voted goes to make up the highway tax which the rolls show. It is objected that a tax thus voted constitutes a part of the township tax, and must appear in the column of township taxes on the roll. *Case v. Dean* 16 Mich. 12. We think, however, that the supervisor was correct in adding it to the other highway tax. Comp. L. § 1002.

Unfortunately, however, the township voted a larger sum than the statute permits. The authority is expressly limited to a sum not exceeding five mills per centum upon the aggregate valuation of the property in the township (Comp. L. § 1269); but the amount actually voted and levied exceeded eight and one-half mills per centum. This excess, under the previous decisions of this court, was sufficient to defeat any sale made for an aggregate of taxes of which this highway tax formed a part. *Lacey v. Davis* 4 Mich. 140; *Buell v. Irwin* 24 Mich. 145; *Wattles v. Lapeer* 40 Mich. 624.

II. The equalization of assessment rolls by the board of supervisors for the year 1869 is said to be defective, but the criticism made is altogether over-nice and technical. The record of the board shows that the committee on equalization made a report, to which was appended a tabular statement giving the names of the townships, the assessed valuation, the increase or decrease, if any was proposed, and the proposed equalized valuation. This report, the record shows, after an

alteration in respect to Fair Haven, "was accepted and adopted as the equalization of the county." The objection to this seems to be—*First*, that neither the report of the committee nor any resolution adopting it was in writing, and that there can be no sufficient record without it; and *second*, that the equalization was of real and personal property both, while under the statute the board are to judge of the relative valuations of real estate only. The first objection aims at matter of form only. It might perhaps be better if all reports and resolutions in deliberative bodies were made and offered in writing, but there is no law or custom requiring it. The second objection is equally baseless. The board, after determining whether the relative valuations of real property are disproportionate, are required to make the additions or deductions they find necessary to or from the whole taxable property of the township. Comp. L. § 993. That is what was done here.

III. It is further objected that there was no proper action of the Board of Supervisors determining the amount of money to be raised for county purposes. The record upon this subject is as follows: "Committee on finance submitted the following report, which on motion was accepted, and the resolution to raise the respective sums adopted: For State tax, $1980.27; poor fund, $400; contingent fund, $6261.68." Here again is no written resolution, but the clerk has taken down the substance of one submitted orally, and the record is as full and complete as is to be expected. There is no defect in matter of substance.

IV. In the levy for 1870 was included a township tax of $150. The township had voted only $125, and it is therefore claimed the levy was excessive. But the township board had a right to increase the sum voted when necessary (Comp. L., § 751); and it must be presumed in the absence of any showing to the contrary that they did so in this case. *Upton v. Kennedy* 36 Mich. 215; *Stockle v. Silsbee* 41 Mich. 615.

V. There was levied for the year 1870 a tax of one-tenth of a mill on the valuation, in aid of the County Agricultural

Society. The statute authorized such a tax only when the sworn certificate of the president and secretary of the society, that the society itself had raised for the year $100 or more, was presented to the supervisors. Comp. L., § 2163. When the trial took place the county clerk could find no such certificate in his office; and the plaintiff requested the court to submit to the jury the question whether one was ever made. This was refused. The presumption is that the proper certificate was presented. *Upton v. Kennedy* 36 Mich. 215; *Hogelskamp v. Weeks* 37 Mich. 422. The only evidence appearing in the record which could have been submitted to the jury as having a contrary tendency was that of a member of the Board of Supervisors for the year, who testified that he had no recollection whether a certificate was or was not presented. But this mere negative declaration was of no force, and there was nothing in it to go to the jury as tending to rebut the legal presumption that the action of the supervisors was based upon a proper certificate.

VI. For the year 1871 there was no equalization of the assessment rolls at the October session, as is required by Comp. L., § 993. It appears, however, that one was made by the board at its June session, as is required every fifth year by Comp. L., § 301. As the board is composed of the same persons in June and in October, and a new equalization would be an idle formality, we are not inclined to hold that a failure to go through with that formality in October is fatal.

VII. The warrant appended to the tax roll for 1871 indicates that a surveyors' tax of $13.53 was included in the levy; and for this it is claimed there was no authority of law. The statute, however, authorizes a levy to be made in some cases on particular parcels of land, to meet the cost of their survey; Comp. L., § 595; so that presumptively this tax may have been lawfully laid. There is no showing and no claim that any part of it was levied on the land in controversy.

VIII. The most serious defect which is pointed out in any of the proceedings, is found in the supervisor's certificate to the assessment roll for the years 1870, 1871 and 1872. Sec-

tion 991 of the Compiled Laws, under which these assessments were made, is as follows:

"When the supervisor has reviewed and completed the assessment roll, it shall be his duty to attach thereto, signed by him, a certificate, which may be in the following form: 'I do hereby certify that I have set down in the above assessment roll, all the real estate in the township of ————, liable to be taxed, according to my best information, and that I have estimated the same at what I believe to be the true cash value thereof, and not the price it would sell for at a forced or auction sale; that the said assessment roll contains a true statement of the aggregate valuation of the taxable personal estate of each and every person named in said roll, and that I have estimated the same at the true cash value, as aforesaid, according to my best information and belief.'"

The form given in this section was followed by the supervisor, except that the words "and not at the price it would sell for at forced or auction sale" were omitted. As the circuit judge sustained the levy, he must have reached the conclusion that the observance of the statutory form was not compulsory.

The early statutory form did not contain the words which the supervisor has omitted (Comp. L. 1857, § 806), and the change in the form was made in a revision of the tax law in 1869. If the change in the form whereby these words were brought into it had no important purpose in view, we may well hold that the proceedings are not affected by the supervisor continuing the use of the form which had been in use before. But it is a matter of common knowledge that the change was made for the very purpose of effecting an important change in the assessments. It was notorious that supervisors had been in the practice of evading the previous law and making assessments at a mere fraction of the real value of the property, when sworn to make it at the cash value. It was very easy to excuse the evasion of duty under the pretense that the cash value of property was only what it would bring if forced upon the market; and the law was amended for the very purpose of taking away this excuse. It will not do to say that such an amendment is unimportant and there-

fore may be disregarded with impunity; it goes to the very essentials of the assessment, and was intended not only to control that, but also through that all the subsequent proceedings. There is not the slightest doubt the Legislature intended that the adoption of the form given, or one that should be equivalent in substance, should be compulsory in every instance. The failure to adopt it is, therefore, a fatal defect. *Clark v. Crane* 5 Mich. 151.

IX. It appears, then, that there was an excessive levy for the year 1869, and that for 1870, 1871 and 1872 there were no valid assessments and consequently no valid taxes. Under such circumstances it remains to be seen whether it is possible to support the deed under which the defendants claim. If so it must be supported upon the State bid for 1869. No defect was pointed out in the proceedings for that year with the single exception that the levy was excessive.

The reason for holding a tax sale void when the levy is excessive is that the sale is for the aggregate of all the taxes, so that the tax title is based as much on what is illegal as upon what is lawful. It is said, however, that this rule is changed by the existing tax law, whereby it is provided that no sale for delinquent taxes shall be held invalid unless it shall be made to appear that all legal taxes were paid or tendered; and further, that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown. Comp. L. § 1129.* Plaintiff contests the validity of this section, contending that when one's land is taken for a levy any portion of which is illegal, it is to that extent taken without due process of law. Defendants on the other hand affirm that the power to sell arises from the default in making

* * (1129) SEC. 163. "No general or special tax authorized to be raised by the laws of this State, and which shall be assessed upon any property in any township or ward within the State, shall be held illegal or invalid for want of any matter of form in any matter or thing not affecting the merits of the case, and which shall not prejudice the rights of the party assessed; nor shall any sale of property for non-payment of the taxes thereon be invalid unless it shall be made to appear that the legal taxes, costs, and charges were tendered to the proper officers within the time limited by law for the payment of all such taxes; or, in case of the sale of real estate, unless it shall be made to appear that all legal taxes assessed

payment of the legal taxes, and that the sale for these, being in due process of law, is not affected by the irregularity of including a sum not legally levied. This is the view that has been taken in Iowa. *Eldridge v. Kuehl* 27 Iowa 160; *Parker v. Sexton* 29 Iowa 421; *Rhodes v. Sexton* 33 Iowa 540.

We had occasion to take some notice of this statute in *Upton v. Kennedy* 36 Mich. 215. It was relied upon in that case in support of a sale based upon an illegal return; but we were of opinion that it was not the purpose of the statute to render unimportant any of the proceedings which before were jurisdictional. As we found in that case that there was no return upon which any sale could be based, it did not become necessary to decide whether the statute would be effectual to support a sale when the only infirmity was the inclusion of an illegal levy among those which were legal in making up the aggregate sum for which sale was made. If it is within the competency of the Legislature to pass an act which shall have that effect, there is no doubt that it would prove exceedingly serviceable in the collection of the public revenues; and if the State interest alone were in question it might be a politic and useful statute.

But the public convenience is to be subserved in all cases without disturbing the foundations of private security; and we must see whether these are respected by the act under consideration. To determine this we must have in mind the method provided for enforcing tax liens upon land. That method is to add together all the taxes for the year, with the interest or penalty for delay, and expenses of advertising and sale, and then to sell sufficient of the land to pay the aggregate sum. The competition of bidders is directed to the

upon such real estate, together with all legal costs and charges thereon, were tendered to the officer authorized to receive such redemption money, within the time limited by law for the redemption thereof; and all taxes assessed upon any property in this State shall be presumed to be legally assessed until the contrary is affirmatively shown; and no sale of real estate for non-payment of the taxes thereon shall be rendered invalid by showing that any paper, certificate, return, or affidavit required to be made and filed in any office is not found in the office where the same ought to be filed or found; but, until the contrary is proven, the presumption shall be, in all cases, that such certificate, paper, return, or affidavit was made and filed in the proper office."

quantity of land that will be accepted for the sum charged against the whole parcel taxed, and the lowest quantity which any one offers to take will be set off to him from the north end of the parcel. If therefore when only five dollars are lawfully due, ten dollars are charged, and the whole tract sold for the payment, it may well be said that the south moiety is unlawfully taken, because it is presumable that whoever would pay the whole sum for all the land would pay half the sum for half the land. No doubt there would be many cases in which this would not hold true; but no one could assume—certainly no court, as a foundation for legal judgment—that purchasers in bidding upon quantity would be wholly uninfluenced by the amount of the tax to be paid, and would demand the same quantity of land when a small sum was to be paid that they would if it were large. On the contrary there must be a legal presumption that the land demanded bears some proportion to the sum to be paid, and that when the amount is in part illegal, some portion of the land sold has gone to satisfy an illegal demand, and would not have been sold at all if only what was lawful had been called for.

It is said, however, that the illegality should not defeat the sale, because the power to sell sprung under the law from the delinquency in the payment of the legal tax, and the sale being made under lawful power, any irregularity or excess in its execution is not necessarily fatal, but may be cured, prospectively, or retrospectively, by legislation, as the statute in question attempts to do. But the lawful power is a power to sell so much only as is sufficient to pay such taxes as the law has authorized; and no attempt has been made to execute such a power here. It is not a case of mere excess in the execution of the power by the officer entrusted with it; for the sum to be demanded was so made up that he could not, if he would, have offered to sell for the legal tax alone; he must sell for the amount reported to him as due, and was powerless to confine the sale to the lawful tax and lawful charges, however willing he may have been to do so.

A plausible argument might be made in support of such a sale if the statute made suitable provision for a remedy in

behalf of the party whose land is thus appropriated. In Connecticut it has been held competent to provide by statute that execution sales shall not be held invalid by reason of the officer having charged excessive fees, and included the amount in the sum for which sale was made. *Beach v. Walker* 6 Conn. 197; *Booth v. Booth* 7 Conn. 350; *Welch v. Wadsworth* 30 Conn. 149. But the officer in such case would be liable to the party wronged by the extortion, and what the party lost in property would be recovered in money. It has not been suggested that in this State there would be any corresponding remedy against the county treasurer, who is the officer by whom tax sales are made. In most cases he is in no way connected with irregularities and can have no knowledge of them; he receives a list of lands with the charges upon them, makes the sale and accounts for the money to the authorities apparently entitled to them; and when he has done this, there is no ground for holding him liable for illegalities not chargeable to himself. *Dickins v. Jones* 6 Yerg. 483; *Lincoln v. Worcester* 8 Cush. 55; *Crutchfield v. Wood* 16 Ala. 702; *Abbott v. Yost* 2 Denio 86. And there certainly could be no remedy against him in a case where the lands were struck off to the State for the want of bidders, as was the case here; for no money passed through the treasurer's hands on State bids, and his connection with the case is limited to the entries he makes on his books, and to his returns to the Auditor-General. Upon these entries and returns no action could arise at the common law, and no statute has given one. The remedy, if any exists, must be found in following the illegal levy, and finding the person, officer or municipality by which the money obtained thereby was finally appropriated.

It is sometimes matter for serious regret that a court is compelled to declare a sale for taxes invalid where apparently no great injustice has been suffered; but when the necessity arises it is commonly because tax officers persistently disregard the limitations which are imposed by express statute upon their authority. Mere irregularities the courts may overlook, but they are powerless to sustain illegal action. In

the case of *Wilson v. McKenna* 52 Ill. 43, it was said that a similar statute had long been a dead letter on the statute books of Illinois; but at last when some one claimed rights under it, it was held unconstitutional. See also *Reed v. Tyler* 56 Ill. 288. We find no escape from the same conclusion.

It is said with much truth that the owner of the land in these cases is entitled to no consideration, for he might have paid the legal tax and avoided the sale. But while this is true, it is also true and is notorious that tax delinquencies are often the result of accident or fortuitous circumstances; such as the death or disability of owners, errors in making or offering to make payment, neglects or omissions of officers, and so on. The purpose of the law is to make the sale of the land for the lawful tax and charges the sole penalty for the failure to pay, whether the failure is blameable or excusable. Equitable circumstances cannot come in to affect the sale, whether they operate one way or the other. If one by accident or misfortune loses the land, he is helpless; if he defeats a sale because the official steps leading to it are in disregard of the law, the blame primarily should rest upon the officers themselves.

There is one fact having much to do with tax delinquencies which has hitherto received little attention, though deserving much. It is the heavy penalty that is imposed when payment is not promptly made. Were this penalty merely interest—even the highest interest individuals may take—nothing could be said against it; but twenty-five or fifty per centum is added in order to induce a more prompt payment into the State treasury; and this too at a time when the State treasury is overflowing. No doubt it has the effect intended in a great many cases, but it also fails in a great many, and the rapid accumulation, especially when some portion of the tax is illegal, becomes then a reason for refusing to pay at all. This is particularly the case when special taxes like those for drains, are laid; for these are generally heavy, and are not unfrequently laid in total disregard of the law. One who finds it impossible or inconvenient to pay such a tax when it comes due is not likely to be brought to the mind

to do so by the addition of a penalty afterwards, and the larger the penalty the greater is his inducement to seek refuge in litigation. We have no doubt that much of the large accumulation of local taxes now carried by the State is due to excessive penalties; and so long as the State carries them, local officers are encouraged to make excessive levies for local purposes. They get the money even when the tax is illegal; the State carries the burden, and the owner contests his liability. However unwilling the courts may be to aid him, the heedlessness with which the several steps are taken in tax proceedings often leaves them no choice.

The judgment must be reversed with costs and a new trial ordered.

CAMPBELL and GRAVES, JJ., concurred.

MARSTON, C. J., dissenting. I have been unable to concur with my brethren in this case. If anything is settled beyond dispute, it is that the right of imposing taxes and the manner of levying and collecting the same are matters exclusively within the power of the Legislature, and the tax payer has no constitutional right to a trial at law as a condition precedent to a sale of his property as a means of enforcing payment of the tax.

Every man is presumed, nay bound, to know the law. The owner of real property situate in this State knows that the State derives its revenue principally from an imposition of taxes upon real estate, and that a prompt collection thereof is absolutely essential to the maintenance of the honor—indeed of the life of the commonwealth. He also knows that the law has given him an opportunity to appear in person or by an agent and examine, and if necessary have corrected, the assessed value of his lands. He farther knows that taxes for various purposes will be spread upon the roll, which will then be placed in the hands of a public officer for collection; and that if not paid by a stated time the lands will be sold therefor on a day certain, after public notice of such sale shall

have been given; and that if not redeemed within a prescribed period the purchaser will receive a deed of such lands from the State. He also knows that from the time the roll is placed in the hands of the proper officer for collection of the taxes assessed thereon, up to the time when a deed may be given, a period of about twenty months, he may pay or tender the whole or such part or portion of the taxes as were legally assessed against his lands, with the legal costs and charges, and by so doing thereby fully protect himself against all illegal exactions. With full knowledge of all such facts, of the law and of his right to thus protect himself, and that it is not only his legal but moral duty to contribute to the support of the government which protects him in the right and enjoyment of the property so assessed, by at least paying all legal taxes, he neglects or wilfully refuses to pay even them and permits his property to be sold at a public and *prima facie* valid sale, in reliance upon his ability to show that a fraction of the taxes were illegal and thus defeat the whole,—it is clear that under such circumstances the delinquent tax payer has no equitable considerations favorable to relief.

I am aware that some courts have gone very far—indeed have been astute—in finding defects under which tax deeds could be declared void, and especially has this been so where any part of the tax, however small, was found excessive or illegal. How far such decisions should be followed, in the absence of legislation such as we now have under consideration, is immaterial in the present case. The strong, and it seems to me the only sound argument, worthy of consideration, which can be presented against the validity of this act is that advanced by my brother Cooley, touching the method of selling the land.

To my mind this is not of so much force in view of the actual practice, which I think should not be overlooked. It is but rare indeed that less than the entire tract is sold for the taxes assessed thereon, without any reference to the value of the land or the amount of the taxes; and this is because of the supposed worthlessness of tax titles, few being willing to

bid at such sales and they largely as a matter of speculation. In the next place the great bulk of the tax usually is valid, so that the illegal portion could have affected the quantity of land sold in but the slightest if indeed in any important degree.

In view of the knowledge which the owner has relating to the assessment of taxes; of his opportunities to appear and be heard; to pay such part as may be legal; and of the consequences of a refusal, why should he not be bound when he stands by and permits a sale and conveyance to be made? Where a party is brought into a court which has jurisdiction over the subject matter, and there permits a judgment to be rendered against him, and a sale of his property to be made in satisfaction thereof, he could not afterwards come in and have such sale set aside, because illegal claims were included in the judgment. A remedy is given the party and if he fails to pursue it, he is concluded, and yet even in such cases, courts frequently give relief, if applied for in season, on condition that the proper amount is paid or stands as a valid claim.

It may, however, be said that the State is selling the lands of an individual upon a claim a portion of which is illegal and that this it has no power to do. This is true to the extent that a part of the amount for which the land was sold was not a proper charge, but the owner permits the sale to be made with the intention of not simply protecting himself against an illegal exaction, but farther to cheat the government out of its legal proportion of the same claim. Why in tax matters should the rights of the citizen be superior to those of the government? But it is the duty of the government to have the law observed in the assessment and collection of its taxes; this is undoubtedly true, but the government must work through imperfect human agencies, and it is equally the duty of the land owner to pay what has been legally assessed. Here are corresponding rights, duties and obligations. The Legislature has endeavored to give the owner of real estate full and ample opportunity to protect himself, but at the same time insisting that he must respect the rights of the government, and it is only upon his neglect or refusal to

respect this latter right that his property is sold as a mode of enforcing obedience.

Is this beyond the power of the Legislature? I think not. In *Sears v. Cottrell* 5 Mich. 251, it was held that the Legislature had a constitutional right to authorize one man's property to be seized and sold for the taxes of any other person in whose possession it was found, and the only redress allowed was an action against the person for whose taxes it was sold which, in case of his insolvency, rendered the remedy one of questionable value. In such a case the party is deprived of his property to satisfy a claim which he is under neither a legal nor a moral obligation to pay. Without discussing this question at any greater length I am of opinion that the fact that a part of the taxes for which lands were sold was illegal should not render the sale and conveyance void; that the owner of the land, with full knowledge of the remedy afforded him, and not thinking proper to avail himself thereof, ought not afterwards, under the guise of protection, to be absolved from the payment of what legally and justly belonged to the State. A strict enforcement of this law can injure none, while it will be of incalculable benefit to the government, and for these reasons I am of opinion that the statute should be sustained.

In reference to the question of interest, but without expressing any opinion upon the effect thereof, I concur in what has been said by my brethren.

Under section 1036 of the Compiled Laws, any person interested could pay returned taxes at any time up to September 20th next preceding the time appointed for sale of the lands, with interest thereon at the rate of 15 per cent. per annum from the first day of February next after the assessment; *provided*, that on all taxes remaining unpaid on the first day of June next after the same were assessed, the interest should be computed at the rate of 30 per cent. per annum from February 1st. This section has since been amended and the rate reduced.

After a sale of the lands, owners thereof or of any interest therein, could redeem at any time previous to the thirtieth

day of September succeeding the sale, by paying the taxes for which their lands were sold with interest thereon at the rate of fifty per cent. per annum, of which interest one-half went to the State and the other half to the purchaser at the tax sale. § 1059. The interest in all such cases was computed from the day of the sale up to the end of the current quarter of the year limited for redemption. § 1060. Section 1059 has also been amended and the rate reduced.

Now without attempting to follow up this legislation, it is well settled that a penalty is thus imposed under the guise of interest. *F. & P. M. Ry. v. County Treas.* 32 Mich. 260.

It has been said that this question of interest is one altogether within the power of the Legislature, limited in amount only by the wisdom and discretion of that department. If this is so, then there is no legal limit to the amount of the penalty that may be imposed, and in the light of §§ 1059 and 1060 it can hardly be said the discretion is one not likely to be abused.

But let us see whether the matter is one so clearly within the power and unlimited discretion of the Legislature. The right of the Legislature to establish a general and uniform rate of interest will not be questioned, but under no circumstances can this be recognized as such. It fluctuates; the rate fixed at a certain percentage is, at a future day certain, increased, and such increase made to refer back over past time, and also to be computed to cover a fixed period of which but the merest fraction may have arrived. What good reason there can be for this last provision is somewhat difficult to discover. It is certainly no encouragement to a prompt payment; the default of a day is punished as severely as the one of months. Interest usually is supposed to cease running on payment of a past-due debt, but this provision is based upon no such maxim. It is therefore but a penalty pure and simple.

Penalties are usually imposed as a punishment, and are supposed to bear some relation to the wrongful act done or omitted, and the circumstances attending the same. Here there is no such discrimination; the penalty is not imposed

to discourage fraud, or designed to operate as a check thereon. The man who wilfully refuses to pay his taxes, although abundantly able, is punished no more severely than he who has failed through inadvertence or inability, however caused; and the same is true as to minors and others who are entitled to and usually receive lenity and protection during their disability.

This penalty is arbitrarily imposed, largely for the benefit of private individuals, and the person against whom it is imposed has no opportunity given him to appear in any way and contest it. There is no judicial determination that a penalty has been incurred, and where a sale has been had there is not even the semblance of notice, or any act except computation of the amount by a ministerial officer. Nor is there even a pretense that the State thereafter has the slightest interest in the question of payment or non-payment by redemption or otherwise, as the risks after a sale and purchase by a third party are purely private in their nature and of no concern to the State. The certainty of a reasonable interest to the purchaser, with a probability, if not redeemed, of acquiring title to the lands, should be to him sufficient encouragement and protection. Nor can this penalty be considered as a part of the tax. If it could be so considered it would still be open to fatal objections. The essential requisite of all taxation requires it to be for public purposes, and whether we consider this penalty as payable to the State or to individuals, it is lacking in this respect.

Respectable authorities will be found in support of the views above expressed. See *Scammon v. Chicago* 44 Ill. 269; *Wauwatosa v. Gunyon* 25 Wis. 271; Cooley on Taxation p. 313, and cases cited.

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ALVAH FULLER v. SUSAN J. HANNAHS.

Error to Allegan. Submitted June 17. Decided Nov. 10.

EJECTMENT. Defendant brings error. Affirmed.

Cowles & Cahill for plaintiff in error.

Williams & Humphrey for defendant in error.

COOLEY, J. The case of *Silsbee v. Stockle*, just decided, ante, p. 561, governs this. The questions which arise on the merits of this case were in that also, and are decided against the positions on which the plaintiff in error relies. The certificate to the assessment roll in this case is differently worded, but we do not think that in substance it complies with the statute; on the contrary, so far as personal property is concerned, the reasonable inference is that the certificate was deliberately so drawn as to evade and defeat the statutory purpose.

The judgment must be affirmed with costs.

The other Justices concurred.

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RICHARD GENEY v. MATTHEW H. MAYNARD, MARLOW H. CROCKER, EGBERT J. MAPES AND JOHN HALL.

Equity pleadings—Bill to quiet title—Complainant's possession—Sale on execution—Homestead rights.

A court is not bound by the opinion of the counsel concerning the theory of a bill for relief, but whatever the purpose of its allegations, is governed by the case actually made by the bill.

A bill which is so framed as to call for redemption, and the setting aside of interfering obstructions on equitable grounds, even though it contains allegations appropriate to a statutory proceeding to quiet title,

presents a case which falls under the inherent jurisdiction of the court of chancery and needs no statutory aid.

Occupancy of rooms in a building containing several separate leaseholds is not to be assumed to be the "actual possession" required in one who seeks to quiet title to the premises, in the absence of a showing that he does not hold under defendants; and if he does not, he is in a situation to bring ejectment for the holdings occupied by others than himself.

Where several judgments against the same person are taken at the same time and are issued, delivered for service and levied at the same time, the sheriff, unless directed otherwise, may offer the premises on which he has levied, to be sold together, under all the writs.

Where a man owning two lots has put up a single building covering one of them and a small part of the other, the premises so covered should be sold on execution as one parcel.

Where the owner of two lots takes up his residence on one, and puts up a building which covers all the other lot and a small part of that on which he resides, his homestead right does not cover that portion of the residence lot used for the building.

Appeal from Marquette. Submitted June 17. Decided November 10.

BILL to remove cloud from title. Complainant appeals. Dismissal affirmed.

F. O. Clark for complainant.

D. H. Ball and *M. H. Maynard* for defendants.

GRAVES, J. Many topics are agitated in this case, but they are generally moot questions. Both counsel have assumed that the bill is filed under the statute to quiet title. Admitting this to be correct, the record discloses insuperable objections.

Waiving the point raised by the defense that complainant is proved to have no title, it is only needful to refer to the defect relative to possession.

The subject matter of the suit is a parcel of land of lot 39 and seven feet off of lot 40 in Negaunee, covered by a building containing two stores and several rooms above suitable for various purposes. The bill applies to the premises as an

entirety and not to any particular part or portions in severalty. At the time of the bill and long prior thereto the several parts of the property were held separately by independent occupiers and not jointly or in common, and it is too plain to admit of question that complainant was not an occupant, or in possession of the stores and a portion of the room overhead. Granting that he was occupant of some of the rooms on the second floor, it is not to be assumed that his occupancy there was the "actual possession" required by the statute, or anything beyond a holding under the possession of Crocker and Mapes. But if otherwise it was a possession which went no further than the actual occupation, and in view of the claims made by Crocker and Mapes and the occupancy of the other portions he was in a situation to bring ejectment for the holdings beyond those occupied by himself.

If therefore we contemplate the bill as counsel have regarded it, the case it makes is different from the case made by the facts. But the court is not bound by the opinion of counsel concerning the theory of the bill. We are to look at the case made, and though allegations appear which are appropriate to a bill under the statute to quiet title, still, if in fact the bill is constituted to call for redemption and on grounds of equity to set aside or displace interfering obstructions, a case is presented which falls under the inherent jurisdiction of the court and needing no aid from the statute. *Ormsby v. Barr* 21 Mich. 475; s. c. on motion for rehearing 22 Mich. 80; *Jones v. Smith* id. 360. See also *King v. Carpenter* 37 Mich. 363. And this bill is so far within this theory as to make it expedient to see what in effect is the case actually set forth under it.

The allegations are that in 1867 the complainant owned adjoining lots 39 and 40 in Negaunee, each being thirty-three feet in width, and with his family resided in a small building situated on the east twenty-six feet of lot 40; that on the 26th of September of that year he borrowed of John Maroney, for the purpose of erecting a block on the premises, the sum of $800 to be repaid in one year with interest at ten per

cent., and to secure the loan gave his note and a mortgage on the two lots, his wife joining in the mortgage; that he went on with his enterprise and put up a two-story building designed and arranged for several separate leaseholds and covering all lot 39 and a narrow strip seven feet wide off of the west side of lot 40, and worth $2000; that in making this improvement he fell in debt several hundred dollars beyond the money borrowed of Maroney, and May 9, 1868, these debts passed into three judgments in favor of as many different creditors, and aggregating, inclusive of the taxed costs, the sum of $1233.48; that defendant Maynard acted as attorney on the part of these creditors, and likewise held the mortgage as attorney for the mortgagee; that by his direction executions were issued to the sheriff, who levied on the parcel covered by the new building, and on the 28th of December, 1868, sold the same to Maynard and gave him a certificate of sale:—a copy is set forth in the bill; that about three and a half months later and on the 17th of April, 1869, Maynard began foreclosure of the mortgage by publication, and on the 17th of July following became purchaser in that proceeding of both lots 39 and 40 as one parcel, for $909; that on the 12th of April, 1870, and when the fifteen months for redemption from the sale on the executions had been out a month and the time allowed the debtor had been out four, and when about three months' redemption time by statute was left to redeem from the foreclosure sale, complainant sold and conveyed the east twenty-six feet of lot 40, being that portion not appropriated to the new block, for $1050; that said sale was made with the assent and approbation of Maynard and under an agreement with him to have and receive the proceeds and apply the same to the payment and redemption of the mortgage sale, there being more than enough for that purpose, and whatever should remain, to credit on the judgment debts, and that said sum was so paid and received and the mortgage thereby satisfied in fact; that complainant did not understand that any writing was necessary to show the fact of the payment and redemption of the mortgage, and did not receive any; that Maynard explained

that he merely wished to realize the debts, and then agreed, as he had frequently promised, to allow complainant a year beyond the statute time to redeem from the execution sale, and that the proceeds of any part of the property complainant might sell, together with the rents, should be paid over to apply on the debts; that except a portion on the second floor which complainant had proceeded to occupy after selling the east twenty-six feet of lot 40, the new block covering the rest of the two lots was held in separate parcels by tenants not connected in any way, and Maynard was the recipient of the rents; that the sale under the executions was irregular and void, and the reason complainant did not contest it and cause it to be set aside was the before mentioned agreement with Maynard for redemption; that Maynard received by way of rents nearly sufficient to satisfy the judgments, and that complainant has been ready and willing always, and now offers to pay the balance whatever it may be; that the illegality in the sale on the executions is in this,—that lot 39 and the seven feet strip off of lot 40 were sold as one parcel on one bid on all three executions for $1200, and that lot 40, from which the strip was taken, was complainant's homestead; that Maynard has refused to carry out the agreement for redemption, and has taken deeds on the execution sale and on the foreclosure, and has conveyed lot 39 and the seven feet off of lot 40 to defendant Crocker, who purchased for defendant Mapes as well as for himself and quitclaimed to him accordingly, after having mortgaged to Hall to secure a debt both owed him; that Crocker, Mapes and Hall respectively had notice of complainant's equities, and the two former claimed title to lot 39 and seven feet off of lot 40 under the purchase from Maynard, and threatened to expel complainant.

Although it may not be strictly necessary for the purpose of reaching a decision, still a brief reference to what we understand to be the objections against the sale on the executions will not be quite out of place. The first seems to be that, as there were three executions, it was contrary to law to offer the premises at once and under all these writs. It occurs immediately to inquire how otherwise the property

should have been offered? The judgments were all taken at the same time, and so far as there is evidence of what occurred, it seems that the executions were all issued, delivered for service and levied at the same time. The liens arose simultaneously and no fact is indicated to entitle either to a preference in law or equity.

Clearly there was no other course open to the sheriff in the absence of an authoritative direction outside of his writs. He could not justify himself in making any distinction, and had he assumed to sell on one alone the court must have given the same effect to it as though he had sold on all. The principle was acted on in *Campbell v. Ruger* 1 Cow. 215.

It is further objected that inasmuch as the law requires where executions are laid on "several known lots, tracts or parcels," that "such lots, tracts or parcels shall be separately exposed for sale," it was not lawful to sell lot 39 and the seven feet off of lot 40 as one parcel. The point has no substance. The premises were neither "several" or two "known lots, tracts or parcels." By covering lot 39 and the little adjoining strip of lot 40 with the new building under the circumstances proved, the complainant as to this question converted the undivided or whole lot 39 and the fragment of lot 40 into an entirety and caused it to be one "known parcel" instead of two. It would have been absurd to treat this strip of seven feet in width and encumbered by the side of the new block as a separate and distinct parcel for the purpose of levy and sale. A leading object of the statute is to secure the best price attainable, and nothing could be much better adapted to defeat it than such a construction and application as this objection implies.

The last point is that the sale of this strip off of lot 40 was wrong because lot 40 was complainant's homestead. The fact necessarily involved is not true. The strip in question, whatever may have been the character of the whole lot originally, was not a homestead or parcel of one. It was severed from the remaining twenty-six feet of the lot by the voluntary act of complainant. He retained his place of dwelling on the rest of the lot, and deliberately appropriated the seven

feet to something else. He devoted it to a foreign use. He caused it to become incorporated with the territory platted as lot 39 in order to sustain a business block, and deprived it of every badge and quality of a homestead property. In fine, he "selected" as his homestead, and held in occupancy as his homestead, if any place, the remaining twenty-six feet of lot 40, and "selected" this strip to be *not* held or "occupied" as a homestead or as a parcel of one.

It has been observed that the bill makes no complaint of the mortgage and contains no averment against the validity of the sale on foreclosure or of any of the proceedings. The sufficiency of the foreclosure to carry a good title is virtually conceded. The position is that the proceedings were prevented from ripening into a perfect title in Maynard by the fact of payment and substantial satisfaction of the mortgage on the 12th of April, 1870, and about three months before the expiration of the time allowed for redemption, and this is the central fact and essential equity in complainant's case. The mortgage was executed by both complainant and his wife in 1867, before the building was put up, and on both lot 39 and lot 40. If in fact it was not paid, the case fails. No foundation remains on any possible theory of the bill. A perfect title followed, and the controversy about the sale on the executions, is, for the purpose of the present case, of no importance.

The important inquiry, therefore, is whether the evidence sustains the complainant in regard to this pivotal fact in the case made by his bill. There is substantial agreement in the testimony that complainant on the 12th of April, 1870, conveyed the east twenty-six feet of lot 40 for $1050 with the approbation of Maynard, and that the proceeds in money and short-time securities went immediately into Maynard's hands. That he gave the buyers his written undertaking to release this purchase from the mortgage on their paying those securities on or before July first is well proved; and the fact is also established that on their completing the payment some few weeks later than the time fixed, he did release by giving them his quit-claim deed.

The evidence agrees that as part of the transaction on the 12th of April there was an understanding between Maynard and complainant that the former should have the rents of the new block and apply them on the remaining indebtedness, and it seems that something was afterwards received by him from this source, but exactly how much is left uncertain. Maynard claims that the amount was small, and complainant admits it was much less than what remained of his indebtedness.

But the disagreement is absolute in regard to what application of the $1050 was agreed on. Complainant swears positively that this was raised by sale of the twenty-six feet of lot 40 and paid to Maynard and received by him in satisfaction of the mortgage debt and redemption from the foreclosure, and that there was an excess of $72 or $73 which was agreed to be applied on the judgment debts, and that the whole transaction, except the conveyance of the twenty-six feet, was oral, and that he, complainant, received no writing whatever in regard to it. To some extent the complainant is corroborated. But the proof is clearly against him and a single item from one of his witnesses lets in some light concerning the likelihood of his being mistaken. In consequence of liquor he was not always in a condition to justify confidence in his attention or his memory.

Maynard swears that the proceeds of the sale of the twenty-six feet of lot 40 were not received on the mortgage, but on the judgment indebtedness, and that the agreement was that they should be so applied; that only $600 of the $1050 was received on the 12th of April, the residue not being realized until later, and that he gave complainant on that day his written engagement to apply the amount then received, $600, on the judgment indebtedness. The evidence supports this explanation. The legal time for redeeming against the execution sale had already expired and it is probable that complainant was trying to rescue the property from that sale rather than from the other on which there still remained three months, and if the arrangement had been as complainant now thinks, that the mortgage was considered satisfied, the

purchasers of the twenty-six feet of lot 40, who were concerned in the transaction, could have had no very sensible reason for insisting, as they did insist, on a release from Maynard as a condition. The mortgage being out of the way, Maynard had no claim on the twenty-six feet.

As already stated, the main fact of complainant's case, that the mortgage was paid, is actually disproved, and the effect of the evidence is that nothing was ever received applicable to it, and that Maynard never intended to open the foreclosure unless on payment. The judgments were given May 9, 1868, and the damages aggregated, after correction of one of the judgments by striking off $100 which had been included by mistake, the sum of $1177.03, and computing interest at seven per cent. to the 12th of April, 1870, when the homestead property was sold, the sum at that time was $1335.62. Deducting the proceeds of that sale, there still remained $285.62 exclusive of the taxed costs, which were $57. If the sum at which the property was struck off on the execution sale is taken as a basis, the difference is small. The sale was December 28, 1868, and the price $1200. On April 12, 1870, it amounted, with interest at seven per cent., to $1309.50, and deducting the price obtained for the homestead there would yet remain $259.50.

Without stopping to notice the theory of complainant's pleading or the shape of his case as marked out by his oath, the weight of evidence determined that the arrangement or understanding between complainant and Maynard, whatever was its precise character, was terminated in the fall of 1870, and that the whole amount which had been received at that time was considerably less than the judgment debts whether we consider the damages and interest, or the price bid on the execution sale and interest, as the equivalent of the debts, and that although the mortgage debt was accumulating interest at ten per cent., no surplus arose out of the transactions referred to, to be applied upon it.

I am of opinion that the decree dismissing the bill cannot be rightly disturbed and should be affirmed with costs.

The other Justices concurred.

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WALDO AVERY AND CHARLES EDDY v. THE CITY OF EAST SAGINAW.

Taxation—Assessment at cash value—Notice of increased assessment.

The constitutional requirement that property shall be assessed at its cash value (Const., Art. xiv § 12) is as much designed for securing against overvaluation as undervaluation.

A tax payer's assessment cannot be raised by a city board of review without such notice to him as will enable him to appear and object to the valuation on which it rests; if raised without such notice he is only liable upon the former assessment, and if he pays the whole under protest he can recover back the excess in an action against the city therefor.

Case made after judgment from Saginaw. Submitted October 5. Decided November 10.

ASSUMPSIT. Plaintiffs had judgment. Reversed.

Wisner & Draper for plaintiffs. Valuations cannot be raised without notice to the tax payer: Cooley on Taxation 266–8; *Sioux City Pacific R. R. v. Washington County* 3 Neb. 30; *South Platte Land Company v. Buffalo County* 7 Neb. 253; *Patten v. Green* 13 Cal. 325.

City Attorney *Lawson C. Holden* for defendant. An assessment may be changed without notice to the tax payer: *Hambleton v. Dempsey* 20 Ohio 168; if an assessment is excessive, there can be no recovery except for the excess: Cooley on Taxation 534 n. *a*; *State v. McClurg* 27 N. J. 253; *State v. Quaife* 23 N. J. 89; *State v. Kingsland* id. 85.

CAMPBELL, J. Avery & Co., the plaintiffs, recovered judgment in the circuit court for the county of Saginaw against the defendant for $453.52 and interest, being city taxes paid under compulsion and protest as unlawfully assessed. Judgment was given in their favor for the full sum claimed. The facts show that plaintiffs, who reside in

East Saginaw, were assessed there in 1879 as partners, for the sum of $6000 as the value of their personal property. When the board of review met, it held sessions for ten days, during which plaintiffs made no complaint or appearance; and on the last day of the meeting the assessment was changed by the board without notice to them, and without any proceeding beyond this: "Supervisor Edsall moved to raise the personal assessment of Avery & Co. from $6000 to $23,000. Carried."

The tax paid was on the assessment as thus raised. The city claim the change was lawfully made.

The assessment of property is required to be made in the first instance in conformity with the general State law, except as to the time of its completion, and the manner of review. When the assessment is completed it is filed with the city clerk, and reported to the council, who appoint the time and place of meeting of the board of review, of which ten days' notice is to be given. Charter, tit. v, § 5.

The assessor, city attorney and supervisors are made such board of review, and are required to meet at least three and not more than ten days. The charter provides that "they shall have power, and it shall be their duty to examine said assessment roll, and correct any errors found therein, and reduce or increase the valuation of any property found on said roll, and to add thereto any taxable property in said city that may have been omitted, and to value the same as provided in the general tax laws of this State." "Any person desiring to do so, may examine his or her assessment on said roll, and may show cause, if any, why the valuation thereof should be changed, and the said board shall decide the same, and their decision shall be final. The concurrence of a majority of said board shall be sufficient to decide any question of altering or correcting any assessment complained of; and the members of the board shall have power to administer oaths and examine witnesses the same as supervisors of townships, as provided by the general laws of the State. The said board shall keep a record of their proceedings, which

shall be signed by a majority of said board, and deposited with the city clerk." Charter, tit. v, § 6.

It is observable that this charter, in order to perfect the assessment, adopts the general law as furnishing the means and analogies of procedure. The Constitution requiring assessments to be at the true cash value, it became necessary, in order to protect tax payers, to have some means provided whereby in case of an overvaluation they might have it corrected. The constitutional provision is as much designed for securing against overvaluation as undervaluation. The general tax law furnishes very full means to the assessing officer for getting at the correct materials for a true assessment, but it also requires him to make an investigation and hear evidence if offered, and the final determination can only be had after such an opportunity has been given. No one has any occasion to make a showing until an *ex parte* finding has been made which he deems wrongful, and no *ex parte* finding is final until there has been such notice given of it as will enable the person assessed to know its amount and attack it if he chooses. Comp. L. § 986. Under the general tax law there can be no change made prejudicial to the tax payer after the roll has been made up for review, and he may therefore rest upon it if not excessive.

The powers of the city board of review are broader in some respects than those of the township assessing officer, because they can enlarge the assessment in some cases. But there is nothing in the charter indicating an intention of allowing this to be done with any less care or responsibility than that required of the original town assessors. The board is to value the property it deals with "as provided in the general tax law of the State." See p. ——. The general tax laws do not allow any change of valuation except on a proper examination, and they allow no valuation to stand, until there has been an opportunity of investigating it on the part of the property owner. The assessment must in the language of the law be "complained of," which signifies at least some distinct reason to be so suggested that it may be examined into in some responsible way. Whatever may be

the presumable familiarity of these officers with the value of specified lands, it is neither presumable nor possible that they can have any such absolute and complete knowledge of the nature or condition or quantity of personal property assessable against citizens, as should preclude any examination to change their estimate, and it is contrary to the whole spirit of our laws, and not in any way compatible with the positive requirement of determining cash value, for any *ex parte* views to determine it finally. In the present case the change was made without anything further than the motion of a member of the board. It was made on the last day of the meeting, and in the absence of the plaintiffs below, who had no notice of any attempted change. It was made without any inquiry on oath or otherwise into the facts in the presence of the parties, and acted upon like any mere matter of business detail on such knowledge as the board supposed they possessed.

As the change when made is final, there must be an opportunity of some kind to complain. We do not think that this opportunity was given. It cannot be expected that the entire body of tax payers can attend the sessions of this board constantly, as they would have to do in order to be sure they were not subjected to increased burdens. While no great formality is possible in providing for doing justice in such cases, some reasonable notice should certainly be given before adding to an assessment. It is presumable that the assessor's work will not require many changes, particularly in repairing omissions. Most complaints will be of overassessments, and the persons interested in reducing these are always the moving parties, who will produce their proofs as soon as they find it is necessary. But additions to the roll when suggested must generally be urged by some one, in or out of the board, who is interested on behalf of the public, or who desires to compel other citizens to bear their share of public burdens. When such a complaint is made, if it has any reason in it, the nature of the supposed deficiency in the existing assessment must necessarily be known at once, so that the inquiry can be very speedily made when once opened. But unless

the tax payer has some notice of the proposed change he cannot be prepared to make his showing, no matter how unjust the change may be. The general tax law, to the spirit of which this board must conform, requires the opportunity, and there is no other way of getting it.

We think the court below held correctly that the change was unauthorized. But it follows from this that the original assessment should stand, and the tax paid up to that amount was a proper charge which the plaintiffs were equitably bound to pay. They should only recover the excess, which is at this date $351. They are entitled to this sum with costs of the circuit court, but defendant is entitled to costs of this court.

Judgment must therefore be reversed with costs of this court and a new judgment rendered on the finding.

GRAVES and COOLEY, JJ., concurred.

MARSTON, C. J., dissenting. I am unable to concur with my brethren in this case.

The charter of East Saginaw provides for a board of review and specifies the duties thereof, among which is the right to increase the valuation of any property found on said roll. The common council is to appoint the time and place where said board shall meet, and the charter requires that notice thereof "shall be given by the clerk of the common council at least ten days prior to the time of meeting, by publishing a notice thereof in the official newspaper published in said city, and also by posting the same in three public places in each ward of said city." I concede the correctness of the doctrine that no changes can be made by the board without notice to the person against whose interest such change is to be made, and an opportunity given him to show cause why no such change should be made, but in my opinion the general notice given by the clerk is all that is necessary and that no formal or special notice beyond this is required. Any other view it seems to me would but defeat the object of the statute and prevent any increase in the valuation of

property upon the roll, as the owner is not at all likely to personally appear and ask for such increase to be made.

If when the attention of the board is called to the valuation supposed to be too low, either by one of the members thereof or by a third person, the board can take no steps until notice of some kind is given the owner of such property, it must result that in very many cases no change whatever could be made. If a special notice is required, while it may be informal, yet by analogy it must be given the owner or person interested in the property, and a reasonable time and opportunity thereafter must be given him to appear and make his showing. The time within which the board must act and conclude its labors is limited to ten days, and if towards the end of the session, or indeed at any time, special notice must be given an owner, owing to his absence from the city, either intentionally or otherwise, or if from some other cause he cannot be notified, then the board would have no power to proceed farther in the premises.

We cannot assume that many such cases may not arise, or that the board should be required to cause personal notice to be given, while no method is pointed out or means given the board under or by which such notice may be given. I can see but little if any object in giving the general notice required by the charter if in addition thereto special notice must also be given in cases like the present. Under the general notice parties must attend the meetings of the board, as they would the sessions of a court, until their assessment is passed upon, and when once this is done, no change could afterwards be made without special notice, within the case of *Griswold v. Bay City* 24 Mich. 262. This may be an inconvenience to the tax payer, but it is one for the Legislature to remedy. It may be said that the board just before concluding its session may pass upon a large number of cases and thus afford no opportunity to object or show cause. This we cannot assume. We must presume that the board will act in a proper and reasonable manner, and should it appear in a given case that such has not been the fact, the law would afford a remedy.

I am of opinion the judgment should be reversed.

William Callam et al. v. Cyrus B. Barnes et al.

Discontinuance as to joint defendant—Liability of committee managing newspaper—Admissions as evidence.

Where the attorney for joint defendants has stipulated for a discontinuance as to some of them, the others, having practically acquiesced, cannot urge the non-joinder in bar of farther proceedings.

A committee understood to be in charge of a newspaper was sued upon acceptances given in the name of the publishing company by its business manager for goods sold on the credit of the committee. In fixing the liability of the members of the committee, who were shown to have been frequently about the office, and whose meetings appeared to be closely connected with the employment of persons engaged on the paper and with the commencement of its publication, it was *held* proper to introduce a letter to the plaintiffs from the business manager's successor assuring them of the responsibility of the gentlemen composing the company, and a document published in the paper itself, purporting to be signed with their names and showing their identity with the management. This evidence, in connection with testimony fairly tending to show that the business manager was not acting for himself, and that it was a duty of the committee to collect and pay over auxiliary funds and to exercise some supervision over the editorial department, made a case for the jury.

Admissions of parties may be admissible in evidence as part of the *res gestæ*, even though they cannot bind any one else.

Error to Wayne. Submitted Oct. 13. Decided Nov. 10.

Assumpsit. Defendants bring error. Affirmed.

O. F. Wisner for plaintiffs in error. A discontinuance as to one joint defendant operates as to all: *Winslow v. Herrick* 9 Mich. 380; *Ballou v. Hill* 23 Mich. 60; *Anderson v. Robinson* 38 Mich. 407. A printed document fixing the liability of those purporting to sign it cannot be put in evidence until the existence and execution of the original are shown: 1 Green's Pr. 549; 1 Greenl. Ev. § 560 n. 5; *Moulton v. Mason* 21 Mich. 364; *Sun Ins. Co. v. Earle* 29 Mich. 406; *McPherson v. Rathbone* 7 Wend. 216.

Henry M. Cheever for defendant in error. Members of provisional committees or managers of clubs are *prima facie* liable for work which they have authorized: *Lake v. Duke of Argyll* 6 Q. B. 477; *Doubleday v. Muskett* 7 Bing. 111; *Burls v. Smith* id. 705; *Braithwaite v. Skofield* 9 B. & C. 401; *Caldicott v. Griffiths* 8 Exch. 898; *Flemyng v. Hector* 2 M. & W. 172; *Delauney v. Strickland* 2 Stark. 416; *Barnett v. Lambert* 15 M. & W. 489; *Higgins v. Hopkins* 3 Exch. 163; *Bailey v. Macaulay* 13 Q. B. 815; they are also liable if the business is transacted by an agent: Lindley on Partnership 198; *Burnes v. Pennell* 2 H. L. Cas. 520.

CAMPBELL, J. Plaintiffs in error were originally joined with Benton Hanchett and Charles V. De Land in a suit upon two acceptances given in September and October, 1876, and maturing in November, 1876, at the end of the month. These were given in the name of the Saginaw Publishing Company, by B. L. Ransford, business manager.

All the defendants joined in one plea, and subsequently their attorney, Mr. Wisner, made a stipulation, June, 1878, followed by an order in September, 1878, for the discontinuance of the cause as against Mr. Hanchett, and by an agreement a discontinuance was agreed to against Mr. De Land on the trial in April, 1880. We do not think that these parties could object to any proceedings against themselves as improper after such a course in which they acquiesced. They cannot now rely on a non-joinder, when they have practically consented to it.

The controversy on the merits refers to the identity of these parties with the Saginaw Publishing Company. Plaintiffs, who are paper dealers, made an arrangement, through Mr. Boyd, their agent, to furnish paper at 30 and 60 days for a daily newspaper published in the name of that company. The original arrangement was made by B. L. Ransford, who was admitted to have been the business manager. Boyd was informed by Ransford that plaintiffs in error were the company, and sold on their credit. He had no personal interviews with any one else but De Land, who was owner of the

printing office, but had given the use of it to the persons, whoever they were, that conducted the paper.

The testimony showed that these parties were appointed a committee to manage the paper in some way. It is claimed the testimony failed to show their business connection with it. As a good deal of the testimony is circumstantial, there is some difficulty in determining how far it is legally deficient, and this can only be got at by comparison.

Ransford was not sworn, and only Draper of the defendants testified. Plaintiffs below introduced one Palmer, who showed very clearly that he understood he himself was employed on the paper in behalf of the committee, and that his employment was very closely connected with their meeting, and that Mr. De Land attended the meeting and reported to him.

This witness testified to knowing all the parties; to seeing them about the office more or less; to seeing them come to the meeting, a report of whose doings was given him by Messrs. De Land and Ransford; to the commencement of the daily publication immediately thereafter in accordance with that report; that witness was employed to do the job work, as he understood, for them,—and subsequently succeeded Ransford in November, when he was discharged or left.

Thus far the testimony was all pertinent and required only some proof of the privity in fact of the committee with the paper. Before closing their case plaintiffs below introduced a letter from Palmer written November 18th, just after the first acceptance became due and about a fortnight before the maturity of the second. This letter was written while he was in charge after Ransford's removal, and explains the delay as owing to Ransford's carelessness which had left the business in confusion. It assured plaintiffs that the gentlemen composing the company were men of position and wealth, and that their standing could be learned of the banks. This letter was objected to, but we think it was admissible and shown to be within Palmer's authority. It mentions no

names, however, and required the identification of the company.

In addition to this a document was produced published in the paper on the 26th of November, purporting to be signed by plaintiffs in error, and giving a history of the enterprise from its beginning in the previous August. It very clearly purports to show the identity of the signers with the management of the paper, and if traced to them would fix their liability. It was objected to as inadmissible, but we think it was evidence of the declarations and professions of the company, and would be helped out by testimony connecting the parties named. The question is whether this connecting testimony appears. It is certainly not without difficulty. The subsequent testimony of Mr. Draper throws some light on it, and will be presently referred to.

It appears positively from Mr. De Land's testimony that these gentlemen were appointed by a meeting of subscribers to act as a committee for some purpose in the application of the subscriptions, and it appears they were the only committee. There was conflicting testimony concerning Mr. Ransford, but there was testimony fairly tending to show that he was not acting for himself. Palmer was employed in the manner before referred to, and if he is to be believed, the paper had no managers, or else it had some committee whom he supposed and represented to be his employers. As business manager, he at least set forth to the world in its columns the manifesto of these gentlemen as his principals.

The defendants, through their witness De Land, introduced the proposal which he made for permitting the use of his office, which he testified contained his part of the arrangement. This paper on its face is an offer in accordance with a proposal made by him to the meeting. It is claimed to show that Ransford was intended to be not only manager, but responsible for everything. It is not, however, a proposal to which Mr. Ransford was on its face to be a party, and was addressed to some persons representing the subscribers. His connection with it was one of the questions before the jury.

Mr. Draper's testimony shows that he did not understand

the committee had any charge or responsibility for the paper, or for anything but collecting and paying over auxiliary funds; but it also shows that they were expected by the subscribers to see that Colonel De Land was not allowed to have any editorial articles of his own inserted (there being a difference of views with him), and he also testifies in general terms to the correctness of the statements of the article of November 20, 1876.

It seems to us that all of these things taken together left enough facts to go to the jury, and that whatever may have been the views of these gentlemen as to their own legal position, there was enough to put the whole case before that body. If so, the court was right in refusing to take the case into its own control and away from the jury.

The objections to some of the testimony have already been referred to. There were several which rest on similar grounds, as to the statements made by various persons. None of these were received as admissions binding any one else, but merely as facts and circumstances forming part of the *res gestæ*. As such they were proper.

The judgment must be affirmed with costs.

The other Justices concurred.

CHRISTIAN RATH, ADMINISTRATOR FOR ROBERT GRAHAM ET AL. v. JOHN VANDERLYN.

Sale to fiduciary agent—Good faith—Laches.

A man gave a general power of attorney to carry on his business, sell and dispose of any of his real estate, and collect dues. During his absence from the State, the agent closed up his business, obtained execution titles to part of his real estate, and made considerable collections. The principal returned and went into the army, and while home on furlough was induced to give his agent a deed of lands. After his return from the war, being unable to obtain any accounts from the

agent, he sued him for what remained due him and for the value of the lands conveyed, but having become broken down in mind and body and being declared incompetent, and put under guardianship, proceedings in equity were afterwards resorted to for setting aside the deed. *Held* that the grantee had the burden of proving implicit good faith and a perfect understanding and agreement on the grantor's part. But as the grantor had not moved seasonably to repudiate his deed, and as his action at law affirmed the sale but treated it as one where no value was fixed, and as he had since died and the precise facts could not be reached, the sale was sustained and the grantor's estate decreed to be entitled to the full value of the land at the date of its conveyance; and pending an accounting the property was to be subject to a lien for the balance due and the grantee restrained meanwhile from disposing of it until the final decree.

Appeal from Jackson. Submitted October 14. Decided November 10.

BILL for an accounting and to set aside a deed. Complainants appeal. Decree modified.

Grove H. Wolcott and *Austin Blair* for complainants.

G. T. Gridley for defendant.

CAMPBELL, J. The bill in this case was originally filed by the guardian of Robert Graham, now deceased, who had been declared incompetent by the probate court of Jackson county, and after his death, was revived in favor of heirs and representatives, against John Vanderlyn to compel an accounting of fiduciary matters, and to avoid a deed alleged to have been obtained by fraud from Graham. The court below decreed an accounting, but refused to set aside the deed, and complainants appeal from this refusal. As this narrows the issues, a brief statement of the controversy will be enough to explain the merits.

Graham was in 1859 and previously engaged in the boot and shoe business at Jackson and had been reasonably prosperous. He had in his employ the defendant, Vanderlyn. On the 12th of July, 1858, Graham executed to Vanderlyn a general power of attorney, authorizing the latter to carry on this business in all its departments, to sell and dispose of

any of his real estate, to settle his debts and collect anything due to him. The authority was very broad and general. The bill states this was given in view of a visit to California. The answer states that Graham had no such design until 1859, when he did go there and remained some two years. The real reason is not made clear, and the transaction was certainly a peculiar one. Vanderlyn claims, and it is probable, that he did not assume control until 1859, Graham continuing his own business in the meantime. During his absence Vanderlyn closed up the business entirely and obtained execution titles to a part of the real estate, and collected considerable money which he claims to have paid out for debts and expenses. On his return from California, or not long after, Graham volunteered in the army. He came home on a short furlough in 1864, and immediately before his return to the front, he made a deed to Vanderlyn which is the one in controversy. Vanderlyn claims it was given to him in payment of an amount of $3500, which, he says, was less than the balance then due him for advances. The bill claims that the deed was conveyed at Vanderlyn's urgency on a representation that it would look better under the circumstances of the parties to have it appear that the land had been sold to him, and that he suggested $3500 as the value on which it would pay suitable rent.

After Graham's return from the war, it is claimed that he had become broken in mind and body, as it is urged he had been more or less for several years. It is insisted that no accounts could be obtained from Vanderlyn. In 1868 a suit was brought at common law to recover such balance as was due, and to recover also the value of the land thus conveyed. This suit remained undisposed of until after the probate court put Graham under guardianship, when it was determined very wisely that a suit in equity was a more appropriate remedy.

The circuit court having decreed an accounting, and both parties acquiescing in it, we have therefore nothing to do with this except as it may have a bearing on the remainder of the issues.

We are disposed to think that Graham was not until a comparatively recent period entirely incompetent. But the whole train of circumstances, beginning with the power of attorney and including his career thereafter would seem, in our judgment, to make it entirely clear that he was in a position which rendered him a very easy subject for imposition, and which made it incumbent on his fiduciary agent to be very careful in his dealings with him. From so much as appears in the record we have no doubt that, whether fraudulently intended or not, the taking of the deed was a transaction of so peculiar a character that it devolved on Vanderlyn to assume the burden of proving the most implicit good faith, and a perfect understanding and agreement on the part of Graham. Vanderlyn's testimony is the only proof we have on the subject, and assuming it to be admissible it is not, in view of the surroundings, at all satisfactory. It does not indicate such means of knowledge or such deliberation on Graham's part as would maintain the deed against him if he at an early day repudiated it. And the large increase of rent on a small expenditure of money is very strong evidence that Vanderlyn was endeavoring to make a profit out of his position at Graham's expense.

We think, however, that there is now some difficulty in setting aside the deed, for two or three reasons. In the view we take of Graham's condition we think he should have taken steps to repudiate it within some reasonable time. The suit at law which he commenced affirmed the sale, but treated it as one where no value had been fixed. And until the account is finally taken it would be premature to determine what allowance shall be made, if any, in case of rescission. There is also a strong reason beyond this for following the general rule requiring diligence. Graham is dead and Vanderlyn cannot, as the heirs cannot, have full means of showing just what the facts were. Under the power of attorney Vanderlyn could have made a valid sale, and Graham, by executing this deed merely changed the purchaser. It seems to us that any decree rescinding the deed would be made in more uncer-

tainty than is proper, and that the fault is somewhat due to Graham in not acting promptly.

While, therefore, we do not feel justified in rescinding the deed, we do not think that under the rules of evidence it can be held established as to its consideration. Should it turn out on the accounting that Vanderlyn was not in advance to the extent he claims, the case would be one of actual and not merely constructive fraud. But under any circumstances he could not equitably hold the land at any less price than its then full value, unless the bargain was made with full information and deliberation. This cannot now be fully proved, but in our opinion the testimony all considered distinctly disproves it. Graham's estate is entitled to have that price allowed. As this will enter into the accounting it would be premature for us to fix it.

And, as it must be until accounting uncertain how much of the price, if any, is to be regarded as paid, we think that the property must be held subject to a lien for any balance which may be found due. We cannot take it out of the fiduciary arrangements, and, inasmuch as the land has not been disposed of, so far as appears, Vanderlyn must be restrained from disposing of it until the final decree.

The decree must be modified so far as to require the land to be brought into the accounting at its actual value on the day it was deeded, and holding the property subject to any balance that may be found due on its price, and restraining any disposition of it until final decree.

Costs to be given to complainants in this court.

The other Justices concurred.

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WILLIAM G. THOMPSON, MAYOR OF DETROIT, RELATOR v. WILLIAM B. MORAN ET AL., PARK COMMISSIONERS.

Quo warranto—Demurrer—Possession of land—Public franchises.

An objection of form and not substance should be specially demurred to.

An information in the nature of a *quo warranto* is not demurrable for stating that a municipality "was and *now is possessed*" of certain premises and that respondents unlawfully hold and exercise the franchises of taking possession of them for a public park. Possession for restricted purposes would not exclude possession as an owner.

"Possessed" is a variable term in law; it may imply a temporary interest in lands; or a corporal having; or merely property as owner, in which sense it may be used even though an intruder has excluded the owner for the time; it may also be used when the intruder's possession is apparently subordinate to that of the general owner.

The right of a city to take possession of, and improve as a public park, lands lying outside of its limits, comes only by sovereign grant, and so far as concerns the city is a public franchise.

A city may hold and own lands for a public park, and cause them to be improved, not in its public capacity as an agency of the government and subject to State control, but as a corporate individual having private rights which the people have a constitutional right to enjoy undisturbed.

A right may be private as belonging to a municipality for the exclusive benefit of its corporators, but public in that individual citizens can have no property in it, and as being a franchise existing only by public and sovereign grant.

INFORMATION in the nature of a *quo warranto*. Submitted October 20. Decided November 10.

Attorney-General *Otto Kirchner* for relator, in support of demurrer, cited Bouv. Inst. § 1690; *Bank of Augusta v. Earle* 13 Pet. 519; *Cochran v. McCleary* 22 Ia. 75; *Com. v. Arrison* 15 S. & R. 130; *People v. Geneva College* 5 Wend. 211; *People v. Ins. Co.* 15 Johns. 358; *Reynolds v. Baldwin* 1 La. Ann. 162; *Rex v. Nicholson* 1 Strange 300.

Maybury & Conely, *John D. Conely* and *Ashley Pond* for respondents.

COOLEY, J. We have in this case an information in the nature of a *quo warranto* to inquire by what authority the respondents usurp certain franchises. It is very brief, and gives the court to understand that on the eleventh day of June, 1880, the city of Detroit was and now is possessed of an island in the Detroit river, known as Belle Isle, which was and is held by said city under a purchase of the same by statutory authority, and that the respondents usurp and unlawfully hold, use and exercise the franchises of taking possession of said island for the purpose of improving the same as and for a public park without any legal warrant or authority whatsoever therefor. To this information the defendants demur.

The grounds of demurrer are set out in the respondents' brief, and they appear to be the following: 1, That the information is contradictory in that it avers possession by the city, of Belle Isle, and also an unlawful possession in the defendants, for which reason no relief can be given; and 2, That the usurpation alleged is not of any franchise whatever, and therefore is not the subject of any such inquiry.

The first objection is one of form, not of substance, and ought rather to be the subject of special demurrer. But we are of opinion that, even as a special demurrer, it would not hold good. There is an apparent contradiction, perhaps, but no necessary and positive repugnancy.

The city of Detroit is said to have been *possessed* of Belle Isle, and the defendants to have usurped the franchise of *taking possession*, etc. "Possessed" is a variable term in the law, and has different meanings as it is used in different circumstances. It sometimes implies a temporary interest in lands; as we say a man is possessed, in contradistinction to being seized. It sometimes implies the corporal having; as we say a man is seized and possessed. But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his. In this sense it may be used even though an intruder may have excluded the owner for the time being. And there is never any impropriety in making use of the term when the only possession

the intruder has is apparently subordinate to that of the general owner.

In this case the city is said to be possessed and the respondents have assumed to take possession for the purpose of improving the same as and for a public park. A possession for this restricted purpose would not exclude the possession of the city as owner, but must be taken and deemed to be subordinate. At any rate, the general possession and the possession for the particular purpose may co-exist, and there is consequently no necessary contradiction in terms in the information.

The second objection is one of substance. If the taking possession of Belle Isle for the purpose of converting the same into a public park is not a franchise, it is manifest that this proceeding must fail.

It is said in behalf of the respondents that a city may hold and own lands for a public park as an individual may for a pleasure ground, and cause them to be beautified and improved as such; and that it would hold the same not in its public capacity as an agency of the government and subject to the unrestricted control of the State, but as a corporate individual, having private rights of its own, which it is at liberty to enjoy undisturbed by the State, and in the enjoyment of which the Constitution will protect its people. *People v. Hurlbut* 24 Mich. 44; *Park Com'rs v. Common Council of Detroit* 28 Mich. 230. And this is no doubt true. It is further said that a franchise is a royal privilege or branch of the king's prerogative, existing in the hands of a subject (2 Bl. Com. 37), or to speak more correctly for this country, a special privilege existing in an individual by grant of the sovereignty and not otherwise exercisable. And further that a park in this country, whatever it may have been in England, is not a franchise at all, and the making of one requires no sovereign grant whatever. This may also be true.

But it is not to be held or assumed because a municipal corporation is possessed of certain property or rights which the State does not control, that therefore the idea of a public

franchise in respect thereto cannot be predicated. A right may be private in respect that it belongs to the municipality for the exclusive benefit of its own corporators, and yet public in respect that there can be no property in it by individual citizens, and the right itself exists only by public and sovereign grant and as a franchise. Indeed, in respect to its water-works, sewers and public parks, a city would be without power to make them accomplish the purposes for which they are created, held and used, but for special franchises conferred upon it by the State for the purpose. The power to condemn lands, for example, is generally essential, but this is only given upon the ground that the end aimed at is public, though it is public only as concerns the particular city, borough, village, etc., to benefited. And then the public offices must be created for the purpose of establishing and caring for these municipal conveniences, and they would exist as franchises only.

But if we were to concede all that respondents claim in this regard the case would be still undetermined. This is not the ordinary case of a city park. Belle Isle is outside the city limits, and it is not pretended that the city could have purchased, improved and controlled the same as a public park except by virtue of special legislation. This legislation was obtained (Local Acts 1879, p. 215), and it not only empowered the city to purchase and create a debt therefor, but to erect a toll-bridge across to the island, and to extend its police authority over the territory. Here were very important franchises which the city could not pretend to claim except by this sovereign grant.

Now it is alleged in the information that the respondents usurp the franchise of taking possession and improving as a public park this island which the city has acquired for that purpose. The right of the city to take possession and improve lands thus lying outside the city limits as a public park, is beyond doubt a franchise. It must come by sovereign grant and not otherwise. If respondents usurp it they usurp a public franchise, public so far as concerns the city, which is all that is important here.

The demurrer must be overruled with leave to plead on payment of costs.

The other Justices concurred.

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The People v. Joel Niles.

Assault with intent to murder—Cross-examination of witness for prosecution—Expert evidence—Remoteness of investigation.

A witness for the prosecution in a trial for an assault with intent to kill, being asked on cross-examination whether he did not steal overshoes from one Allen, answered that he never stole overshoes; and to the questions whether Allen did not follow him to his house and take these shoes, and whether he was followed and the overshoes taken from him, answered No. *Held*, that no reasonable complaint could be made of the refusal to allow a farther question as to whether any one followed him and took the overshoes; and that the court had already been liberal in permitting cross-examination as to this collateral matter.

In a prosecution for a murderous assault in which the assailant used a knife a witness testified that more than a year before, he had seen the defendant have a dark-handled knife, sharp on both edges. *Held* allowable, against objection, to permit the witness to be asked to describe it, though such testimony would be very remote. Exception could not be taken to excluding the question put to a witness for the defense, whether defendant was not a shoemaker, there being no showing of its relevancy in the trial court, though it was suggested above that such an occupation would account for the knife.

Exact rules cannot be prescribed to limit examinations in criminal prosecutions; circumstances must determine how far back the prosecution may carry them.

Exceptions by the defense in criminal cases cannot be sustained where the action of the court was not clearly erroneous and did not injure the respondent.

A person accused of an assault with intent to kill a man on horseback was said to have struck a downward blow with a knife, cutting the man's clothes, wounding the horse, and cutting the hair off square across the wound. A witness who had farmed for seven years, during which he had doctored horses and performed surgical operations

on them, and who claimed to have had experience in cutting live horse flesh and the hair on the horse, was asked whether the hair could be cut clean the full length of the wound. *Held*, that the question was properly ruled out as the witness had not shown that he ever tried to cut hair in the way suggested, and it was not shown and was not supposable that in a surgical operation it would be important so to cut it.

A trial judge has a right to introduce into his charge the remarks of the appellate court or other authority or author as to the value of expert evidence, and to read them to the jury.

A judge's charge in a criminal case is presumed to be warranted by the case made by the defense, if the bill of exceptions does not purport to give all the evidence and does not negative the submission of a theory which would support it.

The charge of the trial judge so far as given in the bill of exceptions must be assumed to be correctly reported, but if only part of it is given, it must be closely scrutinized to determine whether injury is done by the instructions when considered together.

In a prosecution for an assault with intent to murder, the complaining witness testified that the respondent had struck at him as he was sitting on horseback, and had cut his clothes and the horse; the defense suggested that the complaining witness might have inflicted the wound himself, and the judge charged that if it was not done at the time sworn to by the prosecution, it remained for the other side to show when and where it was done. He also charged that the case for the prosecution must be made out, not by a mere preponderance of evidence, but beyond a reasonable doubt. *Held*, that the former suggestion, though loosely made, might be regarded as meaning only that the defense could advance by suggestion or argument any theory as to when and where the injury was committed, if not as alleged by the prosecution, but not as requiring them to show when and where it was done, as that would be irrelevant if the prosecution did not establish defendant's guilt at the time and place and in the manner alleged.

Exceptions from Berrien. Submitted Oct. 20. Decided Nov. 10.

INFORMATION for assault with intent to kill and murder. Respondent was convicted. Exceptions overruled.

Attorney-General *Otto Kirchner* for the people.

Jacob J. Van Riper for respondent.

COOLEY, J. The defendant was prosecuted and convicted on a charge of assault with intent to kill and murder one John Wyant. The evidence tended to show that the assault was made with a knife while Wyant was riding upon a horse in the public highway, and that a downward stroke of the knife cut the clothes of Wyant and inflicted a wound to the horse below the backbone, over the swell of the ribs, cutting the hair off square across over the wound. The case comes before us on exceptions.

Several of the exceptions are to the rulings of the court in the reception and rejection of evidence in respect to matters where we think the court had a plain discretion. One of these relates to the testimony of John Bennett, who gave important evidence for the prosecution. On cross-examination he was asked whether he did not steal overshoes from one Allen, and replied that he never stole overshoes. He was then asked whether Allen did not follow him to his house and take these shoes, and replied "No." Also, whether he was followed and the overshoes taken from him, and again replied "No." A further question whether any one followed him and took the overshoes was not allowed to be put. No reasonable complaint can be made of this. The court had already been liberal in permitting cross-examination respecting this collateral matter.

Another witness testified to seeing the defendant have a dark-handled knife, sharp on both edges, more than a year before the alleged offense. The witness was asked to describe it, and this was objected to for remoteness, but allowed. It was certainly very remote, but the question how far back the prosecution shall be allowed to carry such inquiries must always be one of some difficulty, and must be determined by the circumstances. Exact rules to guide the trial court are impossible. Besides, the description of the knife had already been given in part, and the witness only said afterwards, it was not a knife that shut up.

For the defense a witness was asked whether the defendant was not a shoemaker by occupation, and the court sustained the objection to the question. It is suggested now that his

occupation would account for his possession of the knife; but the suggestion was not made in the circuit court, nor does any other reason appear to have been given for the proposed evidence. Without explanation the evidence seemed to be irrelevant. In none of the above cases was the action of the court clearly erroneous, and by none have we reason to believe the defendant was injured. These exceptions cannot therefore be sustained. *Strang v. People* 24 Mich. 1.

To show that a downward stroke of a knife would not cut the hair of a horse square off, as that of the horse in question was said to have been cut, the defense called one Spearing as an expert, who testified that he had been farming about seven years, during which time he had been in the habit of doctoring horses, and performing surgical operations upon them; that he had been employed some for that purpose; had had experience in cutting horse-flesh when alive, and in cutting the hair upon a horse, he could not tell how many times. He was then asked whether, in his opinion, in cutting an animal in the way this horse was cut, the hair could be cut clean the full length of the wound. The question was objected to and ruled out.

The ruling may be justified on the ground that the witness had not shown that he ever cut or attempted to cut hair in the way suggested, and was therefore not an expert at all. A horse's hair, it may be presumed, is seldom cut in that way, and from the ordinary methods of cutting, it is presumable the jury could judge as well as the witness whether the alleged downward stroke would or would not cut the hair square off. It did not appear, and is not supposable, that in a surgical operation it would be important to cut or attempt to cut the hair in that way.

Three exceptions were taken to portions of the charge to the jury. One of these was to the judge reading to the jury remarks of this court concerning the testimony of experts, contained in the report of the case of *People v. Morrigan* 29 Mich. 8. The objection seems to have been that the judge read a certain paragraph calculated to depreciate the value of

expert evidence, without giving the context, or a statement of the facts which called out the remarks read. But the judge had an undoubted right to make the same remarks himself as a part of his charge, and it was immaterial whether they were original with him, or were taken at second hand from some other judge or other authority or author.

The most serious difficulty in the case arises upon certain portions of the charge which relate to a claim, or rather a suggestion on the part of the defense, that the complaining witness must himself have inflicted upon the horse the injury which he swore had been done by the defendant. The charge is not given in full, but the following paragraphs appear:

"You recollect the testimony of John Wyant the complaining witness, who swears that he met this man there on the highway, in the middle traveled track; that the other man got off his wagon and stood by the road, and when he came along swore he would kill him, and struck at him with his knife. You recollect how he testified what the effect of that blow was. The defendant alleges that this is a mere fabrication; that it is a put-up job, and that no assault occurred there at all. They say that this testimony is manufactured by the complaining witness, John Wyant. Now you will recollect the circumstances in this case. Wyant, you remember, went to Pokagon before the defendant started, and met the defendant as he was coming back. You are to consider what the probabilities would be of his originating that design, or whether he went prepared for any such design or not.

"It is claimed by defendant that such a wound as this could not have been made with a knife at that time. Now to determine that question you are to look at the probabilities of the case. If it was not done there, the prosecution claim and bring testimony which they claim shows that it was done then and there, but if it was not done then it remains for the other side to show when and where it was done.

"What are the probabilities as to a plan of that kind being concocted upon the meeting of these persons, without any evidence showing that such a design had been formed beforehand? If there is no such design shown by this man Wyant, is entirely for you to say. If there is none, then it is for you to say what the probabilities are of his originating such a thing upon the meeting of these men, and going after

he got home to have him arrested. This is a matter proper for you to consider in determining whether there was an assault or not.

"You will recollect the testimony of Mr. Reed; you recollect that Reed testified that when he came to Berrien with the horse he was upon the horse; you remember what he said about the wounds, and as to the cut in the overalls, whether they agreed or not, and all about these circumstances. You will remember his testimony. It is not worth while for me to repeat it: it is proper for you to consider whether or not a person sitting upon a horse and making a wound in that way could have made a wound in the shape that this is: whether the tendency of a wound by a person sitting upon a horse, attempting to manufacture this testimony, whether it would be downwards or this way, or whether it would be upwards; that is a matter for you to consider, whether a man sitting upon a horse attempting to make such a wound could have made such a wound as this is."

This last paragraph is objected to, as tending to lead the jury to suppose the theory of the defense was that the complaining witness cut the horse himself while sitting upon his back, when in point of fact they had not attempted to support such a theory by evidence. But the bill of exceptions does not contain all the evidence, or negative the fact that the defense may have advanced such a theory. The presumption is the judge's remarks were warranted by the case the defense attempted to make.

A more serious question arises upon the paragraph in which the judge seems to throw upon the defendant the burden of showing when the wound was inflicted if not at the time when the parties met upon the highway. If this paragraph gives the exact words of the circuit judge, he certainly expressed his views very loosely; not to say incorrectly.

It is manifest, however, from the bill of exceptions, that the whole charge is not given, but that we have only the questions raised upon detached sentences. The paragraph in question also reads as if something may have been omitted, or the judge's remarks inaccurately reported; and although we must assume the contrary, the awkwardness of expression

here may well invite additional care in scrutinizing the remainder of the charge in order to determine whether injustice has probably been done to the defendant.

If in fact the horse was not cut at the time the parties met in the highway, it was plainly immaterial when he was cut; for the case of the prosecution depended upon their making out that the injury was committed then and there. If, therefore, the judge had told the jury "the prosecution claim that the injury was done then and there, but if it was not done then and there, it is immaterial to this case when it was done," he would have been entirely correct. When instead of this he told them "it remains for the other side to show when it was done," did he mean or is it likely he was understood to mean, that when the prosecution failed to establish their case, it was still necessary for the defence to account for a wound which the prosecution had failed to show he had inflicted.

We have examined this record with care and my brethren are all of opinion that when the whole charge is considered there is no reason for believing the jury to have been misled. The defendant, if guilty at all, was guilty of making the assault at the time and place and in the manner testified by John Wyant. The judge correctly instructed the jury that the case for the prosecution must be made out, not by a mere preponderance of evidence, but beyond a reasonable doubt. They must then have been satisfied beyond a reasonable doubt that the cutting was done by the defendant, as testified to by the complaining witness. It does not appear that there was any evidence that the cutting was done at any other time or place, but the defence suggested that it may have been so done, in order to fix a false charge upon the defendant. The judge's remark made after all the evidence was in, that if the cutting was not done as charged, it remained for the defense to show when and where it was done, could only have referred to his suggestion, and must have been designed to direct the attention of the jury to the theory whereby the defense threw the blame upon Wyant himself. The jury could not have understood the judge as meaning that if the

offense was not committed, the defence must nevertheless show when and where the cutting was done, for this would have been in direct and positive contradiction to the previous instruction, and to the whole tenor of the charge. He probably meant, as we all think, no more than this: that it was open to the defence to advance by suggestion or argument any theory as to when and where the injury was committed if not as the prosecution alleged.

On the whole record the court is satisfied no wrong has been done to the defendant by the rulings or instructions of the circuit judge, and he must be advised to proceed to judgment.

The other Justices concurred.

JOHN BIXBY v. JOHN STEKETEE, SUPERVISOR OF THE FIRST WARD OF GRAND RAPIDS.

Action for penalty for not killing biting dogs.

Comp. L. §§ 2066–7 authorizing a supervisor to sue in the name of the township for the penalty imposed upon the owner of a dog for not killing it after he has been notified that it has bitten a person, does not empower a ward supervisor to bring such an action, where under the city charter, the ward is a mere territorial division of the municipal corporation, with no treasury of its own and no capacity of suit.

Error to Kent. Submitted Oct. 20. Decided Nov. 10.

DEBT for statutory penalty for neglect to kill a vicious dog. Defendant brings error. Reversed.

J. W. & O. C. Ransom for plaintiff in error.

C. G. & W. W. Hyde for defendant in error.

CAMPBELL, J. Bixby was sued in a justice's court in Grand Rapids under sections 2066 and 2067 of the Compiled

Laws for failing to kill his dog after being notified in writing that he had bitten a person peaceably walking outside of his enclosure. Judgment was given against him for the statutory penalty of three dollars. The case was affirmed on *certiorari* and now comes up on error to Kent circuit.

The statute under which this penalty was recovered is an old statute of 1850, and is entitled "An act for the protection of sheep and other domestic animals, and for other purposes." Its chief purpose was the protection of domestic animals against vicious dogs, but provisions are also inserted giving a private right of action for personal injuries, and for a penalty if, after written notice, the dog is not killed.

This penalty of $3, and a further sum of $1.50 for every 48 hours' delay, is required to be sued for on complaint of a "citizen of any township where the trespass has been committed," who must satisfy the supervisor of the facts, and then the supervisor is authorized to sue "in his name of office" and pay the money recovered by him "into the township treasury, to be applied towards the incidental expenses of the township."

The supervisor in thus suing, acts not on behalf of any private person or of the State, but on behalf of the township, and the money belongs to the township which he represents. The supervisors of the several wards of Grand Rapids are by the charter of that city authorized to perform the duties of supervisors of townships *except as thereby otherwise provided.* Local acts 1877, p. 145. This exception is very material, because a ward is thereby made a mere territorial division of a single larger corporation, and is not for any purpose a municipal corporation by itself, and has no treasury and no capacity of suit. The supervisor cannot, under the city charter, bring any action for the city or any part of it, and the authority left to him involves no such representative character as would make him for any such purpose as this capable of acting for the municipality.

The statute authorizing supervisors to sue does not in terms apply to cities, and there is little reason why it can be supposed it was intended to apply to them. The chief purpose

of the law is not the protection of persons but of property. Its application for private suits is not confined to townships but extends everywhere. The section authorizing suits by supervisors is the only one which is confined to those localities. When this law was passed there were but few cities in the State, and the special necessity of requiring dogs to be killed was probably not supposed to exist except in agricultural districts. At any rate the law did not then any more than now give city supervisors any control either of city litigation or of city funds. We think the action was not within the law.

Judgment must be reversed with costs of all the courts.

The other Justices concurred.

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WILLIAM S. GUNN ET AL v. PHILIP F. GEARY.

Action on bond for jail limits.

No recovery can be had against the sureties on a bond for the jail limits, where the bond recites that the principal is in custody by virtue of a *capias ad respondendum* and the evidence shows it to be under a *capias ad satisfaciendum*, the measure of damages in the first instance being the actual damages sustained by the plaintiff, while in the second, it is the amount of the execution. Comp. L. § 7351.

Sureties execute a bond in view of its recitals, and their liability cannot be enlarged by contradicting the recitals and showing facts which they cannot be assumed to have known of.

Error to Kent. Submitted Oct. 20. Decided Nov. 10.

DEBT on bond. Defendant brings error. Reversed.

Champlin & More and *Taggart, Stone & Earle* for plaintiffs in error. Sureties on a bond are entitled to a strict construction of the contract and are chargeable only when brought within its terms: *Birckhead v. Brown* 5 Hill 635;

People v. Chalmers 60 N. Y. 158; *United States v. Kirkpatrick* 9 Wheat. 720; *McCluskey v. Cromwell* 1 Kern. 598; *McMicken v. Webb* 6 How. 292; *Lang v. Pike* 27 Ohio St. 498; *Campau v. Seeley* 30 Mich. 60; a recital in the bond preceding the condition is conclusive on the parties as an admission of the fact recited: *Bennehan v. Webb* 6 Ired. (N. C. L.) 59; *Pearsall v. Summersett* 4 Taunt. 593; *Fletcher v. Jackson* 23 Vt. 591; *Ransom v. Keyes*, 9 Cow. 134; *Arlington v. Merricke* 2 Saund. 403; *Leadley v. Evans* 2 Bing. 32; *Liverpool Water Works v. Atkinson* 6 East 507; *Bowman v. Taylor* 2 Ad. & El. 278; *Lainson v. Tremere* 1 Ad. & El. 792; *Horton v. Westminster* 7 Exch. 780; *Hill v. Manchester* 2 B. & Ad. 544.

Andrew T. McReynolds for defendant in error.

MARSTON, C. J. There seems to be one objection in this case fatal to the plaintiff's right of recovery and which renders any discussion of the other questions raised unnecessary.

The action is brought to recover upon a breach of a bond given for the jail limits. In the condition thereof it is recited that the principal is in custody "by virtue of a *capias ad respondendum* issued out of the circuit court," etc. Upon the trial it appeared that he was in custody not by virtue of such a writ, but by virtue of a *capias ad satisfaciendum*.

The sureties executed the bond in suit in view of the recitals therein contained and the legal obligations arising thereon, and their contract could not be enlarged by showing a different liability contrary to such recitals, and of which it could not be assumed they had any legal knowledge.

This doctrine concerning the right of sureties to a strict construction of the obligation creating their responsibility and measuring the extent thereof, is settled by previous decisions in this State.

Under our statute, where a bond for the jail limits is given and the prisoner has been confined by virtue of a *capias ad respondendum*, the plaintiff is entitled to recover only the actual damages sustained by him, while in the case of a *capias*

ad satisfaciendum the damages is the amount directed to be collected by such execution. 2 Comp. Laws § 7351.

The sureties have a right to insist that they have assumed no such responsibility, and the judgment must be reversed with costs of both courts.

The other Justices concurred.

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WILLIS H. BROOKS ET AL. v. WILLIAM COOK.

Civil damage law—Right of action.

Act 193 of 1877 giving "every wife, child, parent, guardian, husband *or other person*" a right of action against a liquor seller for injury done the plaintiff by reason of the intoxication of any person, does not give the intoxicated person himself a right of action against the dealer for money stolen from him while drunk.

Where a statute, after enumerating specific cases uses a general term to cover others, the latter are understood to be of the same general character, sort or kind with those specified.

Case made from Kent. Submitted October 20. Decided November 10.

DEBT under the Civil Damage Law on liquor seller's bond. Defendants bring error. Reversed.

D. E. Corbitt for plaintiffs in error.

Stuart & Sweet for defendant in error.

COOLEY, J. The question in this case is, whether one who becomes intoxicated in a saloon, upon liquor there sold to him by the keeper, and who while in that condition has his pockets picked, may maintain an action against the keeper to recover the money taken from him?

The question arises under Act No. 193 of 1877 commonly called the police act, the third section of which provides

among other things that "every wife, child, parent, guardian, husband or other person, who shall be injured in person and property or means of support, by any intoxicated person, or by reason of the intoxication of any person, or by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury."

The question is one of the construction of the statute. Is the person to whom the liquor is sold, etc., and who in consequence sustains an injury, one of the persons for whose benefit the statute is passed? The circuit court was of opinion that he is.

So far as the statute attempts any enumeration of persons who may sue, they all stand in some one of the domestic relations to the person to whom the liquor is sold, given or furnished. To that extent the statute unquestionably contemplates that there shall be three persons concerned: the person selling, giving or furnishing, the person receiving and causing an injury, and the person injured. But there might be other cases equally meritorious with these (see *English v. Beard* 51 Ind. 489; *Bodge v. Hughes* 53 N. H. 614); and therefore after enumerating wife, child, parent, guardian and husband, the statute extends the right of action to other persons injured. Does it intend among the other persons who may sue to include the person himself whose intoxication causes or is the occasion or reason of the injury?

Doubtless the statute might have extended its benefits to the intoxicated person, but if such were the intent it is surprising that it was not distinctly and unequivocally expressed. It was as easy to designate the party himself as it was his wife, child, guardian, etc. Moreover the man himself may generally be supposed to be injured in some degree by intoxication, so that his case would furnish the most frequent occasion for a suit if he should see fit to resort to legal pro-

ceedings. It would be very remarkable that a statute in enumerating the persons who should share in its benefits should omit to name the very one who would most often be entitled to its aid. But it is a sensible and well understood rule of construction that when after an enumeration, the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named. *Hawkins v. Great Western R. R. Co.* 17 Mich. 57; *McDade v. People* 29 Mich. 50, and cases cited. Apply this rule here, and the party intoxicated is excluded. The persons enumerated are persons who stand to him in special relations, and it is therefore to be assumed that "any other person" who may sue must also stand to him in some special relation so as to be injured by his intoxication or by the sale, etc., to him. A creditor might perhaps stand in that relation under some circumstances, or a contractor, or servant, or the master of a vessel, or a traveler passing him in the street, and so on. But he could not stand in any such relation to himself, and therefore cannot be understood as embraced in the terms, "wife, child, parent, guardian, husband *or other person*," injured in person, property or means of support by himself, or by reason of his intoxication or by the sale, etc., of intoxicating drinks to himself. The statute evidently contemplates three parties—seller, receiver and injured party—in all cases.

It is possible that the facts of any particular case may be such as to connect the saloon keeper with the injury or loss in such a way as to give a right of action at the common law. What we have said above has no reference to or bearing upon such a case.

The judgment must be reversed with costs of all the courts.

The other Justices concurred.

Reuben Cheney v. Washington Russell.

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Certiorari—Technical defects—Trespass by a dog.

Objections that are merely technical should not be given any weight on *certiorari* to a justice, unless there is reason to believe they tended to a wrong result.

In an action before a justice against the owner of a dog for injury done by the dog to a quantity of meat, it was not improper to receive testimony as to the dog's vicious character and roving propensities as having some bearing on the probabilities.

Error to Branch. Submitted Oct. 20. Decided Nov. 10.

Trespass on the case. Defendant brings error. Affirmed.

C. L. Fitch for plaintiff in error.

John R. Champion for defendant in error.

Campbell, J. Russell obtained judgment against Cheney for ten dollars by reason of the latter's dog injuring and partly devouring certain fresh meat. The amount of damages was agreed upon and Cheney told Russell he would pay for the meat if his dog did the mischief. The judgment was affirmed at the circuit on *certiorari*, and Cheney brings the case into this court.

A great many rather technical objections were raised before the justice, but upon *certiorari* none of them should be given any weight unless there is reason to believe they tended to a wrong result. The statute requires judgment to be given at the circuit "as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice which did not affect the merits."

The objections made before the justice, who tried the case without a jury, were to the introduction of testimony of the vicious character and roving propensities of the dog. Without going into the details, the effect of these rulings

rather indicates that the justice required some conditions of liability beyond those properly to be demanded. But he acted judiciously in receiving all this testimony as having some bearing on the probabilities, and we are not prepared to say it had not. Upon all of the testimony he was certainly justified in holding there was enough to make out a case, and as he came to that conclusion, and as we cannot see any other conclusion would have been made more reasonable by rejecting the evidence, we think the circuit court was right in affirming.

The judgment must be affirmed with costs.

The other Justices concurred.

Isaac Haynes v. William B. Ledyard.

Agreement to pay proceeds of farm to the mortgagee.

A contract reciting that one of the parties holds mortgages on the lands and personalty of the other, in consideration of which the latter assigns to him the net proceeds of the farm, which he promises to apply upon the mortgages, is not itself a chattel mortgage or similar security, and cannot be shown to be by parol evidence; but it can be shown to be fraudulent.

Error to Kent. Submitted Oct. 20. Decided Nov. 10.

Replevin. Defendant brings error. Affirmed.

E. S. Eggleston and *M. V. Montgomery* for plaintiff in error.

Hughes, O'Brien & Smiley and *Ashley Pond* for defendant in error.

Campbell, J. This case, which was before us at the January term, 1876, and reported in 33 Mich. 319, now comes up again on questions which we cannot distinguish from those before decided.

The court below ruled in accordance with our decision as there reported that the instrument there set forth at length was not a chattel mortgage or any security of the same or similar character, and could not be made out as such by parol evidence; but that whatever its nature, it could be shown to have been fraudulent.

As we have already so decided we do not think it proper to do more than affirm the judgment with costs.

The other Justices concurred.

Wilson H. Richards v. Lucy M. White.

Land contract—Default in payments—Compound interest.

A party in default in his payments on a land contract cannot, as a matter of right, discharge himself from all responsibility by tendering or paying simple interest, and become thereby entitled to a deed, especially where the other party has declared the contract forfeited for the default; a court of equity can require compound interest in such cases if justice demands it. And it is not certain that specific performance should be compelled as a matter of law unless the other party has been also in fault.

Appeal from Kent. Submitted Oct. 22. Decided Nov. 10.

Bill for specific performance. Complainant appeals. Affirmed.

Grove & Harris for complainant.

Reeves, Felker & Robinson for defendant.

Campbell, J. Complainant filed his bill to obtain specific performance of a written contract for the sale to him by defendant of certain lands, made November 7, 1872, and providing in addition to $200 down, a further payment of

$200, November 7, 1873, and $150, November 7, 1874, with interest annually at 10 per cent. According to the bill he paid none of the principal or interest when due, but paid interest November 15, 1873, another year's interest due November 7, 1874, on February 5, 1875, when he made another payment which he claims was principal, one year's interest on $300 January 17, 1876, and a similar amount in February, 1877.

In November, 1877, Mrs. White notified him that she should consider the contract forfeited for his default. In April, 1878, he claims to have tendered her $347, which he insists was the amount then due in full payment, and demanded a conveyance, which she refused. He thereupon filed his bill.

The court below granted him specific performance on payment of $404.31, with interest from November 16, 1879, and required complainant to pay costs. From this he appeals and claims that by his tender he became absolutely entitled to a deed.

There are several reasons against any such a claim. He had been in default throughout and had never made a payment of principal or interest on time, and had not paid interest on the whole amount of principal at all, unless allowed to hold $50 of it several months without interest. A party in default on such a contract cannot as a matter of right come in and discharge himself from all responsibility by tendering or paying simple interest. Unless there is some reason to the contrary it is allowable for courts of equity to require compound interest in such cases if justice demands it. In this case he made no tender until several months after he had been notified of the desire of defendant to close the contract. As we figure up the amount due at the time of his tender, under the statutory rule as to instalments, it exceeded the amount which he claims to have tendered.

Moreover he did not make such a tender as defendant was bound to accept, being partly in money which was not a legal tender. But had he tendered the full amount after such a default, we are not prepared to say that the case of a land

contract is such that the defendant would as a matter of law be cut off unless herself guilty of very unreasonable conduct. But in this case no such question necessarily arises.

We think the decree was as liberal as he was entitled to under any circumstances and it must be affirmed with costs.

The other Justices concurred.

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CHASE H. DICKINSON v. GEORGE L. SEAVER ET AL.

Probate jurisdiction of claims against estates—Laches in complaining of fraud against claimants—Taxation of costs—Printing, stenographer's, register's and witness fees.

A decree by a federal court cannot affect strangers to the record, or interfere with the regular probate of an estate in a State court which has jurisdiction.

Under the probate system of Michigan, estates must be settled and claims proved in the probate court. Whatever may be done with the final balance where a will has been previously probated at a foreign domicile, the estate must be administered under the probate laws of the State to the time of distribution.

No administration of an estate is extra-territorial, and no foreign proof can be enforced without re-allowance; a foreign judgment may have great force or even be conclusive as evidence, but it cannot be enforced as a judgment outside of the jurisdiction in which it is given, without being established in new legal proceedings.

The probate court is the only court that has any such jurisdiction *in rem* as will enable it to reach persons out of the State or call in all creditors; the circuit court has no power in equity to act as a substitute for the probate court in this way, and unless it has authority to deal with a case through the parties actually before it, cannot deal at all with it.

Where the creditors of an estate have notice that its owner has lately held a mortgage which has only partly matured, they should inquire into the matter in the probate court if they wish to have it applied to their benefit; and an unexplained delay of fifteen years in doing so is fatal to any complaint of it as a fraudulent mortgage.

A right of action for fraud is not assignable and equity will not permit one to buy up stale claims and then seek to establish frauds committed against his assignors.

In taxing costs for printing, the clerk should limit the allowance to the customary rate for such work unless satisfied that more has in good faith been paid or a greater liability incurred. And counsel have a right to have the printing done where it will be convenient to look after the proofs.

A claim for register's fees in the lower court must be itemized before allowing it in taxing costs.

Costs for stenographer's fees cannot include anything for taking the testimony of the losing party.

Witness fees to parties are not covered by the ordinary affidavit of disbursements attached to a bill of costs; a special affidavit must show that they attended as witnesses and traveled, as charged, for that purpose, and not to assist as parties, by counsel or otherwise, in the conduct of the case.

Where a re-taxation of costs is allowed on motion of a party complaining that too much was allowed, the clerk cannot tax at a higher amount even though he might have been justified in doing so to begin with.

Appeal from Van Buren. Submitted October 26. Decided November 10.

BILL for setting aside an award and for an accounting and marshalling of assets. Defendants appeal. Reversed and bill dismissed.

Norris & Uhl for complainant.

Geer & Williams, A. C. Baldwin and *Ashley Pond* for defendants. An executor or an administrator has no authority beyond the jurisdiction in which he is appointed: *Isham v. Gibbons* 1 Brad. 69; *Parsons v. Lyman* 20 N. Y. 103; *Atkins v. Smith* 2 Atk. 63; *Morrell v. Dickey* 1 Johns. Ch. 153; *Williams v. Storrs* 6 id. 353; *Doolittle v. Lewis* 7 id. 45.

CAMPBELL, J. Dickinson filed his bill as an alleged creditor of the estate of Timothy Morse, deceased, to set aside an award made in July, 1863, on a submission between Seaver, as administrator with the will annexed, and the other defendants, who by the award were released from full payment of a mortgage given by them to decedent of $50,000. The bill

seeks the enforcement of this mortgage against the mortgagors, so far as the debt thereby secured is involved, and for a general accounting and distribution of the estate.

The court below, which was the circuit court for the county of Van Buren, declared the award invalid as against complainant and such other creditors as should appear, and made a decree for an accounting including not only these assets, but also the credits due the administrator. Defendants appeal.

The case can be better understood by some reference to the antecedent proceedings.

Morse, who lived in Vermont, died testate in 1862, and his will was probated in Vermont, and Seaver qualified as executor. Commissioners were appointed in that State, and a large number of debts proved, including all now claimed by complainant.

In June, 1863, the will was upon regular proceedings admitted to probate in Lapeer county, Michigan, and Seaver qualified as administrator with the will annexed. No claims were ever presented or allowed in the Lapeer probate, so far as we are advised by this record.

In July, 1873, Seaver and other defendants submitted their differences to arbitration. The chief controversy—and so far as the evidence satisfies us, the only real controversy—was as to the mortgage before referred to, which—so far as we need refer to it—was of this nature: In 1857 the mortgagors purchased of Morse 3200 acres of land for $50,000 payable in ten instalments. There was an agreement given back that unless a railroad then projected should be built to the lands in two years, the purchasers might rescind, and Morse would release the mortgage and notes and take back the land. When the two years expired he had hypothecated the securities and could not give them back. The defendants claim, and they are borne out by the evidence, that Morse under these circumstances desired them to go on and lumber the lands, and take such measures as were necessary for that purpose, and he would make the proper allow-

ance for the difference in price caused by the failure of the railroad.

There were some other matters between them which in our view are of no present importance.

Seaver and William F. Dickinson (father and assignor of complainant) came out shortly after Morse's death, and became fully acquainted with all of these matters. Dickinson was then interested in his own behalf or for others in claims against the estate, and defendants had full communication with him. There is no direct evidence of his complicity in the award, but he knew of the Michigan probate, and dealt with the administrator as such.

The bill claims that the award in question was made by the arbitrators as practically no more than a mere formality to carry out an arrangement as to its terms already agreed upon.

As already suggested the parties alleging claims did not prove their claims before the Lapeer probate court, and took no part in that whatever.

Complainant gets his alleged title in this way: On the 31st of December, 1872, somewhat more than nine years after the Michigan probate, a bill was filed in the United States circuit court for the Western District of Michigan, in the name of a considerable number of persons claiming to be creditors of Morse's estate, to the amount of $11,589.97 as of May 12, 1863, when the commissioners in Vermont reported—the whole amount of claims being set forth as allowed at $58,604.09—to set aside probate sales of land made in June, 1865, under a license granted in Lapeer in October, 1864, for fraud. These sales were made to William F. Dickinson, and complainant in this case was brought in as having become interested under him. The bill purported to be filed on behalf of the complainants named in it and all other creditors who might come in and contribute to the expenses.

The bill contained among other things a prayer for an accounting by Seaver of the affairs of the estate, and payment of claims, and a receiver of the assets, as well as the general prayer.

On the 7th of September, 1877, a decree was made avoid-

ing the sales, except as to Chase H. Dickinson and others not parties to the suit, and requiring an account of the proceeds to be taken. It also set forth that several of the complainants had assigned before or after suit brought (not showing who were in either category), and allowing their assignees to come in and prove their claims.

The master reported claims originally allowed at $17,707.55, part of which had been subsequently purchased by William F. Dickinson, and on September 8, 1877, transferred to Chase H. Dickinson, and the rest purchased by Henry C. McDuffy, and on the last mentioned day assigned to Chase H. Dickinson, against whom the case was discontinued.

These claims were proved by a stipulation between Thomas B. Church purporting to act as solicitor for defendant W. F. Dickinson, and by Chase H. Dickinson and Norris as solicitors for complainant, whereby it was stipulated that any person now claiming to own any of the claims allowed in Vermont, might prove them by producing and establishing by his own oath an assignment of any of those claims as appearing in what purported to be a copy of the commissioner's report—not certified in the form required by the acts of Congress, and very incomplete otherwise. Under this stipulation, Chase H. Dickinson, who is a citizen of the State of Michigan, and was no longer a party to the record, was allowed to prove all the claims passed upon, and of these there were between $3000 and $4000, which were not set forth in the bill, with interest from 1863.

No further action was taken on behalf of any of the parties to the record, but on the 25th of February a petition was filed by Chase H. Dickinson, stating the master's report and his sale of the disputed lands, leaving a balance in court of $1280.10, and praying an order of distribution. Simultaneously with this filing, and by consent of Thomas B. Church appearing for William F. Dickinson but not for Seaver, and of L. D. Norris appearing for complainants and for Chase H. Dickinson, a decree was made directing the whole, and not his aliquot part of this money to be paid to Chase H. Dick-

inson, and adjudging him to be owner of a remaining amount of claims of $30,356.13.

Upon this state of things the circuit court of Van Buren made, and we are asked to affirm, the decree appealed from. We think the decree was entirely unsustainable, either on the law or on the facts.

It is not within our province to consider the effect of the decree of the United States Circuit Court so far as it affects the parties to that suit. It does not appear to have been made by the judge on his own consideration nor to have been made on a regular hearing, or upon papers by which Seaver was called in. But it is very certain that it cannot affect strangers to the record, or operate to interfere with the regular State probate. In the view we take of the case it is not important as to complainant's claim, which for the purposes of this suit may be assumed to be one which was covered by the Vermont probate. And therefore we need not discuss this proceeding further, and need not question the decree or the manner in which Chase H. Dickinson got back upon the record as *dominus litis*.

Under our probate system estates must be settled in the probate court, and claims must be proved there. Whatever may be done with the final balance where the testator's will has been previously probated at his domicile, the estate must be administered up to the time of distribution under the State probate laws. The doctrine is elementary that no administration is extra-territorial, and the statutes provide fully for the proof of claims. No foreign proof can be enforced here without re-allowance any more than a foreign judgment of any other kind can be enforced without being sued over. The force of a foreign judgment as evidence may be very great, and in cases covered by the constitutional provisions may be conclusive, but nevertheless it must be established here in new legal proceedings. No judgment can be enforced outside of the jurisdiction rendering it, in any other way.

Under our statutes the probate judge has full power, within the time fixed by statute, to appoint commissioners and to

provide for proof before himself. Comp. L., §§ 4420, 4427. If the executor makes no application, then the creditors have power to apply, and it must be held that if they do not choose to do so, they have only themselves to blame.

In the present case it is urged that the fraud complained of was secret, and therefore equity will aid them in securing payment out of assets of whose existence they were ignorant, and without which any second proof of claims already established in Vermont would have been to no profit. Upon this there are several things to be considered.

In the first place no court but the probate court has any such jurisdiction *in rem*, as will enable it to reach persons out of the State, or to call in all creditors. Every creditor is interested in reducing the claims of other creditors, and this is recognized by statute, allowing them to appeal. Comp. L., § 4439. The circuit court in equity has no power to act as a substitute for the probate court in this way. Unless it has authority to deal with a case through the parties actually before it, it cannot deal with it at all. It is beyond the power of the circuit court for Van Buren county to usurp the functions of the Lapeer probate court, in attempting to take charge of and wind up this estate. *Shelden v. Walbridge* ante, p. 251.

Had the suit been brought merely to set aside some fraudulent transaction in aid of the administration, by a creditor in proper standing in due time, a different question of jurisdiction would present itself, involving possibly less difficulty. But in the present case we think complainant has no such equity. Fifteen years elapsed after the will was probated in Lapeer before this bill was filed. In the meantime none of the creditors represented by complainant attempted in any way to bring their claims before the court, or inquire into the condition of the assets. The mortgage to Morse was on record undischarged, and they had notice that he had lately owned such a security which had only in part matured. They ought therefore to have inquired into the matter if they desired to have it applied to their benefit. The probate court has full power to do this. *Shelden v. Walbridge* supra;

In re Rathbone's Estate ante, p. 57. And such a delay unexplained is fatal to any complaint for fraud. Not only is it not explained, but there is no allegation or showing that the original creditors were ignorant of all that was done.

So far as William F. Dickinson is concerned, he was informed before the Lapeer probate of the existence and precise situation of the mortgage, and of the counter claims of the mortgagors, and there is no reason to doubt that he kept, or might readily have kept, informed of all that followed, and did not disapprove it. At any rate he was in a position where speedy action was incumbent on him to have the assets accounted for. There is room for no serious claim that he had any reason to complain, and he never did complain, so far as the record shows.

The present complainant—according to his own proofs—has merely purchased claims for the purpose of this litigation or of some litigation. He was never defrauded. It would be against every rule of equity to allow a party to buy up stale claims and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable, and the claims in controversy have nothing involved which could keep them alive at all unless fraud would do so. Being nothing more than an assignment of an action for fraud it is well settled that it will not be enforced. *Brush v. Sweet* 38 Mich. 574.

It would not be quite fair to defendants to dispose of the case in such a way as to leave an inference that the arbitration was fraudulent. We think the testimony shows that the mortgagors desired to rescind and were prevented by the hypothecation of the mortgage, and that they only retained the lands on the understanding that the price should be abated. We need not consider the legality of the arbitration. The result, whether treated as an award or a compromise, was not an unfair one, and we think was honestly reached.

The decree must be reversed and bill dismissed with costs of both courts.

The other Justices concurred.

Afterwards, at the January term, 1881, complainant appealed from the taxation of costs by the clerk of the Supreme Court and moved for a re-taxation. The bill of costs as allowed was as follows:

STATE OF MICHIGAN—IN THE SUPREME COURT.

The Circuit Court for the County of Van Buren—In Chancery.

CHASE H. DICKINSON, COMPLAINANT V. SAMUEL ROGERS ET AL., DEFENDANTS.

Solicitors' fee by rule in the Circuit Court			$ 30 00
Solicitors' fee by rule in the Supreme Court			30 00
For printing record for Supreme Court, 306 pages, 70c.			214 20
For printing two briefs, one 37 pages, one 14 pages, 70c. per page,			35 70
For preparing copy of record to print from for Supreme Court, 802 folios, at 10c.			80 20
Register's fees in the Circuit Court			10 00
Register's fees for making return to Supreme Court			5 00
Clerk's fees in Supreme Court, under rule			6 00
Circuit Court Commissioner's fees taken by stenographer by stipulation, 189 folios, at 20c. a folio			37 80
To administering four oaths, at 25c.			1 00
Witness fees, the names, number of days and travel of each:			
	Miles.	Day.	
Josiah Turner, travel and attended as follows	85	1	9 50
Isaac N. Jenness, travel and attended as follows	67	1	7 70
Samuel Rogers, travel and attended as follows	65	1	7 50
George L. Seaver, travel and attended as follows: from South Haven to Detroit	170	1	18 00
George L. Seaver, travel and attended as follows: from South Haven to Grand Rapids	65	1	7 50
David R. Shaw, travel and attended as follows: to Grand Rapids	1	1	1 00
Total			$501 20

Motion submitted January 4, 1881. Granted January 19.

Norris & Uhl and *Chaney* for the motion.

Geer & Williams against.

PER CURIAM. The following objections to the bill of costs appear to be well taken:

1. The printing bill is *apparently* excessive. The clerk should limit the allowance to what is the customary rate unless satisfied that the party in good faith has paid or promised to pay more. Of course charges throughout the State

are not expected to be uniform, and counsel has a right to have the printing done where it will be convenient to him to look after the proofs.

2. If defendants claim for register's fees in the court below, they must present a bill of items. The fees in that court in the main are fees for which the register must look to complainant. It is different in the Supreme Court: the defendants being the moving party there.

3. If the stenographer's charge includes anything for taking complainant's testimony, it is to that extent erroneous; otherwise it is unobjectionable.

4. Fees charged for the attendance of parties as witnesses are not covered by the ordinary affidavit of disbursements. There should be a special affidavit showing that they attended in the capacity of witness, and traveled as charged for that purpose, and not as parties to assist, by their counsel or otherwise, in the conduct of the cause.

The defendants should be allowed to withdraw their papers and make a new showing.

On re-taxing costs the Clerk increased the allowance for printing to the amount sworn to in the affidavit of disbursements, having reduced it on the first taxation. At the April term complainant appealed from the re-taxation and again moved for a re-taxation. Motion submitted and granted April 12.

Norris & Uhl for the motion.

Geer & Williams against.

THE COURT ordered the amount allowed on the re-taxation to be reduced to the sum originally taxed.

44 634
75 178
44 634
91 656

Allan Shelden v. Patience A. Bennett et al.

Application of payments—Joinder of partners as complainants in foreclosure—Costs on double appeal.

Where a mortgager gave a note for the whole amount of his debt including sums for which he had become indebted before the mortgage was given and which were not secured by it, and the mortgagee applied payments made to him upon the note generally, it was equivalent to an application upon the new and old indebtedness *pro rata*. and a different application could not be made where it did not satisfactorily appear to have been directed or to have been for the interest of the parties.

Partners need not be joined as complainants in the foreclosure of a mortgage given to only one of the firm as trustee for the partnership.

Costs may be withheld on affirmance of a decree from which both parties have appealed.

Appeal from Clinton. Submitted October 27. Decided November 10.

Foreclosure. Both parties appeal. Affirmed.

Spaulding & Cranson for complainants.

H. & H. E. Walbridge for defendants.

Cooley, J. This is a foreclosure suit. To a proper understanding of the issues a brief statement of the dealings between the parties seems essential.

The complainant is a member of the firm of Allan Shelden & Co., wholesale dealers in merchandise in the city of Detroit. The defendant Patience A. Bennett was in business as a retail dealer at Ovid, and commenced making purchases of said firm in 1871, her husband W. C. Bennett apparently acting as her general business manager. On the seventh day of October, 1872, an indebtedness had accrued from the defendant to Allan Shelden & Co. amounting to between $2000 and $3000, and on that day Mrs. Bennett deeded to complainant a farm which she owned in Victor, and which was subject

to two mortgages of $2500 each and interest. Complainant claims that this deed was given and received as collateral security for what was then owing by defendant to the firm; but she insists that the transaction was a sale by her at the price of $12,000; complainant at the same time agreeing that if he sold the farm for more than that sum, the overplus should be paid to her.

The dealings continued until November 20, 1873, on which day defendant Bennett proposing to make further purchases the mortgage now in suit was given. The property mortgaged was the store and lot where defendant Bennett did business in Ovid, and the mortgage was conditioned for the payment at maturity of all sums the mortgager owed the firm for goods that day purchased, and all sums for goods thereafter purchased, as the same should be established by note or book account. April 30, 1874, defendant Bennett came to an accounting with the firm, when it was found that she was owing in all $7127.80, and for this a note was taken payable one day after date, with interest. After this time some payments were made, which were endorsed upon the note, and Shelden testifies that he also gave credit for whatever he received from the farm.

Included in the note was indebtedness that accrued before the mortgage was given. The defense gave evidence tending to show that Shelden was directed to apply all payments made after the date of the mortgage upon the indebtedness secured thereby; but Shelden denied receiving any such direction, and we cannot say that there is any preponderance of evidence in favor of this branch of defendants' case. The complainant, on the other hand, claims a right to apply all payments on the amount owing to him before the mortgage was given. The grounds on which the circuit court gave decree are not stated in the record, but as near as we can understand them the amounts paid must have been considered as applied, by the endorsement on the note, upon the indebtedness accruing before and after the giving of the mortgage, *pro rata*.

The claim that the farm was bought by Allan Shelden &

Co. is not sustained by the evidence, and is disproved by the action of defendant Bennett herself. The farm was afterwards sold for interest accruing on the pre-existing mortgages, and was redeemed by her or by her husband; an act not likely to have taken place if the land had been sold. Neither would the note have been given in 1874 without taking the price of the land into account had a sale been made. The farm was again sold for the principal of the mortgages, and was bid in by complainant; but no question respecting this purchase arises in this case. It may be that defendant Bennett may still have an equity of redemption, but the present suit does not bring into controversy any such right. This suit concerns only the indebtedness secured by the mortgage set out in the bill.

When complainant took a note in which he united the indebtedness which was not covered by the mortgage with that which was, and afterwards applied the payment made to him upon the note generally, this was equivalent to an application upon the new and old indebtedness *pro rata*, and a different application cannot be made now. As the old indebtedness was secured when the mortgage was taken, and perhaps may be now, we cannot say with legal certainty that it was ever for the interest of the complainant that the payment should be applied differently.

It is objected that complainant should have joined his partners with him in this suit, but the mortgage was given to him as trustee for the partnership, and it was immaterial whether they were joined or not.

We find no fault with the decree. Both parties have appealed from it, and it will be affirmed without costs to either.

The other Justices concurred.

44 637
76 68
44 637
81 88

In re Francis Palms' Appeal from the Commissioners on the Estate of Denis J. Campau.

Administrator's liability for claims against estate.

Where the probate court had delayed for nearly eight years to order the payment of claims allowed against an estate, and had then directed them to be paid within a fixed time after which they would become a personal claim against the administrator, and he neglected to pay them and died within six years thereafter, it was *held* that they became a valid claim against the administrator's estate.

When an administrator's statutory liability for claims against the decedent's estate has once attached, the creditor's right becomes absolute against him and his estate, whether the claim could or could not have been enforced against the decedent's estate.

The allowance of claims against an estate by a court of competent jurisdiction cannot be impeached in a collateral proceeding if there was no fraud in allowing them and no appeal was taken.

Where claims against an estate are made a personal charge against the administrator it is presumed that he retains sufficient assets to extinguish them, which assets, if he does not pay the debts, pass after he dies to his representatives, who remain liable for the debts.

An administrator should hasten the payment of claims against the decedent's estate, and if he allows payment to be delayed so that he becomes personally liable, he cannot claim to be prejudiced.

Case made after judgment from Wayne. Submitted October 27. Decided November 10.

Appeal from commissioners on claims. Claimant had judgment. Affirmed.

Moore & Moore for claimant.

Chas. B. Lothrop, administrator, for the estate.

Graves, J. This case was taken to the circuit court by appeal from the determination of commissioners on claims in the settlement of the estate of the late Denis J. Campau, disallowing certain claims prosecuted before them by Mr. Palms. The hearing in the circuit court was conducted

without a jury, and the judge made a finding of facts and allowed the claims. The finding appears in the margin.*

The administrator urges two main objections. He admits that the claim of $272.44 allowed February 11, 1865, as a lawful claim against the estate of Joseph Campau, was at one time a legal demand against decedent Denis J. Campau, but he insists that, under the provisions regulating the settlement of estates, the remedy is barred as respects the estate of Joseph Campau, and being so, cannot be enforced as a personal demand against the estate of the deceased administrator of Joseph Campau. He insists that the other items allowed

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* 1. Joseph Campau died intestate July 23, 1863.

2. On September 3d, 1863, Francis Palms, said claimant, Theodore J. Campau and Denis J. Campau were appointed by the probate court for Wayne county, administrators of the estate of said Joseph Campau, deceased, and each filed his several bond provided by law, and received letters of administration and entered upon the discharge of his duties as such administrator.

3. An inventory was filed of the property left by said Joseph Campau, deceased, showing that the amount of real estate left by said Joseph Campau amounted to $1,809,531, and the amount of personal property left by said Joseph Campau amounted to $20,652.16.

4. Commissioners on claims against said estate of Joseph Campau were duly appointed to hear, examine and adjust all claims against said estate, and said commissioners, on March 3, 1865, filed their report, dated February 11, 1865, in the probate court for Wayne county, and in the matter of said estate, allowing the claim of said Francis Palms against said estate at the sum of $272.44; the whole amount allowed against said estate, by said report of said commissioners, was $7,162.27.

5. But three appeals were taken from the said report of said commissioners on claims, viz:

(*a*) Shaw & Botsford, from disallowance of claim. The *remittitur* from the Supreme Court affirming judgment in favor of claimant, was filed in the probate court March 18, 1867.

(*b*) James Campau, administrator of Jacques Campau, appeals from disallowance of claim. This was taken to the circuit court of the county of Wayne, but, as appears from the record, nothing was done beyond filing of record transcript.

(*c*) Appeal of Levi Bishop from disallowance of claim. Judgment was rendered in circuit court in favor of said Bishop for $2,280.76, and satisfaction of said judgment was entered February 1st, 1867.

6. After the said report of commissioners on claims was filed, H. H. Emmons presented to said probate court a claim against said estate which, on June 15, 1866, was allowed at the sum of $3,105.94.

7. All of the claims against said estate, but that of said Palms, have been paid.

8. Said Palms rendered three accounts as administrator of said estate, in which there was allowed as due to him from said estate, under the first account, the sum of $763.33, allowed March 20, 1866, and under the second account $1,208.33, allowed April 7, 1868; upon his third account, $1,305.66, allowed May 10, 1870. Copies of each account, and the allowance thereof, are as follows:

were never proper claims or demands except as against the estate of Joseph Campau; and that if decedent Denis J. promised to pay them, the promise was not binding at the time for the want of writing and the absence of consideration, and in any event is not now enforceable because more than six years elapsed between the promise and the death of said decedent.

In regard to the claim first mentioned, the judge finds that the probate court made no order for the payment of debts by the estate of Joseph Campau until the 28th of January, 1873. At that time an order was made on the application

ESTATE OF JOSEPH CAMPAU IN ACCOUNT WITH FRANCIS PALMS, ADMINISTRATOR.

Dr.			*Cr.*		
1864.			1864.		
May 4.	To revenue stamps for qualification.....	$1 00	July 8.	By cash from J. L. Whiting, for rent	$62 50
1865.			Aug. 15.	By cash from Albert Ding, for rent.....	8 00
May 4.	To one year's services.	1,000 00	Aug. 17.	By cash from J. Rehfuss, for rent.....	15 00
1866.			Oct. 8.	By cash from J. L. Whiting, for rent.....	62 50
Feb. 13.	To 9 months' and 9 days' services, to date	775 00	1865.		
		$1,776 00	Jan. 3.	By cash from Albert Ding, for rent.....	8 00
		1.012 65	Jan. 8.	By cash from J. L. Whiting, for rent.....	62 50
		$763 35	April 8.	By cash from J. L. Whiting, for rent.....	62 50
			July 8.	By cash from J. L. Whiting, for rent.....	62 50
			July 10.	By cash from F. Morrell, for timber.....	529 15
			Oct. 8.	By cash from J. L. Whiting, for rent.....	62 50
			1866.		
			Jan. 8.	By cash from J. L. Whiting, for rent	62 50
			Jan. 12.	By cash from J. Rehfuss, for rent.....	15 00
					$1.012 65

Examined and allowed as within stated, this 20th day of March, A. D. 1866. H. W. DEARE, Judge of Probate.

Recorded in Liber 63, page 374.

ESTATE OF JOS. CAMPAU, IN ACCOUNT WITH FRANCIS PALMS, ADMINISTRATOR.

1867.		DR.	CR.
July 8.	By cash of J. L. Whiting.....		$62 50
Sept. 10.	By cash of Albert Ding		10 00
Nov. 1.	To 5½ months' service, at $1,000 per annum.....	$458 33	
Nov. 1.	To balance brought forward.....		385 83
		$458 33	$458 33
Nov. 1.	To balance (due F. Palms) brought down.....	$385 83	

of a creditor and against the opposition of the decedent Denis J. who was then sole administrator and held sufficient assets to pay all claims which had been established against the estate he represented, including those now urged by Mr. Palms in this proceeding. The cause of the delay in ordering payment does not appear in this record. In case of certain appeals, and no doubt in other cases of necessity, the

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ESTATE OF JOSEPH CAMPAU, IN ACCOUNT WITH FRANCIS PALMS, ADMINISTRATOR.

1866.		Dr.	Cr.
Feb. 14.	By cash of Charles Wauke		$75 00
Feb. 20.	By cash of A. Ding, on account of rent (lot on Front street)		8 00
Feb. 20.	By cash of A. Ding, for three years' rent to June 1, 1866, (Main street)		15 00
April 9.	By cash of J. L. Whiting		62 50
July 8.	By cash of J. L. Whiting		62 50
Oct. 8.	By cash of J. L. Whiting		62 50
1867.			
Jan. 8.	By cash of J. L. Whiting		62 50
April 8.	By cash of J. L. Whiting		62 50
April 16.	By cash of Charles Wauke, on account of rent		30 00
1866.			
Feb. 13.	To paid *Free Press* notice	$4 78	
1867.			
May 15.	To 15 months' and 3 days' services, at $1,000 per annum	1,258 22	
May 15.	To balance brought forward		822 50
		$1,263 00	$1,263 00
1867.			
May 15.	To balance (due F. Palms) brought down	$822 50	

Examined and allowed this 6th day of April, A. D. 1868, at the sum of $1,208 33 due this administrator from this estate.

H. W. DEARE, Judge of Probate.

ESTATE OF JOSEPH CAMPAU IN ACCOUNT WITH FRANCIS PALMS.

1869.		Cr.	Dr.
Nov. 6.	To 24½ months' service as administrator, from November 1st, 1867, at $1,000 per annum		$2,041 66
1867.			
Nov. 11.	By cash of J. Rehfuss, for rent	$15 00	
1868.			
Jan. 8.	By cash of J. L. Whiting, for rent	62 50	
Feb. 21.	By cash of C. Wauke, for rent	30 00	
April 1.	By cash of J. Rehfuss, for rent	40 00	
April 8.	By cash of J. L. Whiting, for rent	62 50	
May 11.	By cash of Henry Hauser, for rent	30 00	
July. 8.	By cash of J. L. Whiting, for rent	62 50	
Oct. 8.	By cash of J. L. Whiting, for rent	62 50	
1869.			
Jan. 8.	By cash of J. L. Whiting, for rent	62 50	
March 6.	By cash of Charles Wauke, for rent	30 00	
March 6.	By cash of Albert Ding, for rent	16 00	
April 8.	By cash of J. L. Whiting, for rent	62 50	
July 8.	By cash of J. L. Whiting, for rent	62 50	
Aug. 24.	By cash of A. J. Heath, for rent	45 00	
Oct. 8.	By cash of J. L. Whiting, for rent	62 50	
			706 00
			$1,335 66
Nov. 15.	By cash of Charles Wauke		30 00
Nov. 15.	To balance due Francis Palms		$1,305 66

probate court is empowered to suspend the decree for payment (Comp. L. § 4458) and hence to prolong the settlement and postpone the arrival of the time for the administrator to become personally liable. It was competent for the administrator and likewise his duty to hasten the event as far as practicable in view of the statutory regulations and the interests of all concerned, and for the purpose of this

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STATE OF MICHIGAN, }
COUNTY OF WAYNE. }

Francis Palms being duly sworn deposes and says that the above account by him rendered is true and correct in all respects.

FRANCIS PALMS.

Subscribed and sworn to before me this 18th day of January, 1870.

JAMES D. WEIR, Judge of Probate.

Examined and allowed as within stated, this 10th day of May, 1870.

J. D. WEIR, Judge of Probate.

9. Each of said administrators filed three several accounts which were passed upon and allowed by the probate court. The third account of Denis J. Campau was allowed May 10, 1870; was of receipts and disbursements of money, and showed a balance due at the time to said Denis J. Campau from said estate of the sum of $5701.77.

10. It appears from an order of said probate court, made April 17, 1871, that a day was fixed by said probate court for hearing a fourth account of Denis J. Campau, but diligent search in the records fails to bring to light either said fourth account, or further mention of the same.

11. Neither the claim allowed said Palms, as creditor of said estate, nor his claim for amount allowed by the probate court aforesaid for services as co-administrator of said estate, has ever been paid.

12. Said Palms resigned his position as administrator of said estate on May 23, 1870, on which day his resignation was accepted and he was released from his said trust. On December 12, 1872, Theodore J. Campau resigned his trust as such administrator, and on that day his resignation was accepted and he was released from said trust.

13. From December 12, 1872, until the time of his death, said Denis J. Campau was the sole surviving administrator of the estate of Joseph Campau, deceased.

14. Theodore J. and Denis J. Campau petitioned the probate court for license to sell real estate. License was granted. They advertised for the sale in their own names, but claimant Palms signed the report of sale and the deeds as co-administrator.

15. When said sales of real estate were made, said Theodore J. and Denis J. Campau requested said Palms to sign the deeds as co-administrator with them, but he refused for the reason that the estate owed him and he had not got his pay. Theodore J. and Denis J. then sent word by their clerk that if he would sign the deeds they would pay him out of the proceeds of said sale, and thereupon, and in reliance upon said promises, said Palms signed the deeds. This conversation occurred before the resignation of said Palms.

16. At the time of granting letters of administration as aforesaid, no order was entered in the said probate court allowing to said administrators a time for disposing of said estate and paying the debts, as is contemplated and required by §§ 4450–1–2–3, Compiled Laws 1871, nor was there ever any order entered in said probate court in the matter of said estate

proceeding we may presume that the court in delaying the decree acted regularly, and that the deceased administrator was not at fault in regard thereto, nor in any manner prejudiced thereby. We think his administrator cannot be heard to contend to the contrary.

The decree before mentioned of the 28th of January, 1873, ordered the payment of the debts within sixty days,

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in regard to the time or manner of payment of debts by said administrators, except as hereinafter stated.

17. On the 16th day of January, 1873, said H. H. Emmons filed in the probate court a petition of which the following is a true copy:

THE PROBATE COURT FOR THE COUNTY OF WAYNE.

In the matter of the estate of Joseph Campau, deceased.

To the Hon. Albert H. Wilkinson, Judge of Probate of the said Court:

The petition of Halmer H. Emmons respectfully shows unto your honor as follows, to wit:

Your petitioner is a creditor of said estate; that his claim against the said estate as such creditor was duly proved and allowed on the fifteenth day of January, A. D. 1866, at the sum of three thousand one hundred and five dollars and 94-100, as in and by the records and files more fully appears.

Your petitioner has frequently applied to the administrators of said estate to pay the said claim, but they have hitherto neglected and refused to pay said claim, and the same still remains unpaid.

Upon examination of the records and files it appears that no order as required by § 4457 of the Compiled Laws of 1871 of the payment of debts proved against said estate has ever been made, and your petitioner therefore prays your honor to make such order, to the end that your petitioner may enforce payment of his said claim.

By ASHLEY POND, his attorney. HALMER H. EMMONS.

Filed January 16, 1873.

Said petition came on to be heard, and on the hearing thereof an order was entered in said probate court, of which the following is a copy:

"At a session of the probate court for the county of Wayne, holden at the probate office in the city of Detroit, on Tuesday, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy-three.

"Present, Hon. Albert H. Wilkinson, Judge of Probate.

"In the matter of the estate of Joseph Campau, deceased.

"This being the adjourned day assigned by the court for hearing the petition of Halmer H. Emmons, a creditor of the said estate, whose claim has been duly proved and allowed, praying that an order may be entered in this court requiring the administrator of said estate to pay the debts proved and allowed against the same; and it appearing to the satisfaction of the court by proof on file that a certified copy of said petition and of the order assigning the twenty-first instant for the hearing by the court of said petition has been duly served on Denis J. Campau, now sole administrator of said estate, as was in said order by the court directed, and the hearing of said petition having been continued by consent until this day, and the court having now heard Ashley Pond of counsel for said petitioner, and James D. Weir of counsel for said Denis J. Campau, administrator as aforesaid, and due consideration having been had in the prem-

and by force of the statute the allowed demand in question became a personal charge against the said Denis J. and he became liable for it "as for his own debt." § 4461. It was therefore a proper demand to be asserted against his estate (§§ 4420, 4431) and was seasonably presented. We find no valid objection against its allowance. Whether it could or could not be enforced against the other estate is immaterial. The law having made the administrator liable for it as for

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isos, and it appearing to the court by the records and files in the matter of the said estate that sufficient assets came to the hands of the said Denis J. Campau, as administrator jointly with Theodore J. Campau, then one of his co-administrators to pay the debts proved and allowed against the said estate in full, and the time limited in the statute for payment of said debts having elapsed, it is ordered and decreed that the said Denis J. Campau, administrator of said estate aforesaid, pay the debts proved and allowed against the said estate within sixty days from the date hereof.

"ALBERT H. WILKINSON, Judge of Probate."

An appeal was taken to the circuit court, and by said court said order was affirmed.

18. From November 26, 1873, down to the death of Denis J. Campau nothing was done in the matter of said estate in said probate court.

19. Said Denis J. Campau died August 15, 1878, and on September 19, 1878, Charles B. Lothrop was appointed and still is administrator of his estate.

20. In the year 1867 a bill for the partition of the real estate of Joseph Campau, deceased, was filed in the circuit court for Wayne county, in chancery, and said real estate was, by a decree of said court made February 6, 1869, divided among the heirs, of which property said Denis J. received one-ninth part as heir-at-law of said Joseph.

21. Said Palms presented to the commissioners on claims appointed in the estate of Denis J. Campau, all the claims allowed him as aforesaid against the estate of said Joseph, and claimed that Denis J. was personally liable to him for the amount thereof, with interest. But said claims were disallowed in whole by said commissioners on claims in the said estate of Denis J. From this decision of the commissioners said Palms appealed.

And upon the said evidence and said findings the defendant and appellee objected that the plaintiff was not entitled to recover, but the court overruled the objection and held that the plaintiff was entitled to recover the whole of his said claim, and allowed the same at the sum of $6,481.81, being the amount of said claim with interest. And thereupon, on the thirtieth day of July, 1880, a judgment was entered in said cause allowing the claim of said plaintiff and appellant against said appellee at the sum of $6,481.81, and costs to be taxed; and thereupon said defendants and appellee excepted by its attorney to the ruling of the said court aforesaid and to said judgment, for the reason that upon all said evidence and said findings said plaintiff and appellant was not entitled to have his said claims or any part thereof allowed against said estate.

And at the request of the parties to this suit I have, this sixth day of August, 1880, settled and signed the foregoing as a case made after judgment in this cause in accordance with the statutes and rules in such cases made and provided.

F. H. CHAMBERS,
Circuit Judge.

his own debt, the right of the creditor is absolutely against him and his estate, and not contingent upon the existence of liability elsewhere.

As to the other items in controversy. They were severally allowed by the judge of probate as lawful charges against the estate of Joseph Campau. Any one aggrieved was entitled to appeal. No appeal was taken however. The judge had jurisdiction, and hence the proceedings cannot be impeached in this collateral action. He had jurisdiction to commit errors, and if he committed any, their correction could be obtained only in a direct proceeding. No one asserts that there was fraud. The effect of his decisions was to establish an indebtedness from the estate of Joseph Campau to this claimant. The indebtedness remained when the deceased administrator became sole administrator. He held sufficient assets to pay with, and this indebtedness was payable out of them. §§ 4454, 4455.

In these circumstances the probate court, as before stated, ordered him to "pay the debts proved and allowed against the said estate within sixty days." This decree covered the allowance in question. No appeal was taken and the right became fixed. The claimant was a creditor, and the deceased administrator was rendered liable "as for his own debt."

The presumption is that the assets for the extinguishment of these debts were retained by the administrator, and passed after his death, as the facts appear in this record, to his representatives. The other points become immaterial.

We think the facts support the judgment, and the latter is affirmed with costs. The determination will be certified to the circuit court and court of probate.

The other Justices concurred.

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3. Where objections to a decree for an accounting relate to details of practice, and were not raised in the lower court, and are urged by a party who has taken no appeal, they will not be noticed in the appellate court. *Id.*
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3. Where a declaration sets forth separate causes of action, one of which is statutory, and the other at common law, neither can be established if facts needed to make out either are wanting. *Bottomley v. Port Huron & N. W. Ry Co.*, 542.
4. An unwritten promise by a railroad corporation to pay the obligations of a contractor to his laborers, will not sustain an action. *Id.*
5. A statute, even when it is remedial, must be followed with strictness where it gives a remedy against a party who would not otherwise be liable. *Chicago & N. E. R. R. Co. v. Sturgis*, 538.
6. The assignment after maturity of a note given in pursuance of a contract does not necessarily transfer to the assignee a right of action for a breach of the contract, or entitle him to base a claim thereon in order to cancel a set-off against the note. An action on the note by the assignee would not bar an action by the assignor for breach of contract. *Wetmore v. Neuberger*, 362.
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2. In an action for damages caused by an assault with intent to ravish, the plaintiff's physician was properly allowed to testify that after the assault he found her in a condition for which he could not account until he heard of the attempted outrage, and that he was satisfied that if the fact was true, it would account for her state. *Id.*

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1. Fraud is not inferable from mere breach of contract, and where an attachment is asked for on the ground of fraud, the burden of proving it is on the plaintiff. *Powers v. O'Brien*, 317.
2. A return of a justice's writ of attachment not personally served, does not confer jurisdiction under Comp. L., § 5276, if it appears only that it had been left at defendant's "usual place of abode, with his wife," who is informed of its contents. *Michels v. Stork*, 2.
3. A general appearance before a justice cannot be considered a submission to the jurisdiction in attachment, when taken in connection with defendant's motion to dismiss the writ for want of proper service. *Id.*
4. An officer levying an attachment on property of which a certain amount is exempt from execution, must appraise it and give the defendant an opportunity to select that which he is entitled to retain, whether a writ is issued by a justice or from the circuit court. Comp. L., §§ 6102–3. *Id.*
5. Proceedings to dissolve an attachment are collateral to the main suit, and a commissioner's order dissolving it is interlocutory only, releasing the property from the lien of the writ; it is not a judgment, nor is an order of the court affirming it on *certiorari*. *Gray v. York*, 415.
6. On an application to dissolve an attachment granted on the ground of fraud by a party to a contract, a finding that there has been no breach and that defendant is right is a finding that defendant designed no wrong and negatives fraud; and if there is no evidence to show the specific fraud on which the affidavit of attachment was based, there is no finding that can be reviewed so as to disturb a conclusion dissolving the attachment. *Powers v. O'Brien*, 317.
7. The plaintiff in attachment is not liable as a trespasser for the omissions of the officer to serve the writ properly, or to give the defendant an opportunity to select such property as he was entitled to under the statutory exemption. If the writ was valid when issued, the officer's subsequent acts or omissions will not render the plaintiff a trespasser *ab initio*. *Michels v. Stork*, 2.

trover for goods seized on, evidence: TRIAL, 7.

ATTEMPT TO COMMIT BURGLARY.
what constitutes: CRIMINAL LAW, 18.
unarmed participation: CRIMINAL LAW, 20.
information for: CRIMINAL LAW, 21.
ATTORNEY AND CLIENT.
stipulation for discontinuance: PRACTICE, 7.
attorney fee on continuance: PRACTICE, 19.
warrant of attorney to sustain confession of JUDGMENTS, 1.
counsel's mere allegation not noticed: PRACTICE, 12.
counsel's opinion as to theory of bill not binding: EQUITY, 23.
examination by counsel of executor under oath: ESTATES ETC., 21.
printing records and briefs: COSTS, 10.
ATTORNEY FEE
to defendant in error on continuance: PRACTICE, 19.
AUTHENTICATION
of stenographer's notes: EVIDENCE, 10.
AVERMENTS
of interests, in bill for partition: EQUITY, 26.
AWARD: See ARBITRATION AND AWARD.
in condemning lands: EMINENT DOMAIN, 2, 3; RAILROAD COMPANIES, 3, 4.

BAILMENT.

1. A man lent a flag to his employer, helped him to hoist it and left it flying when he went away. It was afterwards damaged by a hail-storm. *Held* that the employer was not liable for the damage done, without proof, at least, that he had failed to take due care of it. *Beller v. Schultz*, 529.
2. A borrower of property is not an insurer of it even when it is gratuitously lent. *Id.*
3. An action does not lie for the value of property gratuitously lent, on a showing merely that the lender had sent for it and had not received it back; it is not presumable without proof that the borrower wrongfully withheld it. *Id.*

BANK ACCOUNT,
evidence as to, in trover: TRIAL, 7.
BANKING LAW,
when affected by local USAGE, 1.

BANKRUPTCY:

1. An assignment preferring certain creditors, if made in good faith more than two months before a petition in bankruptcy is filed against the debtor (Rev. Stat. § 5128) precludes the seizure of the goods under the warrant in bankruptcy. *Mathews v. Stewart*, 209.
2. A common law assignment preferring specified creditors is like a chattel mortgage securing a prior debt, as both are for the benefit of particular creditors and are based on a consideration of past indebtedness, and both fall within § 5128 of the U. S. Revised Statutes, by which transfers based on past indebtedness are protected from the operation of the Bankrupt Law, if made in good faith more than two months before bankruptcy proceedings. *Id.*
3. Submission to the seizure of goods under bankruptcy process cannot be construed as a voluntary surrender of them, precluding an action of trover against the officer making the seizure. *Id.*
4. An assignee for the benefit of creditors, who has been in possession for the purpose of making sales and is shown to be acquainted with the goods and with the prices they brought, can give his opinion as to the value of a portion of the stock taken from him under process in bankruptcy, and for which an action of trover has been brought against the officer taking them. *Id.*

BAR.
judgment for defendant for costs, is not: RES JUDICATA, 2.
non-joinder acquiesced in, is not: PRACTICE, 7.
county's remedy against TOWNSHIPS, 4.
judgment not upon the merits: JUSTICES OF THE PEACE, 5.
action on note by assignee: ACTION, 6.
BASTARDY.
1. The bastardy act is to secure the public against the necessity of supporting bastard children; and the expense of enforcing it against the father of such a child falls on the public and not on the child's mother. *Waite v. Washington*, 388.
2. Mandamus lies to the sheriff to imprison a person convicted under the bastardy act when necessary to compel him to contribute to the child's support; and the mother is a proper relator in applying for the writ. *Id.*
BEATEN TRACK: see NEGLIGENCE, 1, 3, 5.
BILL FOR INJUNCTION.
allegation of ownership: INJUNCTIONS, 1.
BILL FOR PARTITION.
averment of interests: EQUITY, 26, 30.
defendants to: EQUITY, 27.
BILL FOR REDEMPTION: see EQUITY, 24.
BILL IN AID OF EXECUTION.
when not maintainable: DEBTOR AND CREDITOR, 5.
transfer of property to wife: DEBTOR AND CREDITOR, 12.
BILL IN EQUITY.
defects of form in: EQUITY, 1, 2.
case actually made by, governs court: EQUITY, 23.
presenting case of equitable jurisdiction: EQUITY, 24.
BILL OF DISCOVERY
cannot be filed in Michigan: EQUITY, 6.
BILL OF EXCEPTIONS.
presumed to report charge correctly: TRIAL, 11.
evidence to be included in: PRACTICE, 14.
presumption as to evidence: PRACTICE, 15.
whether can bring up questions on appeal under railroad law: RAILROAD COMPANIES, 5.
BILL OF INTERPLEADER: see EQUITY, 7–13.
BILL OF PARTICULARS.
not part of the declaration: PLEADINGS, 10.
service of does not amend PLEADINGS, 11.
amendment does not change the issue: PLEADINGS, 11.
not waived by pleadings, or by notice of trial: PLEADINGS, 13.
no plea or demurrer to: PLEADINGS, 11.
declaration not demurrable by: PLEADINGS, 12.
refusal excludes evidence: PLEADINGS, 14.
BILL OF EXCHANGE,
authority to draw; burden of proof: NEGOTIABLE INSTRUMENTS, 2.
post-dated; agents' authority: NEGOTIABLE INSTRUMENTS, 3, 4, 6–9,
BILL TO FORECLOSE MORTGAGE.
parties, makers of joint and several note: MORTGAGE OF LANDS, 14.
for interest in arrears, time of filing: MORTGAGE OF LANDS, 15.
BILL TO QUIET TITLE: see EQUITY, 23, 24.
BILL TO REVIVE POLICY.
sustained: INSURANCE, 2.
delay not precluding: EQUITY, 18.
BOARD OF REVIEW,
must give notice of increased assessment: TAXATION, 15.

BOARD OF SUPERVISORS.
approval of sheriff's bond: SHERIFFS, 1, 2.
determining amount of county tax: TAXATION, 21.
equalization of assessment rolls: TAXATION, 16–18.
permission to dam NAVIGABLE STREAMS, 4.
presentation of certificate to: TAXATION, 23.
BONA FIDE PURCHASERS.
who are, under purchase on EXECUTIONS, 6.
mere institution of suit does not make: DEEDS, 12.
BONDS.
for jail limits, liability: SURETYSHIP, 3.
injunction bond valid, though bill dismissed: INJUNCTION, 2.
mandamus to compel council to act on: LIQUOR LAWS, 2, 3.
of insurance agent, what covers: INSURANCE: 10–13.
of residuary legatee as executor: ESTATES ETC., 22, 23.
of sheriff, county named as obligee: SHERIFFS, 1, 2.
received in payment: RAILROAD COMPANIES, 15; DEBTOR AND CREDITOR, 1.
recitals cannot be contradicted to enlarge liability: SURETYSHIP, 2.
BOOK AGENT.
agreement with subscriber: CONTRACTS, 3.
BOOKS.
cash book entries as evidence: PARTNERSHIP, 6.
of vendors; entries not proof of land sales: REAL PROPERTY, 10.
BOOMING COMPANIES.
1. In deciding what sums booming companies may properly charge for booming under Comp. L. ch. 88, it is proper to admit evidence of the fair market value of their booming grounds as helping to afford a basis for a proper estimate, and the fact that they are generally of little value for any other purpose requires considerable latitude to be exercised in admitting evidence; the value is not conclusively fixed by their actual cost to the company. *Pere Marquette Boom Co. v. Adams*, 403.
2. It is suggested that charges for boomage should be fixed by statute, or by some board or local authority empowered for that purpose, instead of being left to be fixed by the booming company. *Id.*
evidence of boom scale: LOGGING, 2.
BOOM SCALE.
evidence of: LOGGING, 2.
BORROWER
not an insurer: BAILMENT, 2.
wrongful withholding not presumed: BAILMENT, 3.
BOUNDARIES.
1. Testimony as to boundaries need not be that of a surveyor or expert; the witness' want of accurate knowledge would only affect the weight of his testimony. *Hoffman v. Harrington*, 183.
in award condemning land: RAILROAD COMPANIES, 3.
BREACH OF CONTRACT.
assignee of note had no right of ACTION, 6.
fraud not inferable from: ATTACHMENT, 1.
BREACH OF COVENANT.
who has the remedy: REAL PROPERTY, 5.
measure of damages: REAL PROPERTY, 5.
BREACH OF WARRANTY.
burden of proof: WARRANTY, 2.
form of action: PLEADINGS, 8, 9.
BREAKING.
instruction not an acquittal: CRIMINAL LAW, 23.
resembling burglary, informations for: CRIMINAL LAW, 19.

BRIEFS
and records, printing of: COSTS, 10.
BUILDINGS.
closing street, equity can remove: INJUNCTIONS, 1.
single building on two lots: EXECUTION, 5; HOMESTEAD, 1.
BURGLARY; see CRIMINAL LAW, 16–23.
BURDEN OF PROOF.
after agreement for settlement of accounts: PARTNERSHIP, 5.
of authority to draw bill: NEGOTIABLE INSTRUMENTS, 2.
of breach of WARRANTY, 2.
of fraud, on plaintiff in ATTACHMENT, 1.
of good faith of agent becoming grantee: EQUITY, 21.

CANCELLATION OF MORTGAGE
by conveyance to mortgagee: MORTGAGE OF LANDS, 8.
CAPIAS AD RESPONDENDUM.
damages in action on bond for jail limits: SURETYSHIP, 3.
CAPIAS AD SATISFACIENDUM.
damages in action on bond for jail limits: SURETYSHIP, 3.
CASE
for the deception from false warranty: PLEADINGS, 8, 9.
CASH BOOK ENTRIES
not conclusive in settlement: PARTNERSHIP, 6.
CASH VALUE.
assessment must not exceed: TAXATION, 14.
certificate to assessment roll: TAXATION, 13.
CERTIFICATE
by officers of agricultural society: TAXATION, 23.
presumed to have been presented, TAXATION, 23.
of service of declaration in local courts: PRACTICE, 3.
for primary school lands: STATE LANDS, 1.
to attest proof of execution: DEEDS, 3.
false, of recording, mortgagee not to rely on: MORTGAGE OF LANDS, 3.
CERTIFICATE OF PURCHASE
of state swamp lands: TAXATION, 5.
mandamus to issue: STATE LANDS, 2.
CERTIFICATES OF ACKNOWLEDGMENT
upheld when possible: DEEDS, 1.
surplusage in: DEEDS, 2.
presumptive evidence of genuineness: DEEDS, 4.
duty of officer: DEEDS, 5.
CERTIORARI: *Surety for costs*, 1, 2; *Hearing*, 3; *Technical Objections*, 4; *Judgment*, 5.
1. The return to a writ of *certiorari* to a justice may properly show whether security for costs was filed in actions by non-residents. *McLean v. Isbell*, 129.
2. *Certiorari* to a justice is in the nature of an appeal so far as to allow the circuit judge to include the surety in the judgment for costs against his principal. *Id.*
3. Questions touching the merits on *certiorari* must be brought up on the hearing of the cause, and will not be considered on notice to quash. *Maybee v. Drain Com'r*, 207.
4. Objections that are merely technical should not be given any weight on *certiorari* to a justice unless there is reason to believe they tended to a wrong result. *Cheney v. Russell*, 620.
5. The Supreme Court can render the proper judgment in a case brought to the circuit court on *certiorari* and taken up on error; but if the plaintiff in error has received too favorable a judgment below, and the other party does not complain, they can only affirm

the judgment, though they may give costs to the defendant in error. *McClatchie v. Durham*, 435,
return to, as to notice: DRAINS, 2.
corporate rights when not reviewed on: RAILROAD COMPANIES, 1.
CESTUI QUE TRUST,
equal equities with creditors: REAL PROPERTY, 7.
CHARACTER OF TITLE
need not be averred by plaintiff in EJECTMENT, 2.
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as to theory open to defense: CRIMINAL LAW, 15.
close scrutiny of: TRIAL, 11.
containing remarks of other judges: TRIAL, 10.
directing attention to evidence: TRIAL, 9.
on question of NEGLIGENCE, 2.
presumed to be correctly reported: TRIAL, 11.
refusal, points already covered: TRIAL, 8.
when presumed warranted: CRIMINAL LAW, 5.
CHARGES
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only remedy to obtain is REPLEVIN, 1.
wrongfully held by widow, remedy: ESTATES ETC., 10.
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as witnesses for prosecution: CRIMINAL LAW, 36.
contradiction of testimony: CRIMINAL LAW, 37.
not proper witnesses as to adultery: DIVORCE, 1–3.
compulsory support of: BASTARDY, 1, 2.
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assignee can sue without indorsement: ACTION, 7.
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a legal holiday, closing saloons: LIQUOR LAWS, 6.
CIRCUIT COURT.
control of costs in appeal cases: COSTS, 2.
new suit in, discontinuance after appeal: JUSTICES ETC., 12, 13.
jurisdiction in QUO WARRANTO, 1.
no probate jurisdiction *in rem*: ESTATES ETC., 8.
discretion to give or withhold COSTS, 1.
CIRCUIT COURT COMMISSIONERS
may tax costs under FRAUDULENT DEBTOR'S ACT, 1.
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and error does not lie on affirmance: ERROR, 1.
CIRCUITY OF ACTION.
how saved in partition: EQUITY, 29.
CITIES.
excessive assessment, recovery of payment: TAXATION, 15.
public parks of: MUNICIPAL CORPORATIONS, 1–3; QUO WARRANTO, 2.
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must give notice of increased assessment: TAXATION, 15.
CITY PAVING TAX.
holder of lien for, defendant in partition: EQUITY, 27.
CIVIL DAMAGE LAWS.
right of action under: LIQUOR LAWS, 1.
CLAIM AND COLOR OF TITLE.
possession under, sustains TRESPASS, 2.
CLAIM BY TAX TITLE
necessarily hostile: ADVERSE POSSESSION, 3.

CLAIM OF TITLE.
evidence to prove notoriety of: EJECTMENT, 6.
CLAIMS: See ESTATES OF DECEDENTS, 6–20.
of third parties, disposition on appeal: EQUITY, 39.
what ones covered by bill of interpleader: EQUITY, 1.
maturity of, under policy of INSURANCE, 5.
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till dismissed for laches: EQUITY, 22.
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unauthorized recording of MORTGAGE OF LANDS, 2.
CLOSING THOROUGHFARE.
power of equity to remove buildings: INJUNCTION, 1.
COLLATERAL ATTACK
of allowance of claims against ESTATES ETC., 18.
COLLATERAL MATTERS.
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COLLECTION
of excessive tax levy, restrained: TAXATION, 8.
of tax on purchaser's interest in primary or school lands: TAXATION, 7.
of revenues, methods: TAXATION, 4.
COLLISION
of vehicles: see NEGLIGENCE, 1–5, 9.
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of complainant in bill of interpleader: EQUITY, 11, 12.
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possession obtained by: LANDLORD AND TENANT, 2.
COMMITTEE
managing newspaper, liability of: EVIDENCE, 9.
COMMON COUNCIL:
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insufficient in action for labor debts: RAILROAD COMPANIES, 12, 13.
COMPARISON
of handwriting, proof by: CRIMINAL LAW, 25.
COMPETENCY
of witnesses, extent of: EVIDENCE, 3.
COMPLAINING WITNESS:
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relationship disqualifies prosecutor: CRIMINAL LAW, 30.
COMPOUND INTEREST
on default in payments: LAND CONTRACTS, 5.
COMPROMISE:
improper, not presumed against jury: TRIAL, 14.
COMPUTATION OF TIME
for return of summons: JUSTICES OF THE PEACE, 2½.
CONDEMNATION OF LAND: see EMINENT DOMAIN. 1–3: RAILROAD COMPANIES, 2–7.
corporate rights, when not to be passed on: RAILROAD COMPANIES, 1.
CONDEMNING LAND.
actual notice of proceeding: DRAINS, 1.
CONFESSION OF JUDGMENT; see JUDGMENT, 1.
CONFLICT OF CONVEYANCES:
action of trespass not enjoined: EQUITY, 22.
CONSIDERATION.
cross-examination as to, excluded: SALE, 2.
for agent's agreement for his own benefit: AGENCY, 1.
for deed, not measuring damages: REAL PROPERTY, 5.
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money paid without, under LAND CONTRACTS, 8, 9.
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wanting, effect of: MORTGAGE OF LANDS, 1.
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withheld to perfect title, foreclosure: MORTGAGE OF LANDS, 1, 6.
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when cannot show fraud in sale: REPLEVIN, 3.
CONSTITUTIONAL AMENDMENTS.
submission at "next general election:" CONSTITUTIONAL LAW, 1.
CONSTITUTIONAL LAW.
1. The requirement that constitutional amendments must be submitted at the "next general election" after they were proposed, meant the biennial November election for State officers, until 1876, when the requirement was changed to permit submission at both Spring and Fall elections: *Westinghausen v. People*, 265.
2. The Legislature can make its own definitions for statutory purposes, but cannot thereby change a constitutional definition. *Id.*
3. The sovereign powers of taxation and police may constitutionally be combined in the same statute. *Reithmiller v. People*, 280.

taxing power: see TAXATION, 1–5.
police power not prevented by taxation: LIQUOR LAWS, 4.
stating object of tax: TAXATION, 6,
liquor tax law valid: TAXATION, 6.
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as to improvement of NAVIGABLE STREAMS, 1–4.
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wisdom or policy of statute not a judicial question: STATUTES, 1.
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of residuary clause in WILLS, 5.
of STATUTES, 2, 3.
of general terms in statutes, CRIMINAL LAW, 28.
of pleadings before justice; PLEADINGS, 16.
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CONSTRUCTIVE PARTIES.
rights of, enforced; CONTRACTS, 1.
CONSTRUCTIVE POSSESSION
is co-extensive with the title which creates it: REAL PROPERTY, 1.
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liquor tax for benefit of: TAXATION, 6.
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CONTRACT PURCHASERS.
bona fide purchase against: EXECUTIONS, 6.
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CONTRACT RELATIONS.
of purchasers with creditors of: PARTNERSHIP, 8.

CONTRACTORS.
control over road-bed: EQUITY, 20.
labor debts of, liability of: CORPORATIONS, 11.
company's unwritten promise to pay debt of: ACTION, 4.
not "laborers:" CORPORATIONS, 9.
assignment by, liability for labor debt: RAILROAD COMPANIES, 13.
CONTRACTS: *Parties,* 1; *Evidence,* 2–7; *Assignees,* 8; *Sumptuary Contracts,* 9.

1. Two firms orally agreed to buy and lumber certain lands, one to furnish cash and the other labor. The former, without the latter's knowledge, took the land contract in their own name, while the latter acted under their oral agreement in the belief that they were partners to the contract. *Held,* that in a settlement of mutual claims they should be treated as if they were such parties, and that their rights as such would be enforceable in equity. *Edson v. Gates,* 253.
2. A claim of set-off made in a plea cannot establish a contract. *Ayres v. Gallup,* 13.
3. A subscription agent, canvassing for a local history to cost $10, had a book for signatures containing a printed contract therefor, a warning to patrons not to be induced to sign unless they expected to pay the price charged, and a "rule" that "no promise or statement made by an agent, which interferes with the intent of printed contract, shall be valid." A justice of the peace consented to sign the subscription book on condition that his office fees from that time to the time of delivery should be taken in payment, and he received from the agent a written memorandum to that effect. *Held,* that this must be considered together with the signature to show upon what point the minds of the contracting parties met, and that if the agent's principals ratified the contract, they must accept the terms agreed on, while if they repudiated it they could decline to deliver the book. But they could not repudiate the actual agreement and hold the subscriber. *Eberts v. Selover,* 519.
4. Where there are conflicting versions of an agreement, it is for the jury to find which is true, and nothing can be shut out on the assumption that one is correct rather than the other. *Peterson v. Anderson,* 441.
5. A logging contract was rescinded by mutual agreement, but the party who did the lumbering afterwards sued for a balance due him, and the defendant claimed as a set-off the sum of $500, which he said plaintiff was to pay as part of the rescission. *Held,* that in submitting the matter, the judge was warranted in assuming that this item was in dispute. *Id.*
6. Where the contract price for work is in dispute between the parties to the contract, evidence as to what the work is fairly worth is admissible as bearing upon the probability that one is correct rather than the other. *Misner v. Darling,* 438.
7. A contract for sawing lumber provided for its measurement as the work advanced. In an action on the contract, proof was offered of a measurement made more than a year afterwards. *Held,* admissible, in the absence of any explanation in the record, as strict compliance with the terms of the contract might have been impossible or been waived. Measurement by either party, or by both, would have been admissible and proper to guard against mistakes or fraud, and if measurement was not made on delivery, it might be made afterwards. *Grosvenor v. Ellis,* 452.
8. Assignees of a contract take it subject to all the rights and equities existing between the original parties. *Edson v. Gates,* 253.
9. Where a man orders a club supper and agrees on the bill of fare

and the price for each guest, he has a right to expect that the printed bill of fare will be limited accordingly; and he is not liable for any extras that may be called for by, or supplied to, the guests, nor is he bound to give notice that he will not pay for them. *Euton v. Gay*, 431.
averments as to, affidavit for GARNISHMENT, 4.
by State, interest subject to TAXATION, 3.
contract right to land: EQUITY, 17; LAND CONTRACTS, 1–3.
cross-examination as to consideration excluded: SALE, 2.
for delivery of timber, acceptance: SALE, 7.
for insurance, held indivisible: INSURANCE, 1.
hiring teachers for graded SCHOOLS, 1.
power of agent, question for jury: AGENCY, 2.
recoupment for claims under: RECOUPMENT, 1.
to pay proceeds of farm to mortgagee: MORTGAGE OF CHATTELS, 1.
waiver of claim to merchandise: SALE, 4.
See LAND CONTRACTS.

CONTRADICTION
not allowed on collateral matters: TRIAL, 6.

CONTRIBUTORY NEGLIGENCE: See NEGLIGENCE, 4–11.

CONVERSATION
between policeman and prisoner: CRIMINAL LAW, 2.

CONVERSION
of wheat, measure of DAMAGES, 5.
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CONVEYANCES: See DEEDS.

CORPORATIONS: *Source*, 1; *For illegal purposes*, 2; *Identity*, 3; *Conveyances*, 4; *Officers*, 5: *Consolidation*, 6, 7: *Labor debts*, 8–13.

1. Corporations cannot exist except by force of express law. *Schuetzen Bund v. Agitations Verein*, 313.
2. A society that is not incorporated, because organized to resist the enforcement of laws, cannot sue in its society name for the collection of a debt. *Id.*
3. The transfer of the assets of one corporation to another does not establish any legal identity between them. *Tawas etc. R. R. Co. v. Iosco Circ. Judge*, 479
4. Act 89 of 1875, in making valid the conveyances of corporations made in good faith though not according to law, does not make them presumptive evidence of the rightful character of the sale. A deed in proper form and a sale in good faith for value must be clearly proven. *Marq., H. & O. R. R. Co. v. Atkinson*, 166.
5. The president and secretary of a corporation are proper officers to agree for it upon an arbitration. *Fitch v. Hydraulic Co.*, 74.
6. Evidence of a stockholder's meeting to ratify a consolidation agreement is properly objected to if no proof has been offered of legal notice of such meeting of stockholders. *Rodgers v. Wells*, 411.
7. One who declares upon a claim held under an assignment from a consolidated company cannot recover on proof merely that it was assigned by one of the constituent companies to his assignor. *Id.*
8. A statutory right of action against a corporation for labor done and materials furnished follows the assignment of the claim; otherwise it would be determined by the claimant's death, and perhaps by his insolvency. *Chicago & N. E. R. R. Co. v. Sturgis*, 538.
9. Contractors and sub-contractors are not "laborers" within the meaning of the statute giving a right of action for labor debts. *Id.*
10. Under an act giving a right of action for labor debts, a laborer may sue for work done by his team, where no right arises from its service to any other person. *Id.*

11. A corporation is not liable for labor to persons hired by a contractor or sub-contractor except so far as it is indebted to the latter. *Bottomley v. Port H. & N. W. Ry Co.*, 542.
12. A declaration against a stockholder upon a labor claim against the corporation must show the nature of the work and when it was done, to establish the defendant's liability. *Peterson v. Tilden*, 168.

corporate rights not to be passed on by inferior tribunals in condemnation proceedings: RAILROAD COMPANIES, 1.
fraud by director buying lands: RAILROAD COMPANIES, 16.
time checks for labor, hearsay EVIDENCE, 6.
declaration for labor debt: RAILROAD COMPANIES, 12, 13.
nature of liability for labor debt: RAILROAD COMPANIES, 11.

CORPORATE DEEDS: see CORPORATIONS, 4.

CORROBORATION
of evidence of ASSAULT WITH INTENT TO RAVISH, 1.

COSTS: *After tender*, 1; *Discretionary*, 2; *Judgment against surety*, 3; *Of separate appeals*, 4; *On affirmance by equal division*, 5; *On double appeal*, 6, 7; *Taxation*, 10–14.

1. The statute permitting a judge to give or withhold costs in his discretion on the partial reversal of a judgment, does not apply where the full amount due had been tendered before suit. In such cases costs accruing after the tender must go to the defendant under Comp. L. §§ 6180–1. *Wilcox v. Laflin & Rand Powder Co.*, 35.
2. Costs in cases heard and determined on appeal in the circuit, are under the control of the court under Comp. L. § 7427, and its discretion in deciding thereon will not be reviewed. *Hewitt v. Ingham Circ. Judge*, 153.
3. Comp. L. § 6133, providing that final judgment for costs may be rendered against the surety for costs as well as against his principal applies to a case where a justice's judgment for plaintiff is reversed in the circuit on *certiorari*. *McLean v. Isbell*, 129.
4. Where a judgment creditor's bill to set aside a conveyance to a wife impleads as defendant a person holding securities belonging to her, but sought by complainant, and he takes a separate appeal from a decree in her favor, costs on affirmance as against him are allowed to the wife. *Brown v. Vandermeulen*, 522.
5. Costs may be withheld on the affirmance of a judgment or decree by the equal division of the court. *Wright v. Smith*, 560.
6. Costs may be withheld on affirmance of a decree from which both parties have appealed. *Shelden v. Bennett*, 634.
7. Costs are denied to either party where they would be about the same on both sides and both parties have sued out writs of error and neither has prevailed. *Ball v. Watertown F. Ins. Co.*, 137.
8. In an action to recover the balance due upon a foreign judgment, the declaration averred the recovery of judgment for a certain sum "and also the sum of $42.60 adjudged to said plaintiff," etc. The judgment record, introduced in evidence, showed a judgment for the sum named, "besides his costs and charges herein expended," and elsewhere showed that they had been fixed at the sum stated in the declaration. *Held*, that there was no fatal variance, and though it was not shown how the costs were taxed, the proceedings fixing their amount could not be presumed illegal. *Hunt v. Middlesworth*, 448.
9. A judgment in Michigan entitles the successful party to costs, but does not usually fix their amount. When taxed, the action fixing them relates back and they become part of the judgment. *Id.*
10. In taxing costs for printing, the clerk should limit the allowance to the customary rate for such work, unless satisfied that more has in good faith been paid or a greater liability incurred. And counsel

have a right to have the printing done where it will be convenient to look after the proofs. *Dickinson v. Seaver*, 624.
11. A claim for register's fees in the lower court must be itemized before allowing it in taxing costs. *Id.*
12. Costs for stenographer's fees cannot include anything for taking the testimony of the losing party. *Id.*
13. Witness fees to parties are not covered by the ordinary affidavit of disbursements attached to a bill of costs; a special affidavit must show that they attended as witnesses and traveled, as charged, for that purpose, and not to assist as parties, by counsel or otherwise, in the conduct of the case. *Id.*
14. Where a taxation of costs is allowed on motion of a party complaining that too much is allowed, the clerk cannot tax at a higher amount, even though he might have been justified in doing so to begin with. *Id.*

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on denial of MANDAMUS, 6.
upon reversal of decree construing will: EQUITY, 38.
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where may have printing done: COSTS, 10.
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remedy against township for embezzled taxes: TOWNSHIPS, 4.
county named as obligee in bond of SHERIFFS, 1, 2.
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cannot bring ejectment on unaccepted DEDICATION, 5.
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COUNTY TREASURER.
not liable for illegalities in tax sales: TAXATION, 27.
compelled to pay over liquor taxes: MANDAMUS, 4.

COURTS: *Jurisdiction*, 1–3; *Removal of Cause*, 4, 5.
1. The constitutional authority to establish local courts in cities contemplates that in transitory actions they can exercise jurisdiction over persons not shown to be residents though served with process within the municipal limits. *Elliott v. Furwell*, 186.
2. The Superior Court of Detroit has jurisdiction of proceedings to take judgment under warrant of attorney. *Elliott v. Ives*, 190.
3. The fact that there is a specific remedy in equity does not necessarily oust the jurisdiction of a common law court, but only appeals to its discretion, which may be exercised where the circumstances call for prompt interference by the courts. *Tawas etc., R. R. Co. v. Iosco Circuit Judge*, 479.
4. A showing of local prejudice was made for the removal of a cause from the State to the Federal court, but it was not presented to the court and action invoked upon it for more than a year. *Held*, that

the paper had become inofficious and would not avail for the purpose. *Metropolitan L. Ins. Co. v. Ethier*, 144.
5. The showing of cause for the transfer of a cause to the Federal court, and the motion upon it, must be substantially contemporaneous. *Id.*
replevin against U. S. marshal: REPLEVIN, 2.
not bound by counsel's opinion as to theory of bill: EQUITY, 23.
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who has remedy on: REAL PROPERTY, 5.
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CREDITORS.
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CREDITOR'S BILL.
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CRIMINAL CONVERSATION.
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CRIMINAL LAW: *Complaint* 1; *Conversation with Officer*, 2; *Extent of Inquiry*, 3; *Exceptions*, 4; *Charge of Court*, 5; *Reasonable Doubt*, 6; *Failure to Agree*, 7; *Verdict*, 8–10; *Plea of Guilty*, 11: *Alternative Sentence*, 12; *Assault with Intent to Murder*, 13–15; *Burglary*, 16–23; *False Pretenses*, 24–30; *Larceny* 31–35; *Robbery*, 36–39.
1. Objections to a criminal complaint or warrant cannot be raised for the first time when the respondent is called upon to plead to an information for the offense charged therein, if he was examined upon the charge contained in them without objection before being bound over. *People v. Dowd*, 488.
2. The admission of evidence of a conversation between a policeman and a prisoner is not prejudicial on the ground that the latter was influenced, if he made no confession. *People v. Long*, 296.
3. Exact rules cannot be prescribed to limit examinations in criminal prosecutions: circumstances must determine how far back the prosecution may carry them. *People v. Niles*, 606.
4. Exceptions by the defense in criminal cases cannot be sustained where the action of the court was not clearly erroneous and did not injure the respondent. *Id.*
5. A judge's charge in a criminal case is presumed to be warranted by the case made by the defense, if the bill of exceptions does not purport to give all the evidence and does not negative the submission of a theory which would support it. *Id.*
6. A reasonable doubt is not far-fetched, speculative or arbitrary, but is such that after looking over the testimony and considering all the facts proven to their satisfaction and the natural circumstances surrounding the facts, the jury are still unable to say that the accused is guilty. *McGuire v. People*, 286.
7. When a jury in a criminal case cannot agree, it is the judge's duty to discharge them; and the prisoner is not thereby relieved from prosecution. *People v. Schoeneth*, 489.
8. Jurisdiction in a criminal case is measured by the offense charged in the information, and is not lost by a verdict for a minor offense included therein. *Id.*
9. A verdict of guilty with recommendation to mercy does not vio-

late public policy or entitle respondent to a new trial. *People v. Long*, 296.

10. A delay of seven hours in agreeing to a verdict is not uncommon, nor are recommendations to mercy, especially with young offenders, and they do not indicate that the verdict was obtained by improper means. *Id.*
11. Judgment on a plea of guilty was reversed and the prisoner discharged, where the record showed that the information was sworn to and the accused was arrraigned, pleaded guilty, and was sentenced on the same day, and did not show anything from which it could be inferred that he was examined under Act 99 of 1875 as to whether his plea of guilty was voluntary. *Clark v. People*, 308.
12. A sentence by a justice to pay a certain sum with costs of prosecution within twenty-four hours, or, in default of such payment, to be imprisoned for a specified period, is void. *People v. Carroll*, 371.
13. A witness for the prosecution in a trial for an assault with intent to kill, being asked, on cross-examination whether he did not steal overshoes from one Allen, answered that he never stole overshoes; and to the questions whether Allen did not follow him to his house and take these shoes, and whether he was followed and the overshoes taken from him, answered No. *Held*, that no reasonable complaint could be made of the refusal to allow a farther question as to whether any one followed him and took the overshoes; and that the court had already been liberal in permitting cross-examination as to this collateral matter. *People v. Niles*, 606.
14. In a prosecution for a murderous assault in which the assailant used a knife, a witness testified that more than a year before, he had seen the defendant have a dark-handled knife, sharp on both edges. *Held* allowable, against objection, to permit the witness to be asked to describe it, though such testimony would be very remote. Exception could not be taken to excluding the question put to a witness for the defense, whether defendant was not a shoemaker, there being no showing of its relevancy in the trial court, though it was suggested above that such an occupation would account for the knife. *Id.*
15. In a prosecution for an assault with intent to murder, the complaining witness testified that the respondent had struck at him as he was sitting on horseback, and had cut his clothes and the horse; the defense suggested that the complaining witness might have inflicted the wound himself, and the judge charged that if it was not done at the time sworn to by the prosecution, it remained for the other side to show when and where it was done. He also charged that the case for the prosecution must be made out, not by a mere preponderance of evidence, but beyond a reasonable doubt. *Held*, that the former suggestion, though loosely made, might be regarded as meaning only that the defense could advance by suggestion or argument any theory as to when and where the injury was committed, if not as alleged by the prosecution, but not as requiring them to show when and where it was done, as that would be irrelevant if the prosecution did not establish defendant's guilt at the time and place and in the manner alleged. *Id.*
16. Burglary is a common law offense and not a statutory crime; but Michigan statutes distinguish between the degrees of punishment for simple and for aggravated burglary, and if all the incidents warranting the severer penalties are not alleged in the information but the offense is stated as at the common law, the smaller punishment only can be inflicted. *Harris v. People*, 305.
17. A common law information for burglary is not bad in alleging that one respondent was armed and another was not. *Id.*

18. Whether unarmed participation in an attempt at burglary with another who is armed does not involve all participants in the severer penalties imposed by statute for armed attempts, Q. *Id.*
19. The various breakings resembling burglary and made criminal by Michigan statutes, are distinguishable from the common law offense of burglary, and informations therefor must set forth in substance all their statutory elements. *Id.*
20. Introducing a knife between the upper and under sash of an outside window of a dwelling house with the felonious intent to break and enter, is enough to sustain a conviction for attempt at burglary. *Id.*
21. An information under Comp. L. § 7561, for an attempt to commit burglary by one who was armed, must allege that there was some one lawfully in the dwelling house which he attempted to enter, or the allegation that respondent was armed is mere surplusage, and conviction can only be had for the common law offense of burglary. *Id.*
22. An information for statutory burglary is defective if it does not charge the intent with which the breaking and entering was done. *People v. Stewart,* 484.
23. An instruction that the evidence on an information for statutory burglary is not sufficient to convict of the breaking and entering, is not equivalent to an acquittal on that part of the charge; and if the jury disagree, the whole charge remains in force. *People v. Schoeneth,* 489.
24. One is not guilty of obtaining property by false pretenses by merely being present when it is received and taking part of it, even if he had then full knowledge of the representations made to obtain it. *People v. Cline,* 290.
25. In a prosecution for obtaining property by the assignment of a fabricated mortgage and accompanying note, proof by comparison of handwritings, that the signature to the assignment and the indorsements on the note were in the same handwriting as the body of the mortgage and that the signatures were forged, is not sufficient to connect the respondent with the offense if it is not also shown, as a basis for the comparison, that the handwriting in any paper is actually his. *Id.*
26. An information for obtaining property by using a fabricated mortgage, alleged the false representation that the pretended mortgager lived somewhere in a particular quarter of the State. *Held,* that evidence that a person of that name had lived in another part of the State and was dead, was not enough to establish the fabrication of the mortgage, especially if it was not shown that the pretended mortgager had not signed it, or that a person of that name had been represented as owner and as the person who had signed. *Id.*
27. An information for obtaining property by false pretenses concerning a mortgage assigned to the defrauded party is sufficient, if it alleges in effect that the mortgage was assigned to him directly, that the false representations were made to induce him to purchase it, and that, in reliance upon the statements and representations made, he did purchase it and parted with his property thereafter. *Id.*
28. Act 218 of 1879 provides for the punishment of any person who, "with intent to defraud or cheat another, shall designedly by color of any false token or writing, or by any other false pretense," obtain signatures to a written instrument. *Held,* that the statute does not attempt to enumerate the false pretenses in particular terms, so that the term "any other false pretense" is not limited to a particular kind of pretense, and the rule of construction that gen-

eral terms must be construed as of the same tenor as preceding particular terms previously enumerated, has no application. *Hugler v. People*, 299.

29. The false pretense of being a storekeeper, if used successfully for the purpose of obtaining credit, will sustain a conviction under Act 218 of 1879, which provides for the punishment of persons who, with intent to defraud, obtain money from others by false pretenses. *Id.*
30. A prosecuting attorney is disqualified from prosecuting for obtaining money by false pretenses where the complaining witness is his brother, and a firm to which he himself belongs is affected by the transaction. *People v. Cline*, 290.
31. An information for larceny must allege the ownership of the goods taken. *People v. Stewart*, 484.
32. Picking a pocket or appropriating a dropped pocket-book needs no different description in an information for larceny, from other cases of stealing. *People v. Long*. 296.
33. On the trial of a youth for the larceny of a pocket-book, the fact that an officer had seen the prisoner's father search him immediately after the theft and take from him what seemed to be a gold piece and put it into his own pocket, was a part of the *res gestæ*, and the prosecution was not bound to call the father as a witness, as it was not claimed that he knew anything more about the transaction than the finding; and as he was actively aiding the defense, his position in regard to the facts was not such as to make him a necessary witness for the prosecution to protect defendant against a false accusation. *Id.*
34. In a prosecution for stealing a dropped pocket-book at a saloon, the exclusion of testimony as to what the complaining witness had done, at another saloon, in dropping his pocket-book and charging theft was not improper; such inquiries would be allowable on cross-examination of the complaining witness himself. *Id.*
35. Comp. L., § 7569 (Rev. Stat. 1846, ch. 154, sec. 18) authorizing one year's imprisonment for a grade of larceny cognizable by a justice, is modified by Comp. L. § 5566 (Act 258 of 1849, § 14) which limits to three months the imprisonment that may be inflicted on conviction of any offense covered by ch. 94 of the Revised Statutes of 1846 which gives to justices their criminal jurisdiction. Act 239 of 1879 in amending Comp. L. § 7569 in another particular retains the provision allowing one year's imprisonment. *Held*, that it did not affect Comp. L. § 5566, nor restore the penalty of a year's imprisonment. *Gordon v. People*, 485.
36. A child between six and seven years old may be properly examined as a witness to sustain a prosecution for robbery, if the trial judge fully satisfies himself that the child is conscious of the duty of speaking the truth, and if the jury is properly cautioned concerning his statements. *McGuire v. People*, 286.
37. A young child testifying as to the identity of a person accused of robbing the child's father was asked on cross-examination if his father had not told him the prisoner was the man, and answered in the affirmative. *Held*, that it was not improper in examining the child's father to allow him to deny this. It was not an attempt to impeach the child's testimony, as it did not refer to contradictory statements out of court, and it was competent to show facts making it unlikely that he had made his conclusion of identity from improper *data*, and the credibility of the witness was for the jury. *Id.*
38. In a prosecution for robbery the recognition of the assailant is a circumstance bearing on the merits, and is not a mere collateral matter. *Id.*

39. On a trial for robbery a fellow-prisoner of the accused testified to an account of it given by the latter, and named other prisoners who were present. One of these was asked as to conversations with the accused in the presence of the witness, but the questions were ruled out as not referring to the particular conversation. He was at length allowed to answer that he heard a statement by the accused in the witness' presence, and counsel for the respondent dropped the inquiry at that point, although no adverse ruling had been made. *Held*, that as no one understood there was any objection to testimony which would contradict the witness or explain what he referred to, there was no error in the previous rulings, which were not meant to exclude proper questions. *Id.*

action for criminal conversation: HUSBAND AND WIFE, 5.
damages for assault with intent to ravish: DAMAGES, 1.
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identity of names and residence, effect: EVIDENCE, 8.
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validity of judgment disproved in action on RECOGNIZANCE, 1, 2.

CROPS.
evidence showing title to, excluded: RES JUDICATA, 3.
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CROSS-EXAMINATION
of plaintiff in suit for collision: NEGLIGENCE, 9.
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in condemning lands, opinions: EMINENT DOMAIN, 1.
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COURTESY.
tenancy by: HUSBAND AND WIFE, 1. 2.

CUTTING TIMBER.
who can bring TRESPASS, 2, 3.

DAMAGES: *Exemplary*, 1: *Measure of*, 2–5; *Unliquidated*, 6.

1. A wrong doer is liable for the natural results of his trespass, and the jury may take into account the disgrace as well as the physical suffering caused by it. *Fay v. Swan*, 544.
2. The measure of damages for the wanton destruction of immature property, such as a field of forming ice, is the value of so much as would have been saved for market, less the expense of storing it. *People's Ice Co. v. Str. Excelsior*, 229.
3. Where an action for damages for the destruction of immature property is brought when the full extent of the injury can be estimated with reasonable correctness in view of the uncertainty whether it would ever have reached maturity, *it seems* that damages may be estimated accordingly and need not be confined to the actual loss at the time the property was destroyed. *Id.*
4. In an action to recover charges for sawing logs defendant claimed an offset of the damages resulting to him from delay in doing the work, and was allowed the interest on the value of the logs for the period of delay. *Held*, that although he was not entitled to interest, the damages might very justly be measured by the rate of interest if the market value of the logs had not changed, and the award was sustained. *Grosvenor v. Ellis*, 452.
5. Damages for the conversion of a quantity of wheat were adjudged

at its value at the time of conversion less the cost of threshing and delivering it in market. *Jackson v. Evans*, 510.
6. Damages for a sheriff's omission to serve process are in their nature unliquidated. *Schwab v. Coots*, 463.
action fixing elements of, review: PRACTICE, 11.
for collision on highway: NEGLIGENCE, 9.
for illegal sale: MORTGAGE OF CHATTELS, 9.
for right of flowage, proper subject of ARBITRATION AND AWARD, 1.
for taking land for RAILROAD COMPANIES, 6, 7.
award of: RAILROAD COMPANIES, 4.
inquest of, how conducted: RAILROAD COMPANIES, 6.
measure of, on bond for jail limits: SURETYSHIP, 3.
measure of on resale of merchandise: SALE, 6.
not measured by consideration for deed: REAL PROPERTY, 5.
not measured by parol agreement for transfer of lands: REAL PROPERTY, 9.
special, when recoverable: MORTGAGE OF CHATTELS, 9, 10.
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in streams, permission of supervisors: NAVIGABLE STREAMS, 4.
written agreement, construed: LICENSE, 1.
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devisee takes as of: ESTATES ETC., 2.
probate relates back to: WILLS, 6.
of administrator, representatives remain liable: ESTATES ETC., 19.
of insured, effect: INSURANCE, 8.
DEBTOR AND CREDITOR: *Payments*, 1–3; *Discharge*, 4; *Bill in aid of execution*, 5; *Awaiting process before paying over*, 6; *Evidence of fraud*, 7, 8; *Sale in payment of debt*, 9, 10; *Conveyances to wife*, 11, 12; *Judgment creditors*, 13, 14.
1. Creditors who have received bonds in payment cannot retain them and question their validity or value at the same time; if they wish for a payment in cash they must give up the bonds. *Mich. Air Line R'y Co. v. Mellen*, 321.
2. A creditor cannot keep money paid to him to satisfy any claim but that on which it was actually paid, unless his debtor consents. *Id.*
3. A debtor when making a payment has the right to direct its application, and the creditor cannot refuse to apply it accordingly and credit it on some other account. *Id.*
4. Merchandise was ordered by the firm of S. & G. and was sent with drafts for acceptance by the purchasers. Meanwhile the firm dissolved and G., who continued in business, stated the fact, and asked for new drafts. The vendor replied that he wanted the acceptances of both and asked an immediate return of the drafts as he needed them. G. sent his own acceptance instead, and falsely stated that S. had gone east, but that if the drafts were not satisfactory he would obtain an indorser. The vendor replied that he needed the paper at once and retained it. S. knew of this correspondence and kept control of the merchandise until it was closed. *Held*, that as the paper of the only debtor supposed to be within reach was forced upon the vendor and no offer was made to return the merchandise and there was no apparent means of enforcing any such acceptance as the contract called for, there was no implication from the correspondence, of a discharge of the other debtor, and that if there was, it was made nugatory by the fraud of the purchasers. *Case v. Seass*, 195.
5. A bill in aid of execution against lands sold by a judgment debtor cannot be maintained against the purchaser if the evidence does not show that he purchased fraudulently. *Fisher v. Hall*, 493.

6. One who has in good faith contracted to buy land, and has no notice of any claims existing against the other party, nor any knowledge as to his ability to meet them, is not bound to await process on being afterwards notified that the latter's creditors wish to garnish him, but may complete the purchase and pay over the consideration without reference to the creditors. *Id.*
7. A considerable latitude is allowed in the introduction of evidence tending to show fraud. *Fury v. Strohecker*, 337.
8. Fraud, as in mortgaging property liable to execution after judgment, must be clearly made out; it is not enough to merely raise suspicion of good faith. *Pogodzinski v. Kruger*, 79.
9. A purchaser of goods from a debtor, with the sole purpose of obtaining payment of an honest debt, does not make the sale void as to other creditors even though the debtor intended thereby to hinder or defraud them, if the purchaser did not share his fraudulent intent. *Beurmann v. Van Buren*, 496.
10. A sale by a debtor to a creditor in payment of a debt is to be considered as a whole; and if there is a balance due the debtor for which the purchaser gives his notes, it is not for that reason alone to be set aside to that extent in favor of other creditors. *Id.*
11. Where a judgment creditor's bill is filed to set aside voluntary conveyances made by a man to his wife long before he became indebted to complainant, the latter must show that they were made with intent to defraud either existing or subsequent creditors. *Brown v. Vandermeulen*, 522.
12. Where a man, while solvent, makes provision for his wife that is not extravagant in view of existing circumstances, and does so in good faith and not in anticipation of reverses, it cannot be set aside on a bill in aid of execution for a debt incurred afterwards. *Id.*
13. A judgment creditor is entitled to crops grown upon the land of his debtor after it has been transferred in fraud of his rights, so far at least as the fraudulent grantor retains an interest in them by an understanding with the grantee; and where there is reason to suppose there is such collusion all doubts shall be solved in the creditor's favor. *Fury v. Strohecker*, 337.
14. A judgment creditor only can inquire into the transmutation of his debtor's assets; and then he can only reach assets equitably belonging to his debtor. *Tawas etc. R. R. Co. v. Iosco Circ. Judge*, 479.

creditors' rights, parol trusts in REAL PROPERTY, 6, 7.
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on statutory and common law causes of ACTION, 3.
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on assigned claim: RAILROAD COMPANIES, 9; CORPORATIONS, 7.
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neglect to record, not binding: DEEDS, 10.
DEDICATION: *Failure, to Record*, 1; *Acceptance*, 2–5.
1. A dedication of land to the public may be made out without any public record of it; the failure to record is important only as it concerns the naked legal title which the record would have vested in the designated parties in trust for the purposes intended. *Cass County Supervisors v. Banks*, 467.
2. A common law dedication of lands to the public must be accepted within a reasonable time or the offer will be considered withdrawn. *Id.*
3. The owners of village property platted it, and marked a square on the plat as a "public square," and in an accompanying description declared it to be "designed for buildings for public uses." The square was subdivided by streets, and no public use was ever made of two of the subdivisions, though the public authorities once assumed to convey the land included in the square to private persons "for the uses and purposes for which said square and grounds were conveyed to said county;" they also reserved the right to erect a court house on a specified parcel. *Held*, that the reservation tended to negative the intention to use the rest of the land for public purposes, and that the clause in the deed recognizing the purpose of the offer of dedication, was not an acceptance of such offer. *Id.*
4. The institution of a suit by public authorities for the possession of land which had been offered for public uses, was not an acceptance of the dedication. *Id.*
5. A county cannot bring ejectment for land which the owners had offered to dedicate for public uses nearly fifty years before, if it has never accepted the offer, and has no intention of using it for public purposes. *Id.*

DEEDS: *Certificate of acknowledgment*, 1–5; *Consideration*, 6; *Delivery*, 7; *Interests under*, 8; *Neglect to record*, 9–12.
1. Certificates of acknowledgment will be upheld wherever possible, and for that purpose a court will resort if necessary to the instrument to which the certificate is attached. *Nelson v. Graff*, 433.
2. A deed cannot be excluded from evidence for a supposed ambiguity in the clerk's certificate in authenticating its execution and acknowledgment as follows: "I further certify that the said instrument is executed and *proved or* acknowledged according to the laws of this

State." The word "proved" is surplusage, as there is no certificate of proof to which it can apply. *Id.*

3. A certificate to attest the proof of execution by a witness explains who the witness is and the fact of his making proof of execution. *Id.*
4. A genuine certificate of acknowledgment is presumptive evidence of the genuineness of the document to which it is attached. *Cameron v. Oulkins*, 531.
5. The acknowledging officer is bound to inform himself of the identity of the parties acknowledging a conveyance. *Id.*
6. The consideration for a deed may be shown, by oral testimony, to include chattels not mentioned therein. *Dean v. Adams*, 117.
7. A person negotiating for the purchase of land was to discharge two mortgages which he held against it and pay a balance due on government certificates of sale. The deed and certificates were left with his attorney for examination, and he left a check with him for part of the consideration, but afterwards repudiated the bargain and tried to perfect his mortgage title, and for that purpose, it appears, kept the certificate of sale. *Held*, that there was evidence tending to show the delivery of the deed. *Martz v. Eggemann*, 430.
8. Where a conveyance or deed to two or more persons does not state the interest of each, their interests are presumed equal. *Campau v. Campau*, 31.
9. An unrecorded deed is made void by Comp. L. § 4231, as against a subsequent purchaser from the same grantor. *Smith v. Williams*, 240.
10. A tax purchaser took a decree by default quieting his title as against the claims of a certain person who had in fact previously conveyed the land. His grantee, however, had not recorded the deed, and was not made a party. *Held*, that the neglect to record the decree was not binding upon the grantee, who was a stranger to the proceeding. *Id.*
11. The conditions under which the neglect to record a deed avoids it are statutory and cannot be extended by judicial construction. *Id.*
12. An unrecorded conveyance is valid as against a subsequent purchaser until the latter shows that he has paid the purchase price; the mere institution of suit by him to quiet his title does not make him a *bona fide* purchaser. *Id.*

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DIVORCE: *Children's testimony*, 1–3; *Desertion*, 4; *Extreme cruelty*, 5.
1. In a suit for divorce for alleged adultery, it is improper to call children of the parties of a tender age, to testify to facts tending to show a want of chastity in the defendant. *Crowner v. Crowner* 180.
2. To make such children witnesses is censurable, not only as it touches them in their natural affections, and tends to demoralize them, but also because their evidence, from their immaturity and liability to misconceive the facts and be tampered with, is unreliable. *Id.*
3. A divorce refused, where the principal evidence against the defendant was that of two children of the parties, the eldest of whom was but twelve years of age. *Id.*
4. A husband is not entitled, even upon a cross-bill, to a divorce as for desertion, where his wife, after refusing for more than two years to leave her parents and live with him, finally returned and her husband lived in the same house with her for years and exacted her services as cook and housekeeper without payment, before filing his bill in answer to one filed by her for cruelty and refusal to continue their marital relations. *Holmes v. Holmes* 555.
5. Extreme cruelty cannot be alleged as a cause for divorce from a wife for conduct which could only be cruelty in wounding the feelings of a faithful husband, where the husband himself is at the same time denying the wife's right to any consideration. *Id.*

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DOMESTIC RELATIONS.
1. Where a son living in his father's family, expends money at his father's request, and with his knowledge and assent, in building a house for his father, the father is liable to the son for the amount so expended unless there has been a different understanding between them; and it is for a jury to decide whether there was or not, in view of all the circumstances. *Hillebrands v. Nibbelink*, 413.
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DRAINS: *Notice*, 1-3; *Delay in making plat*, 4; *Laches*, 5.
1. Proceedings to lay out a township drain should not be set aside except for substantial defects; and where a person interested has had actual notice and has taken part up to the time when a jury was struck for the purpose of condemning land and assessing the costs, he cannot be supposed to have been taken by surprise. *Dunning v. Drain Com'r*, 518.
2. A drain commissioner's return to a writ of *certiorari* that he "gave the notice required by the statutes to the parties interested in said water course" is insufficient to sustain his proceedings in laying out a ditch. *Wright v. Rowley*, 557.
3. Where a notice of proceedings to lay out a drain has not been given in strict compliance with the statute, subsequent proceedings are void as to those who do not waive notice or are otherwise estopped from objecting. *Id.*
4. Whether a year's delay in making a plat of a proposed ditch to be laid out under proceedings taken by a drain commissioner, would not make subsequent proceedings void for want of jurisdiction.—Q. *Id.*
5. The right to complain of proceedings to lay out a ditch is not lost by delay where the cause of complaint does not develop itself until after the work is done and paid for; as where the opening of a ditch converted a lake bordering on plaintiff's land into a sickening mudhole, though he had been authoritatively assured that it would not lower the water. *Id.*
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money stolen during; right of action: LIQUOR LAWS, 1.
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EJECTMENT: *Parties*, 1; *Pleadings*, 2; *Case for Jury*, 3; *Defenses*, 4, 5; *Evidence*, 6, 7; *Judgment*, 8-10.
1. The fact that a will has not yet been proved does not prevent a devisee of lands or a person claiming under him, from bringing ejectment. *Richards v. Pierce*, 444.
2. The plaintiff in ejectment is not bound, under forms of pleading used in Michigan, to aver the character of his title, except as to its extent. *Id.*
3. A case of ejectment cannot be taken from the jury where the fact of possession is in question; and where if there was possession, it was explainable as a tenancy that had not been terminated by

notice; or where the defendant denies ever having set up any claim; or where the testimony is such that there is a question as to the extent and shape of the land in dispute. *Bryce v. King*, 181.

4. The common law rule excluding all defenses in ejectment that are not legal has been abrogated in many parts of the United States, but the federal courts recognize it, and it remains in force in Michigan. *Harrett v. Kinney*, 457.
5. A defendant in ejectment cannot interpose to the action at law the merely equitable defense that the plaintiff's title was fraudulently obtained, especially where he himself has only an equitable claim under a contract giving no right to the possession. *Id.*
6. In ejectment where the plaintiff claims title by adverse possession, it is proper to permit him to show that the land was generally called and spoken of as his in the neighborhood, as this tends to prove the notoriety of his claim of title. *Sparrow v. Hovey*, 63.
7. A guardian suing in ejectment for the benefit of wards claiming by descent makes a *prima facie* case by proving paper title to the ward's ancestor, descent to the ward, and the plaintiff's title as guardian to sue for possession. *Harrett v. Kinney*, 457.
8. A plaintiff in ejectment who has estopped defendant from disputing his present right of possession, but has not established title, cannot take judgment for the value of the premises. *Bertram v. Cook*, 396.
9. Judgment in ejectment for possession cannot be rendered in favor of a plaintiff who has filed his election to take judgment for value when he is not entitled to the latter but would be entitled to possession. *Id.*
10. Where a grantee's right to a parcel of land is confined to the use of it for a specific purpose, he cannot, on bringing ejectment for it elect to abandon his claim and take the value of the land. *Cass County Supervisors v. Banks*, 467.

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ELECTION.

to take judgment for value: EJECTMENT, 10.
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ELECTIONS.

1. An election to fill a vacancy in the office of judge of probate, though held at the same time as a general election of other officers, is void unless some distinct and public notice was so given that voters might clearly understand that it was to be held. *Secord v. Foutch*, 89.
2. Comp. L. § 34, in providing that vacancies in certain offices, if not supplied before the next general election may be filled then, is merely permissive. *Id.*
3. A judge of probate having moved from the county during his term, the governor appointed another to fill his place. In giving notice of the next general election, it was intimated in two notices that an election would be held to fill the vacancy, but this intimation was afterwards omitted. At the election there was no competition, and the number of votes cast for the one candidate indicated that it was not generally understood a probate judge was to be chosen. *Held*, on *quo warranto* proceedings against the governor's appointee, that the election was void, as held without sufficient notice, and that respondent was entitled to the position. *Id.*

submission of constitutional amendments: CONSTITUTIONAL LAW, 1.

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of taxes, county's remedy against town: TOWNSHIPS, 4.
EMBLEMENTS.
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EMINENT DOMAIN.
1. It is not error in proceedings to condemn land to exclude on cross-examination of a witness a question as to his opinion upon facts the existence of which he has denied, especially when he has in effect answered the question in his direct examination. *Mich. A. L. Ry. v. Barnes*, 222.
2. Objections to the petition and award in proceedings for the condemnation of land must be clearly specified. *Id.*
3. An objection that the award of a jury in proceedings to take land "is against the law and evidence in the case," cannot show what objections are deemed waived, and is insufficient to raise any question. *Id.*

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1. Defects of form in a bill in equity cannot be taken advantage of by general demurrer. *Glidden v. Norvell*, 202.
2. The failure to allege that the demand in controversy does not exceed one hundred dollars, will be regarded as a matter of form, where it appears the debtor has secured it by turning out 1500 tons of No. 1 iron ore. *Id.*
3. The failure to verify an injunction bill is of no importance except on the motion for injunction. *Id.*
4. A bill which shows, however imperfectly, that complainant has had turned out to him a quantity of No. 1 iron ore, and that an assignee of the debtor has possession of it, and is mixing it with ore of inferior quality and shipping it, makes out an equitable case to which a general demurrer will not lie. *Id.*
5. A party in such a case cannot be turned over to a suit at law to recover damages from the wrong-doer, even though he may be solvent. *Id.*
6. A bill of discovery cannot be filed in Michigan. *Shelden v. Walbridge*, 251.
7. A bill of interpleader lies only where complainant is, in good faith and without collusion or fault, so placed that he cannot safely decide between adverse claimants of a fund or right under his control. It is only upheld upon full merits. *Michigan & Ohio Plaster Co. v. White*, 25.
8. Where it is determined on a bill of interpleader that one of only two conflicting claimants has no claim, or where the bill is taken

as confessed by one, it follows that the fund indisputably belongs to the other. *Id.*

9. A bill of interpleader was filed against two persons, one of whom disclaimed any right to the fund in dispute. A stranger was afterwards admitted, on petition, to contest the interest of the remaining defendant, in which he claimed a partnership right. *Held* that there was no practice which would allow him to get into the cause by petition; that bringing him in without an amendment to the bill put nothing in issue; that his claim was not one against which the bill was filed, and that the bill could not be amended so as to reach him, because it was filed to guard against known and not unknown claims. *Id.*

10. Any improper delay after answer to a bill of interpleader, in preparing the cause for hearing, will authorize the party who has answered, to apply for the money, if there is any fraudulent purpose or collusion. *Id.*

11. A complainant in a bill of interpleader may be allowed a lien on the fund if he has acted honestly and promptly; and the prevailing defendant will generally have to look to the other defendant for his costs. But if complainant has improperly delayed the case by collusive conduct, costs may be granted against him in defendant's favor. *Id.*

12. It is a suspicious circumstance, if after one of only two defendants to a bill of interpleader has disclaimed, complainant seeks for delay and complainant's agent petitions in behalf of a stranger, for leave to contest the interest of the other defendant; and an order of court that the fund remain in the register's hands, and that defendant and petitioner interplead, is irregular. *Id.*

13. Interest is not stopped by a bill of interpleader improperly filed. *Id.*

14. Wrongful conduct can never be the foundation of an equitable right. *Putnam v. Reynolds*, 113.

15. Intent does not bring a case within equitable jurisdiction if the act to which it attaches does not supply an equitable cause of action. *Winegar v. Newland*, 367.

16. The doctrine which makes parties bear the consequences of mistakes of law is often hard and can only be maintained on grounds of general policy. It is not so universal as to exclude relief in some instances where mistake is only one element and is combined with the fraud or misconduct of the other party. *Tabor v. Mich. Mutual Life Ins. Co.*, 324.

17. Equity often gives relief where one has been surprised into doing what it is inequitable to hold him to, where fact and law are blended, or where the mistake of law is so combined with other things that it cannot reasonably be regarded as a deliberate blunder. *Id.*

18. A delay of less than two months in filing a bill to obtain the re-establishment of an insurance policy, the surrender of which had been procured by fraud, was not such delay as to preclude relief, the insured having died meanwhile, and the beneficiary being his wife, and no injury being caused to the company. *Id.*

19. Where parties claim conflicting descriptions of land under a common source of title, and one had a contract right and had entered into possession before the other purchased, but received his deed afterwards, he can maintain a bill to enjoin an action of ejectment brought by the other claimant. *Seager v. Cooley*, 14.

20. A firm of loggers agreed to build a tram railway and contracted with the corporation controlling it to carry their lumber at certain rates. The corporation afterwards assigned, and its assets went into the hands of one of the parties with whom the agreement to

build was made, and through him became the property of a railway company in which he was a principal stockholder. This company refused to fulfill the agreement for transportation, and the loggers sued out a preliminary injunction restraining it from running over so much of the road as they had built, except on condition of carrying their lumber at the rates agreed on. *Held* that the agreement was no more than an ordinary executory contract, was not enforcible in equity, and gave complainants no more control than other contractors over the road-bed; that the preliminary injunction was a final order and void, and that mandamus would lie to set it aside. *Tawas etc. R. R. Co. v. Circuit Judge*, 479.

21. A man gave a general power of attorney to carry on his business, sell and dispose of any of his real estate and collect dues. During his absence from the State, the agent closed up his business, obtained execution titles to part of his real estate and made considerable collections. The principal returned and went into the army, and while home on furlough was induced to give his agent a deed of lands. After his return from the war, being unable to obtain any accounts from the agent, he sued him for what remained due him and for the value of the lands conveyed, but having become broken down in mind and body and being declared incompetent, and put under guardianship, proceedings in equity were afterwards resorted to for setting aside the deed. *Held* that the grantee had the burden of proving implicit good faith and a perfect understanding and agreement on the grantor's part. But as the grantor had not moved seasonably to repudiate his deed, and as his action at law affirmed the sale but treated it as one where no value was fixed, and as he had since died and the precise facts could not be reached, the sale was sustained and the grantor's estate decreed to be entitled to the full value of the land at the date of its conveyance; and pending an accounting the property was to be subject to a lien for the balance due and the grantee restrained meanwhile from disposing of it until the final decree. *Rath v. Vanderlyn*, 597.

22. A deed from a father to his minor son was left unrecorded for some months, but was finally taken by the son from a trunk where it was kept, and recorded. Afterwards the father conveyed a tract including the parcel covered by the son's deed, to another person who had notice of the prior conveyance within three years afterwards, but beyond beginning an action of ejectment five years later, and suffering nonsuit, took no steps to clear his title until twenty-four years had gone by from the date of his own deed, and the prior grantor had died. He then entered the land and being sued in trespass filed a bill to enjoin the action and to clear his title. *Held* that the bill was properly dismissed. It was not likely that the son would have fraudulently recorded his deed, as the wrong could be easily found out, nor that the other grantee would have neglected when the facts were recent to seek a remedy if he was entitled to it. The latter's long unexplained delay and acquiescence would have cut off any equities he may have had, so that both at law and in equity he would have had no claim for redress. *Birdsall v. Johnson*, 134.

23. A court is not bound by the opinion of the counsel concerning the theory of a bill for relief, but whatever the purpose of its allegations, is governed by the case actually made by the bill. *Geney v. Maynard*, 578.

24. A bill which is so framed as to call for redemption and the setting aside of interfering obstructions, on equitable grounds, even though it contains allegations appropriate to a statutory proceeding to quiet title, presents a case which falls under the inherent jurisdiction of the court of chancery and needs no statutory aid. *Id.*

25. Occupancy of rooms in a building containing several separate leaseholds is not to be assumed to be the "actual possession" required in one who seeks to quiet title to the premises, in the absence of a showing that he does not hold under defendants; and if he does not, he is in a situation to bring ejectment for the holdings occupied by others than himself. *Id.*
26. A bill for partition averred that the land was devised to eleven heirs who were named; that seven had assigned to defendant, who holds seven-elevenths of the property, and that complainants, who represent four of the heirs, claim the rest. *Held* that it sufficiently averred defendant's interest and would be good for a union of four-elevenths in complainants, if it did not, indeed, show that each held one-eleventh. *Eberts v. Fisher*, 551.
27. The holder of an inchoate lien for paving taxes, in the shape of a redeemable lease, need not, under Comp. L. § 6274, be made a party defendant to a bill for the partition of the property; it is proper, however, to make him so, and in case of non-redemption the lien may be made chargeable on the defendants, as the final form of relief may make suitable. *Id.*
28. "An estate in possession" within the meaning of the statute for partition (Comp. L. § 6268) means merely an estate in present enjoyment, whether occupied by defendant's tenants or entirely unoccupied. *Id.*
29. Where a tenant in common of land in partition is also a lessee of the land, it saves circuity of action to consider all of his claims together; but the jurisdiction does not depend on so doing. *Id.*
30. Allegations in a bill for partition, as to the rights and obligations of tenants of the defendant, could only be a ground of demurrer by the tenants themselves; and being only collateral to the regular issues in partition, there is no legal objection to averring or establishing any facts that would determine the relative interests of all parties. Any facts bearing upon the termination of the lease by forfeiture or otherwise are pertinent as the object of the bill is not properly to enforce a forfeiture, but to determine the right to a partition and the extent of the property to be partitioned. *Id.*
31. There is no rule that equity will not recognize a forfeiture when it is only one of the incidents of a past transaction. *Id.*
32. Where defendants in partition desire to rely on a lease made by them they must include such averments in their answers as will enable them to maintain their interests, so that, whether the land is partitioned or sold, equities may be adjusted in it or in its proceeds. *Id.*
33. Courts of equity cannot appoint receivers except when such appointment is allowed by law (Comp. L. § 5070) and there is no statute authorizing them to make *ex parte* orders appointing a receiver to take possession of real estate under foreclosure, even though the parties themselves agree thereto by the terms of the mortgage. *Hazeltine v. Granger*, 503.
34. A right of action for fraud is not assignable and equity will not permit one to buy up stale claims and then seek to establish frauds committed against his assignors. *Dickinson v. Seaver*, 624.
35. Any decree or order divesting possession or rights on a preliminary inquiry is illegal and void; and when made in equity is a final order and appealable, though an appeal is not necessary to rescind it. *Tawas etc. R. R. Co. v. Iosco Circuit Judge*, 479.
36. Where proofs were taken in open court, an extension of time for filing a case on appeal can be applied for after sixty days from the date of the decree, and may be granted if the time allowed does not exceed the statutory period of three months. *Tilden v. Wayne Circ. Judge*, 515.

37. On an appeal in chancery the appellate court may examine the exceptions of the party who did not appeal. *Lambert v. Griffith*, 65.
38. Where a decree construing a will was found to be incorrect, and valid objections to the jurisdiction were made, the Supreme Court on appeal reversed the decree and dismissed the bill with costs of both courts to defendants. *Hogan v. Hogan*, 147.
39. On an appeal from a decree dismissing a judgment creditor's bill, the Supreme Court can determine the claims of a person impleaded as holding securities belonging to a principal defendant, but claiming them in complainant's interest and against the owner's will and with no lien upon them. *Brown v. Vandermeulen*, 522.

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ERROR.

1. Error does not lie on the affirmance by the circuit court of a commissioner's order dissolving an attachment; the order only determines the right to the lien, and a writ of error based upon it would not affect the judgment actually given on the merits. *Gray v. York*, 415.
2. Where evidence improperly admitted is evidently not considered by the jury, the error does not require a reversal of judgment. *Drysdall v. Smith*, 119.
3. It cannot be assumed on error that the jury disregarded the proofs and acted on something else. *Wilcox v. Laflin & Rand Powder Co.*, 35.

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proper judgment on, after CERTIORARI, 5.
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ERRORS OF DESCRIPTION
not affecting rights conferred by LAND CONTRACTS, 2.

"ESTATE IN POSSESSION."
in meaning of statute for partition: EQUITY, 28.

ESTATES OF DECEDENTS: *Statute of descents*, 1; *Devisee's estate*, 2; *Heir's right to emblements*, 3, 4; *Jurisdiction*, 5–11; *Creditors*,

10–15; *Administrator's liability for claims*, 16–20; *Examination of executor*, 21; *Residuary Legatee*, 22, 23; *Costs*, 24.

1. The Michigan statute of descents applies only to property which is not devised. *Richards v. Pierce*, 444.
2. A devisee may take his estate as of the death of the testator, except so far as otherwise provided by statute. *Id.*
3. Under Act 138 of 1877 an intestate's estate is subject to sale for his debts for six years after his death, but except for this and for the jurisdiction of equity to restrain waste, the heir's right of enjoyment during that time is absolute. *Held*, that an heir who had sown a portion of the estate before a probate order for its sale was asked for, was entitled after the sale to cut and carry the crop away, and could maintain trespass against the purchaser and the administrator for interfering with his right of possession. *McDaniels v. Walker*, 83.
4. Wherever the law gives a right it gives the means necessary to its beneficial enjoyment. *Id.*
5. A decree by a federal court cannot affect strangers to the record, or interfere with the regular probate of an estate in a state court which has jurisdiction. *Dickinson v. Seaver*, 624.
6. Under the probate system of Michigan, estates must be settled and claims proved in the probate court. Whatever may be done with the final balance where a will has been previously probated at a foreign domicile, the estate must be administered under the probate laws of the state to the time of distribution. *Id.*
7. No administration of an estate is extra-territorial, and no foreign proof can be enforced without re-allowance: a foreign judgment may have great force or even be conclusive as evidence, but it cannot be enforced as a judgment outside of the jurisdiction in which it is given, without being established in new legal proceedings. *Id.*
8. The probate court is the only court that has any such jurisdiction *in rem* as will enable it to reach persons out of the state, or call in all creditors; the circuit court has no power in equity to act as a substitute for the probate court in this way, and unless it has authority to deal with a case through the parties actually before it, cannot deal at all with it. *Id.*
9. A court of equity cannot examine into the question of the rights of an estate against the widow or of her claims against the estate, where it has already been passed upon by commissioners on the estate and is still in litigation on an appeal. *Shelden v. Walbridge*, 251.
10. The creditors of an estate have a legal remedy, as for money had and received, against the widow on claims held by the estate against her, or for chattels wrongfully held by her; and the remedy in the probate and circuit courts for investigating the accounts and settling claims and set-offs is not only sufficient, but is imperative after the controversy has begun and the creditors have actively entered into the litigation; and where the rights are fixed there is a remedy on the probate bond. *Id.*
11. A father obtained the allowance of a claim against his son's estate, but the son's widow, who was his executrix, refused to pay it, and conveyed away the property out of which it should have been satisfied, and the estate remained unsettled. *Held* that his remedy was not in equity, but, if not lost by neglect, was in the probate court, where, in spite of the conveyances, the land was liable in due course of administration and for a limited period, to the claims of creditors, and after the arrival of the time of payment the executor was liable personally or on his bond. *Winegar v. Newland*, 367.

12. Where a claimant against an estate neglects to take advantage of the means provided by statute for satisfying his claim, he has no remedy at law or in equity. *Id.*
13. Where the creditors of an estate have notice that its owner has lately held a mortgage which has only partly matured, they should inquire into the matter in the probate court if they wish to have it applied to their benefit; and an unexplained delay of fifteen years in doing so is fatal to any complaint of it as a fraudulent mortgage. *Dickinson v. Seaver*, 624.
14. A widow's relinquishment of her "thirds" and acceptance of a legacy do not place her in the position of a purchaser for a valuable consideration so far as to entitle her claim as legatee to priority over the claims of creditors of the estate; she is placed on the same footing with other creditors, and, if the estate is insufficient, is entitled to share *pro rata* with them. *Tracy v. Murray*, 109.
15. A widow's release of dower and acceptance of a legacy, though a purchase, is not completed until the provisions of the will are accepted after her husband's death, and her claim then becomes simply a debt of the estate. *Id.*
16. Where the probate court had delayed for nearly eight years to order the payment of claims allowed against an estate, and had then directed them to be paid within a fixed time after which they would become a personal claim against the administrator, and he neglected to pay them and died within six years thereafter, it was *held*, that they became a valid claim against the administrator's estate. *Palm's Appeal*, 637.
17. When an administrator's statutory liability for claims against the decedent's estate has once attached, the creditor's right becomes absolute against him and his estate, whether the claim could or could not have been enforced against the decedent's estate. *Id.*
18. The allowance of claims against an estate by a court of competent jurisdiction cannot be impeached in a collateral proceeding if there was no fraud in allowing them and no appeal was taken. *Id.*
19. Where claims against an estate are made a personal charge against the administrator, it is presumed that he retains sufficient assets to extinguish them, which assets, if he does not pay the debts, pass after he dies to his representatives, who remain liable for the debts. *Id.*
20. An administrator should hasten the payment of claims against the decedent's estate, and if he allows payment to be delayed so that he becomes personally liable, he cannot claim to be prejudiced. *Id.*
21. The probate court may require executors whose accounts are under investigation, to submit to oral examination under oath by counsel for heirs and legatees of the estate. *In re Rathbone's Estate*, 57.
22. Where a residuary legatee is made executor, and gives bond to pay his testator's debts and legacies, the assets of the estate become part of his general property, and no more subject to the enforcement of a trust in favor of other legatees. *McElroy v. Hatheway*, 399.
23. Where a residuary legatee has given bond, as executor, to pay the testator's debts and legacies, a surety on his bond cannot maintain a bill in equity against him and the co-sureties for an accounting for assets of the estate, the appointment of a receiver, and an administration of the estate by the chancery court. *Id.*
24. Costs of a litigation of doubtful questions arising in the settlement of an estate, are allowed to be paid from the estate. *Tracy v. Murray*, 109.

ESTOPPEL
to deny lien of MORTGAGE OF CHATTELS, 7.
by covenant: REAL PROPERTY, 4.

to question bonds received in payment: DEBTOR AND CREDITOR, 1.
to repudiate payment in bonds: RAILROAD COMPANIES, 15; DEBTOR AND CREDITOR, 1
to disprove validity of judgment: RECOGNIZANCE, 1.
by suing for payment, to deny SALE, 3.
from contesting landlord's title: LANDLORD AND TENANT, 1–3.
EVIDENCE: *Admissions*, 1, 2; *Competency*, 3; *Experts*, 4; *Hearsay*, 5, 6; *Maps*, 7; *Of identity*, 8, 9; *On former trial*, 10, 11.

1. Admissions of parties may be admissible in evidence as part of the *res gestæ*, even though they cannot bind any one else. *Callum v. Barnes* 593.
2. Where a wife's admissions are not confined to acts of agency they cannot be used against her husband in an action on contract against him unless where they are *res gestæ* and admissible as acts instead of relations of facts. *Rose v. Chapman*, 312.
3. A witness may be competent to testify to some facts, and nevertheless be disqualified from testifying in the same case to other facts equally within his knowledge and admissible in evidence. *Eybert v. Greenwalt*, 245.
4. A person accused of an assault with intent to kill a man on horseback was said to have struck a downward blow with a knife, cutting the man's clothes, wounding the horse, and cutting the hair off square across the wound. A witness who had farmed for seven years, during which he had doctored horses and performed surgical operations on them, and who claimed to have had experience in cutting live horse flesh and the hair on the horse, was asked whether the hair could be cut clean the full length of the wound. *Held*, that the question was properly ruled out as the witness had not shown that he ever tried to cut hair in the way suggested; and it was not shown and was not supposable that in a surgical operation it would be important so to cut it. *People v. Niles*, 606.
5. In an action on a contract for sawing logs testimony that a witness had heard something going to affect the correctness of plaintiff's scale from certain specified persons, is not hearsay. *Groscenor v. Ellis*, 452.
6. Time-checks issued by a sub-contractor to laborers are in the nature of hearsay and inadmissible against objection in an action for a labor debt. *Chi. & N. E. R. R. Co. v. Sturgis*, 538.
7. A map can only be used in evidence in connection with the testimony of a witness, to enable the jury to clearly understand the facts stated. *Hoffman v. Harrington*, 183.
8. Identity of common names and of residence in cities or long settled localities is not enough to establish identity of persons where the personal liberty of others depends on the fact. *People v. Cline*, 290.
9. A committee understood to be in charge of a newspaper was sued upon acceptances given in the name of the publishing company by its business manager for goods sold on the credit of the committee. In fixing the liability of the members of the committee who were shown to have been frequently about the office, and whose meetings appeared to be closely connected with the employment of persons engaged on the paper and with the commencement of its publication, it was *held* proper to introduce a letter to the plaintiffs from the business manager's successor, assuring them of the responsibility of the gentlemen composing the company, and a document published in the paper itself, purporting to be signed with their names and showing their identity with the management. This evidence, in connection with testimony fairly tending to show that the business manager was not acting for himself, and that it was a duty

of the committee to collect and pay over auxiliary funds and to exercise some supervision over the editorial department, made a case for the jury. *Callam v. Barnes*, 593.

10. A stenographer's notes of testimony given on a former trial, are not admissible in evidence if he has not testified to their accuracy or if they are not in some way authenticated. *Misner v. Darling*, 438.
11. Testimony given on a former trial by a party whose examination was left incomplete, cannot be introduced in evidence, as a whole, by an adverse party, even though the witness has an opportunity to add to it. *Id.*
12. The efforts made to secure an absent witness, or the reason why his deposition was not obtained, should be shown to warrant reproducing his testimony on a former trial. *People v. Long*, 296.

as to agent's power to contract: AGENCY, 2.
as to collateral matters: CRIMINAL LAW, 13.
as to doings of complaining witness: CRIMINAL LAW, 34.
as to identity of one accused of robbery: CRIMINAL LAW, 37.
as to indorsed payments: STATUTE OF LIMITATIONS, 2.
as to value of land for farm use: RAILROAD COMPANIES, 7.
as to vicious character of dog: TRESPASS, 5.
cash book entries: PARTNERSHIP, 6.
charge calling attention to: TRIAL, 9.
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corporate deeds as: CORPORATIONS, 4.
cross-examination, opinions: EMINENT DOMAIN, 1.
excluded for refusing bill of particulars: PLEADINGS, 14.
for jury, conflicting versions of CONTRACTS, 4.
general reputation to support adverse possession: EJECTMENT, 6.
in action for ASSAULT WITH INTENT TO RAVISH, 1, 2.
in action for negligent injury: NEGLIGENCE, 10, 11.
in suit for removal of timber: REAL PROPERTY, 13.
in rebuttal, in action of trover: TRIAL, 7.
jury not presumed to have disregarded proofs: ERROR, 3.
local usage; see USAGE, 1.
must be made part of bill of exceptions: PRACTICE, 14.
of articles of association, objections: RAILROAD COMPANIES, 8.
of boom-scale: LOGGING, 2.
of conversation with officer: CRIMINAL LAW, 2.
of default, when unnecessary: PRACTICE, 5.
proof of delivery: DEEDS, 7.
of forgery of MORTGAGE OF LANDS, 17.
fraud must be clearly shown: DEBTOR AND CREDITOR, 8.
of fraud, wide latitude allowed: DEBTOR AND CREDITOR, 7.
of fraud against creditors of principal defendant in GARNISHMENT, 9.
of measurement not in terms of CONTRACT, 7.
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of possible profits, excluded: SALE, 8.
of receipt of money by successor of town treasurer: TOWNSHIPS, 1.
of stockholders' meeting: CORPORATION, 6.
of value in dispute as to contract price: CONTRACTS, 6.
of young children as to adultery: DIVORCE, 1–3.
on inquest of damages, liberality: RAILROAD COMPANIES, 6.
on settlement of accounts of PARTNERSHIP, 5, 6.
on trial for robbery: CRIMINAL LAW, 38, 39.
opinion as to value: BANKRUPTCY, 4.
parol, cannot change contract: MORTGAGE OF CHATTELS, 1.
parol testimony as to consideration of DEEDS, 6.
plea of set-off cannot establish CONTRACTS, 2.
presumption as to sufficiency: PRACTICE, 15.

presumption of genuineness from acknowledgment: DEEDS, 4.
previous habits of plaintiff in suit for collision: NEGLIGENCE, 9.
remoteness of investigation in CRIMINAL LAW, 3, 14.
required, of NEGLIGENCE, 5.
res gestæ in larceny: CRIMINAL LAW, 33.
scintilla of, gives case to jury: TRIAL, 12.
striking out, competency: TRIAL, 3.
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to overcome presumption of legitimacy: HUSBAND AND WIFE, 8.
to disprove intercourse between HUSBAND AND WIFE, 6–8.
to fix charges of BOOMING COMPANIES, 1.
to sustain action for property gratuitously lent: BAILMENT, 3.
testimony of children: CRIMINAL LAW, 36.
testimony as to BOUNDARIES, 1.
use of map in action of TRESPASS, 4.
unprejudicial error in admitting: ERROR, 2.
effect of excluding testimony: TRIAL, 4.
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EXAMINATION
as to plea of guilty: CRIMINAL LAW, 11.
left incomplete, use of testimony: EVIDENCE, 11.
objection to complaint should be made on: CRIMINAL LAW, 1.

EXCEPTIONS
of party not appealing, examined: EQUITY, 37.
error must be clear and prejudicial: CRIMINAL LAW, 4.

EXCHANGE.
payments to perfect title as set-off: REAL PROPERTY, 5.

EXECUTIONS: *Antedated*, 1; *Exemptions*, 2, 3; *Sale*, 4, 5; *Purchaser*, 6.

1. An execution on the judgment in a cause appealed from before a justice was antedated, and a motion to require the sheriff to return it for correction was denied. Mandamus to compel the circuit judge to grant the motion was denied, as in any proceeding against the sureties on the appeal bond the facts could be shown. *Jennings v. Kalamazoo Circ. Judge*, 99.
2. Each member of a firm against which execution is levied may claim the amount of goods excepted in Michigan from execution; and if several partners claim the same property, the officer setting aside the exempt property may select for them. *Skinner v. Shannon*, 86.
3. A quantity of shingles and building lumber, worth less than $100, was *held* exempt from execution as stock or material to enable defendant to carry on his trade as carpenter and joiner, where he was about to use it in building a homestead, and had, aside from this, only $75 worth of property connected with his business, *Hutchinson v. Roe*, 389.
4. Where several judgments against the same person are taken at the same time, and are issued, delivered for service and levied at the same time, the sheriff, unless directed otherwise, may offer the premises on which he has levied, to be sold together under all the writs. *Geney v. Maynard*, 578.
5. Where a man owning two lots has put up a single building covering one of them and a small part of the other, the premises so covered should be sold on execution as one parcel. *Id.*
6. A purchaser on execution who knows that land which he buys was subject to a contract of sale before judgment was rendered is not a *bona fide* purchaser as against the contract purchaser. *Kinyon v. Young*, 339.

against vendor: SALE, 4.
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exemption from, appraisal and selection: ATTACHMENT, 4, 7.
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justification under, of officer: REPLEVIN, 3.
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purchase, right of action under: REAL PROPERTY, 12, 13.
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right of action: REAL PROPERTY, 12.
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residuary legatee as: ESTATES ETC., 22, 23.
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for transportation, not enforcible in EQUITY, 20.
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for assault: DAMAGES, 1.
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defendant entitled to select: ATTACHMENT, 4.
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FAILURE OF CONSIDERATION
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who guilty of: CRIMINAL LAW, 24.
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as against creditors of principal defendant: GARNISHMENT, 8-10.
by director upon RAILROAD COMPANIES, 16.
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in agreement to pay proceeds of farm to mortgagee: MORTGAGE OF CHATTELS, 1.
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in sale, when officer cannot show: REPLEVIN, 3.
in transferring land, title to crops: DEBTOR AND CREDITOR, 13.
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latitude in admitting evidence of: DEBTOR AND CREDITOR, 7.
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of purchasers, effect on discharge: DEBTOR AND CREDITOR, 4.
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FRAUDULENT CONVEYANCES.
judgment creditor entitled to crops: DEBTOR AND CREDITOR, 13.
FRAUDULENT DEBTOR'S ACT.
A circuit court commissioner may tax costs in proceedings under the Fraudulent Debtor's Act, and issue execution for their collection; and mandamus lies to compel him to do so. *Watson v. Randall*, 514.
FRAUDULENT INTENT
in sale to creditor: DEBTOR AND CREDITOR, 9.
FREEHOLD.
timber severed from, action for: REAL PROPERTY, 12.
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disposition of, bill of interpleader: EQUITY, 7-11.
in hands of township treasurer, liability: TOWNSHIPS, 3.

GARNISHMENT: *When the writ can issue*, 1, 2; *Affidavit*, 3-5; *Discharge*, 6; *Disclosure*, 7; *Exemptions*, 8; *Fraud*, 9, 10; *Intervenors*, 11; *Judgment*, 12, 13.
1. Act 256 of 1879 does not authorize the writ of garnishment to issue in suits begun by declaration. *Weimeister v. Manvil'e*, 408.
2. Act 256 of 1879, allowing process in garnishment to be issued after judgment "in all personal actions arising upon contract, express or implied, brought in the several circuit courts or municipal courts of civil jurisdiction," and on "any judgment or decree rendered in any of the several courts hereinbefore mentioned," is meant only to cover cases in which the process could not have been issued before judgment, and does not apply to justices' courts but only to courts whose jurisdiction is similar to that of circuit courts. *Weimeister v. Singer*, 406.
3. Garnishment is a harsh and peculiar remedy and ought not to be resorted to without sufficient reason; and when the affidavit upon

which the writ is taken out is defective no presumption can arise in its favor. *Weimeister v. Manville*, 408.
4. Under Act 256 of 1879, an affidavit for a writ of garnishment must state whether the principal suit is on an express, or an implied, contract, and must distinctly connect the garnishee's indebtedness sworn to with a suit or contract. *Id.*
5. An affidavit for a writ of garnishment is defective if based upon the apprehension of any other person than the actual affiant. *Id.*
6. A garnishee may properly be discharged with his lawful costs if there is undue delay in bringing the principal defendant, and if the maintenance of the proceeding against the garnishee appears to be an abuse of process. *Noble v. Bourke*, 193.
7. A garnishee's disclosure in justice's court must be explicit in its admissions to warrant judgment. *Weirich v. Scribner*, 73.
8. The garnishee's exemption of any demand to which he may be entitled as against the principal defendant (Comp. Laws, § 6504) does not apply where the property in his hands was wrongfully obtained, as under a chattel mortgage, which, by reason of being kept from record, was fraudulent as against other creditors. *Cummings v. Fearey*, 39.
9. The entire antecedents of the dealings between a principal defendant and a garnishee and their agents, and all transactions regarding the property and its disposal, are admissible in evidence where fraudulent dealings of the garnishee as against the principal defendant's creditors are in question. *Id.*
10. Parties dealing so as to defraud creditors of a principal defendant, and having no preference by legal proceedings, cannot go behind judgments recovered against the principal defendant to inquire into the dates at which debts matured. *Id.*
11. The rights of intervenors are in some degree protected in garnishment proceedings in courts of record, but not in justice's courts; and justices have no discretionary authority to interfere in their behalf. *Laidlaw v. Morrow*, 547.
12. A justice cannot give judgment against a garnishee until after he has rendered a valid judgment against the principal defendant in a cause in which he had jurisdiction. *Id.*
13. Judgment was rendered against a garnishee by a justice who had never acquired jurisdiction in the principal case, though he had rendered judgment therein, but the garnishee paid the judgment, and being afterwards sued by the assignee of another claim against the principal debtor, interposed her payment of the judgment in garnishment as a defense. *Held*, that as the judgment in the principal case was void, the defense could not be allowed. *Id.*

no obligation to await process: DEBTOR AND CREDITOR, 6.
mortgagee barred by replevin from repudiating ownership: MORTGAGE OF CHATTELS, 6.

GENERAL DEMURRER.
does not lie on defects of form: EQUITY, 1.
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GENERAL ELECTION.
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construction of, in statutes: CRIMINAL LAW, 28.

GENUINENESS
presumed from due acknowledgment: DEEDS, 4.

GIFTS.
A donee has no right as against the donor to sell for one purpose what was given him for another. *Cass County Supervisors v. Banks*, 467.
GOOD FAITH.
deed to agent, burden of proof: EQUITY, 21.
in exercising right of re-sale: SALE, 5.
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of provision for wife: DEBTOR AND CREDITOR, 12.
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HIGHWAY COMMISSIONERS.
appeal to township board: HIGHWAYS, 2–4.
HIGHWAYS; *User*, 1; *Laying out*, 2–4.
1. Highways, whether by land or water, must be used with due regard to their lawful and proper use by others. *People's Ice Co. v. Excelsior*, 229.
2. Appealing from the action of highway commissioners to the township board, whose decision is made final by Comp. L. § 1264, is a waiver of previous defects and irregularities. *Prescott v. Putterson*, 525.
3. The action of township boards on appeal from the highway commissioners cannot be sustained if it does not appear that the party injured by it had notice of their meeting, even though the return shows that it was held at his house. *Id.*
4. The fact of notice of a meeting of township boards to review the action of highway commissioners, is jurisdictional and must appear of record. *Id.*
tax levy for purposes of: TAXATION, 19, 20.

HOMESTEAD.
Where the owner of two lots takes up his residence on one, and puts up a building which covers all the other lot and a small part of that on which he resides, his homestead right does not cover that portion of the residence lot used for the building. *Geney v. Maynard,* 578.

HUSBAND AND WIFE; *Estates by Curtesy,* 1, 2; *Wife's Liability for Husband's Debt,* 3, 4; *Action Crim. Con.,* 5, 6; *Testimony,* 6, 7; *Legitimacy Presumed,* 8.

1. The Revised Statutes of 1846 in creating a statutory estate by the curtesy, did not in any manner interfere with the wife's absolute control of the property during her lifetime, or with her right to dispose of it, but only subjected it after her death to the interest of the surviving husband as a limitation upon the inheritance. *Brown v. Clark,* 309.
2. The legislative power to subject any existing estate to the rights of tenancy by curtesy is the same as the power to modify the rules of descent for the subsequent transmission of property, and do not interfere with any constitutional right of the wife. *Id.*
3. A surety on a promissory note given by a wife for an unpaid balance upon her husband's debt, could not, after paying the note, recover against the wife, on a showing that the husband after contracting the debt had conveyed encumbered real estate to her, especially as it did not appear what the value of the property was or the amount of the encumbrance, or that the conveyance was fraudulent as against creditors. *Richards v. Proper,* 96.
4. A married woman is not liable on a promissory note which she signed with her husband, if no consideration passed to her from the party to whom the note was given. A consideration as between herself and her husband is not enough. *Reed v. Buys,* 80.
5. The right to an action for damages for criminal conversation with plaintiff's wife is not barred by the fact that the act was done by violence, and that a criminal action will lie. *Egbert v. Greenwalt,* 245.
6. In an action for damages for criminal conversation the testimony of the husband and wife is inadmissible to disprove intercourse between themselves for the purpose of raising a presumption against the legitimacy of the wife's child. *Id.*
7. Act 125 of 1861 does not abrogate the common law principle that the testimony of a wife is inadmissible to disprove intercourse with her husband for the purpose of imputing illegitimacy to her children. *Id.*
8. Legitimacy is presumed, and where there has been opportunity for intercourse between husband and wife within such a period that a child born of the wife may be legitimate, there must be strong evidence to overcome the presumption and disprove the fact of their intercourse. *Id.*

costs on separate appeal against wife: COSTS, 4.
revivor of policy by wife: INSURANCE, 2; EQUITY, 18.
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transfers of property to wife: DEBTOR AND CREDITOR, 11, 12.
wife's admissions against husband: EVIDENCE, 2.
See DIVORCE.

ICE FIELDS.
right to maintain: RIPARIAN RIGHTS, 1, 2.
destruction of: RIPARIAN RIGHTS, 3; DAMAGES, 2.

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of persons, how established: EVIDENCE, 8.

of person accused of robbery: CRIMINAL LAW, 37, 38.
of parties acknowledging DEEDS, 5.
not established by transfer of assets: CORPORATIONS, 3.
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surety to sue at law for: SURETYSHIP, 1.
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for breakings resembling burglary: CRIMINAL LAW, 19.
for attempt to commit burglary by one who was armed: CRIMINAL LAW, 21.
for statutory burglary: CRIMINAL LAW, 22.
for larceny, must allege ownership: CRIMINAL LAW, 31.
measures the jurisdiction: CRIMINAL LAW, 8.

INJUNCTION.

1. An injunction bill was filed to restrain certain defendants from closing up premises which complainants claimed the right to use as a street. The bill alleged, in substance, that, in September, 1859, one R., who is also made defendant, being the owner and actual possessor of certain land, conveyed it to complainant, bounding it as on the south side of G street, which did not reach the land conveyed, but which R. expressed the intention of opening through the premises afterwards obstructed by defendants; that complainants had bought relying on such extension, and said R. had aided in preparing the premises for a highway; that defendants hold land on the north side of these premises under a mortgage from R. dated in December, 1859, and recognizing the proposed extension of G street; and that they had erected a small brick office which stands partly on the premises, and for the removal of which complainants ask. *Held*, that the bill sufficiently alleges the ownership of R., and the source of the other defendants' title, to be sustained at

least unless specially demurred to, and that a court of equity could require the destruction or removal of the building under the circumstances, there being no adequate remedy at law. *Karrer v. Berry*, 391.

2. Where an injunction is allowed on condition that the petitioner therefor give the defendants a bond to indemnify them for any damage which the injunction may cause them, the bond remains valid and will sustain a recovery even though the injunction bill is dismissed for want of jurisdiction. *Kimm v. Steketee*, 527.

against disposing of property deeded to agent: EQUITY, 21.
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to restrain mixing of ores and transportation: EQUITY, 4, 5.
to restrain use of road-bed: EQUITY, 20.
verification of bill, when unnecessary: EQUITY, 3.

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from non-performance of public duty: OFFICERS, 1.
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INQUEST OF DAMAGES.
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of timber for acceptance: SALE, 7.

INSTALMENTS.
release of indorser: MORTGAGE OF LANDS, 19.
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INSTRUCTIONS.
refusal, when not error: TRIAL, 8
singling out particular facts: TRIAL, 9.

INSURANCE: *Contract of*, 1; *Re-establishment of Policy*, 2; *Premium Paid by Note*, 3; *Right of Action*, 4–7; *For Mortgagee's Benefit*, 7–9; *Liability on Agent's Bond*, 10–13.

1. An insurance policy, covering both real and personal estate, is not to be held a divisible contract, part of which may remain in force though the rest be invalid, where it is not perfectly clear that the insurer would have assumed both risks separately. *Ætna Ins. Co. v. Resh*, 55.
2. A life insurance agent by false representations that a policy had become forfeited, and by great urgency, persuaded the insured, who was too feeble to withstand his arguments, and whom he would allow no time for consultation, to give up his policy, which was for the benefit of his wife, and accept instead a policy for its surrender value. The wife was not consulted as if she had any rights, and the husband died soon afterwards. *Held* that a bill seasonably brought by the wife to compel the re-establishment of the policy, should be sustained. *Tabor v. Mich. Mut. Life Ins. Co.*, 324.
3. The acceptance of a note for the amount of premium due on a life insurance policy and the giving of a renewal receipt by the company, amounts to a payment of the premium. *Id.*
4. Where proofs of loss under an insurance policy are received within a reasonable time before the expiration of the period fixed by the policy for bringing suit against it, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it. *Westchester Fire Ins. Co. v. Dodge*, 420.
5. A claim under a fire insurance policy does not mature until the company has decided whether it will exercise the right to rebuild, if such a right is reserved. *Id.*

6. Whether the right of action on an insurance policy can be limited to a shorter period than is prescribed by the statute of limitations. Q. *Id.*
7. An administrator can sue on an insurance policy for the use and benefit of a mortgagee, to whom the loss is made payable. *Id.*
8. Where a loss under an insurance policy is made payable to a mortgagee, as his mortgage interest may appear, the death of the insured cannot make the policy void under the provision that it shall become so if any change takes place in title or possession. Whether it would have that effect in any case—Q. *Id.*
9. Whether a mortgagee's rights in insured property belonging to a deceased person can be impaired by delay in appointing an administrator, and in furnishing proofs of loss— Q. *Id.*
10. The bond of an insurance agent who had assumed an indebtedness of a former agent for uncollected premiums, does not cover the debt, but if the agent collects any part of the premiums it covers the amount. *Ball v. Watertown F. Ins. Co.*, 137.
11. An insurance agent's bond covers moneys collected by him within his district on policies issued independently of him; also, unearned premiums returned by the company on cancelled policies and remitted to the agent to be paid back to the assured. *Id.*
12. A firm were appointed agents for an insurance company, one of them having previously been the agent, alone. They gave a bond for the faithful performance of their duties, which was conditioned, among other things, for the payment to the company of all moneys, etc., and other property belonging to it. They also gave their firm note for an amount covering a large amount of uncollected premiums due from the former agent. In an action on the bond to recover the amount due on the note, it was *held* that the firm could not charge their surety by assuming the amount due the company, but that if they collected any part of that amount the bond would cover it. *Id.*
13. An insurance agent's bond was made to cover all liabilities and delinquencies of the agent under his existing or any future appointment, and whether as sole agent, or a joint agent with others, and notwithstanding changes in the tenor of the agreement or agreements under which he should act. *Held*, that the sureties were not bound by this for the acts of a cashier appointed by the company to assist the agent, but would be liable for such moneys as came under the control of the agent, or of subordinates for whose selection he himself was answerable. *Equitable Life Ass. Soc. v. Coats*, 260.

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validity of purchase from: DEBTOR AND CREDITOR, 5.

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1. A warrant of attorney need not be proved to sustain a confession of judgment taken thereunder within a year and a day after its execution. *Elliott v. Ives*, 190.
2. A party must stand by the judgment he has elected to take. *Bertram v. Cook*, 396.
3. Judgment for a joint conversion cannot be entered against a defendant who had not been served with process. *McLean v. Isbell*, 129.
4. A judgment by default is not absolutely void for want of sufficient notice of the rule to plead, where process has been personally served; and if the party suffering judgment neglects to seek relief against it on error, until the other party would have lost his remedy by lapse of time, he cannot then have it vacated by mandamus. *Granger v. Judge of Superior Court*, 384.
5. A transcript of a justice's judgment filed in the circuit court is not a judgment rendered in the circuit court. *Weimeister v. Singer*, 406.

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JUSTICES OF THE PEACE: *Appearance*, 1, 2; *Summons*, 2½, 3; *Formal Defects*, 4; *Judgment*, 5–7; *Appeal*, 8, 9; *Suit on Appeal Bond*, 10, 11; *Discontinuance after Appeal*, 12, 13.

1. A special appearance for the sole purpose of making an objection is not a submission to jurisdiction. *McLean v. Isbell*, 129.
2. An appearance for the purpose of objecting to irregularities does not waive them, but if it is for some other purpose, as for obtaining a continuance, it is a waiver and no objection can afterwards be taken to prior defects even though the motion for which the appearance was made was denied. *Lane v. Leech*, 163.

2½. A justice's summons, returnable not less than two days from its date, is defective if made returnable on the second day after it was issued. *Everts v. Fisk*, 515.

3. A justice acquires no jurisdiction over a defendant who does not appear, where the return to the summons only shows that it was served at his last place of residence upon a specified person described as a person of suitable age and discretion, but not as a member of the family, and does not show that it was served in the presence of some one of the family. *Laidlaw v. Morrow*, 547.
4. Formal defects in the proceedings in justices' courts will be overlooked if no objection is made to them until evidence is offered. *Holbrook v. Cooper*, 373.
5. Where the judgment of a justice is pleaded in bar it may be shown not to have been upon the merits. *Franks v. Fecheimer*, 177.
6. Comp. L. § 5479, forbidding reversal of a justice's judgment for an improper allowance of fees, does not cover a case expressly governed by a statute regulating costs generally, and where the question is not as to particular allowances which the justice has failed to consider. *Wilcox v. Laflin & Rand Powder Co.*, 35.
7. Where a justice's judgment is rendered within the time that would ordinarily be proper, it cannot on appeal be assumed without proof that he has exceeded his jurisdiction by delaying judgment while the defendant was in custody; and if he in fact did so, an order to compel a farther return should be applied for to show it. *Barker v. Wheeler*, 176.
8. A justice's judgment rendered within four days was held sufficiently regular to sustain an appeal where the parties appeared at the hearing by attorney only, and no objection to an adjournment was shown to have been made, and there was nothing to show that defendant was in custody, and that judgment ought therefore to have been rendered at once. *Id.*
9. A justice's receipt for "ten dollars as *fees* and costs on appeal of case" so binds him that he must make return to the appeal even though the fee for making it has not in fact been paid. The appellant has a right to rely on the receipt and cannot be deprived of his appeal by a misunderstanding with the justice. *Stevenson v. Kent Circuit Judge*, 162.
10. A levy on real estate in case of a return of *nulla bona* upon an execution from justice's court is not prerequisite to a suit upon the appeal bond. *Nowlin v. Tibbits*, 77.

11. A justice's neglect to make return within ten days after an appeal is perfected does not preclude a remedy on the appeal bond; the default in prosecuting the appeal is that of the appellant, and not of the appellee. *Id.*
12. If a justice's judgment is for costs only, and is not upon the merits, and does not give defendant any substantial rights, the plaintiff, after appealing from it, may discontinue his suit, and on paying the costs can begin a new suit in the circuit if the case involves the jurisdictional sum. *Franks v. Fecheimer*, 177.
13. Discontinuance of a suit after appeal is not a discontinuance of the appeal within the meaning of Comp. L., § 5456, which provides that on the discontinuance or dismissal of an appeal a justice shall proceed as if it never had been taken. *Id.*

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LAND CONTRACTS: *Rights under*, 1, 2; *Deed*, 3, 4; *Interest on default*, 5; *Parol*, 6, 7; *Rescission*, 8–10.

1. Immediate possession and constant occupancy by one who holds under a land contract, operate as full notice of his rights under the contract, so far, at least, as concerns enclosed premises. *Seager v. Cooley*, 14.
2. Rights conferred by a land contract cannot, as against one in full possession under it, be affected by errors of description whereby deeds from the same grantor to subsequent purchasers are made to cover portions of the same land. *Id.*
3. Where a deed is given in pursuance of a land contract, it is presumed to secure and perpetuate all rights conferred by the contract, and an intermediate conflicting deed given by the same grantor has no priority. *Id.*
4. A deed collusively given in execution of a land contract, possession of which was surreptitiously obtained in the absence of the party holding it, is not absolutely void in law as for fraud, as it passes the legal title to the grantee named and the contract purchaser cannot cause it to enure to himself except by showing his equitable right and title as against the grantee; and this showing cannot be made in an action of ejectment. *Harrett v. Kinney*, 457.
5. A party in default in his payments on a land contract cannot, as a matter of right, discharge himself from all responsibility by tendering or paying simple interest, and become thereby entitled to a deed, especially where the other party has declared the contract forfeited for the default; a court of equity can require compound interest in such cases if justice demands it. And it is not certain that specific performance should be compelled as a matter of law unless the other party has been also in fault. *Richards v. White*, 622.
6. A parol contract was made for the sale of land and was carried out by giving a deed which was ineffectual for misdescription. The land was afterwards levied upon and sold on execution, and the contract purchaser filed a bill to enjoin an action of ejectment by the execution purchaser, to correct the mistake in the deed, and to have the deed on execution set aside as clouding his title. *Held* that to entitle complainant to enforce the parol contract as against the owner of the legal title he must show (1) a contract, the terms of which are clear and complete, so that no reasonable doubt can exist respecting its enforcement according to the understanding of the parties, if enforcement seems equitable; (2) such acts of part performance, as, according to equitable principles, will justify its enforcement, notwithstanding the failure to comply with the statute of frauds in making it; (3) the payment of the purchase price. *Kinyon v. Young*, 339.
7. An oral contract for the sale of land is made valid by part performance. *Davis v. Strobridge*, 157.
8. When a person who has contracted to sell land proceeds to rescind the contract and oust the other party, the latter may acquiesce and consider it at an end; and as there is a failure of consideration for whatever he has paid on the contract, he may recover it back under the equitable count for money had and received. *Id.*
9. Interest is recoverable in an action for money paid without consideration under a land contract where the amount recovered does not adequately compensate for damages. *Id.*

10. Where land is cleared in reliance on a contract for its sale and the contract is rescinded without fault of the party relying on it, and the benefit of the work is appropriated by the other, the latter becomes liable to pay for it. *Id.*

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LANDLORD AND TENANT.

1. A tenant's rights rest upon corresponding rights in his landlord, and so long as he claims the former he cannot dispute the latter. *Bertram v. Cook*, 396.
2. A defendant in ejectment who has obtained possession by collusion with plaintiff's tenant, is estopped for purposes of recovering possession, from disputing the plaintiff's title; but the estoppel is not equivalent to an admission of his title in fee. *Id.*
3. A tenant is estopped from disputing his landlord's title so long only as the lease continues or he holds over; after he surrenders possession he is as free to set up an independent claim to the property as any other person; and any one who comes into possession by the tenant's consent is no farther estopped than he is. *Id.*

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1. There can be no presumption that a party will hesitate in the prompt performance of a legal duty. *Edson v. Gates*, 253.

LEGAL HOLIDAY.
saloons to be closed on Christmas: LIQUOR LAWS, 6.

LEGATEES.
cannot enforce trust against residuary legatee: ESTATES ETC., 22.

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LEGISLATIVE POWER
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of administrator, for claims: ESTATES ETC., 16, 17, 19, 20.
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on sheriff's bond given to the county: SHERIFFS, 1, 2.
on subscription for book: CONTRACTS, 3.
to pay for work in reliance on LAND CONTRACTS, 10.

LICENSE.

1. A written agreement permitting the establishment of a dam, granting a right of flowage, providing for a perpetual use and for the settlement of damages, and containing no clause of forfeiture on default, is not a revocable license, but an absolute sale on time for credit. *Fitch v. Constantine Hydraulic Co.*, 74.
2. So far as the parties to an oral agreement for the sale of standing timber execute it in good faith before it is revoked, the sale may, for their protection, be regarded as a license for what has been fairly and seasonably done. *Greeley v. Stilson*, 27 Mich. 153; *Haskell v. Ayres*, 35 Mich. 89. *Wetmore v. Neuberger*, 362.

LIEN.

estoppel to deny mortgage as: MORTGAGE OF CHATTELS, 7.
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LIMITATIONS: see STATUTE OF LIMITATIONS, 32.
of liability on labor debts: CORPORATIONS, 11.
of right of action on policy of INSURANCE, 6.

LIQUOR LAWS.

1. Act 193 of 1877 giving "every wife, child, parent, guardian, husband *or other person*" a right of action against a liquor seller for injury done the plaintiff by reason of the intoxication of any person, does not give the intoxicated person himself a right of action against the dealer for money stolen from him while drunk. *Brooks v. Cook*, 617.
2. *Mandamus* to compel a municipal council to act on a liquor bond offered for its approval will not be granted where the ground on which the council refused is not clearly shown. *Negley v. Sturgis*, 1.
3. Where *mandamus* is sought to compel a municipal council to approve a liquor seller's bond, the petition for the order to show cause should show respondent's reason for refusing, if any was given, and the circumstances of refusal; otherwise the reason must be presumed sufficient and the order may be refused. *Goss v. Com. Council of Vermontville*, 319.
4. Payment of a liquor tax for the coming year does not exempt the dealer from the operation of a subsequent law passed during the year forbidding the sale of liquor on specified days. *Reithmiller v. People*, 280.
5. The enactment of a statute taxing the liquor traffic does not prevent the State, in the exercise of its sovereign powers of taxation and police, from passing farther laws affecting the traffic. *Id.*
6. Christmas is a "legal holiday" within the meaning of Act 267 of 1879, which directs saloons to be closed on legal holidays, Sundays and election days. *Id.*

county treasurer compelled to pay over taxes: MANDAMUS, 4.
liquor tax law of 1879 upheld: TAXATION, 6.

LOCALITY OF OFFENSE.
pointing out, in TRESPASS, 4.
LOCAL PREJUDICE.
showing of, time for: COURTS, 4, 5.
LOCAL USAGE: See USAGE.
LOGGING.
1. The cost of running the logs of outsiders which have become mingled with a drive cannot be charged against the owners of the logs constituting the original drive; the drivers must look to the owners of the intermingled logs to satisfy their claim therefor. *Edson v. Gates*, 253.
2. In a suit for compensation for getting out logs, the scale by which to determine the quantity of feet got out was disputed, and it was shown that certain purchasers had received the logs from the boom company, and paid according to the boom scale, with the apparent acquiescence of the parties. Evidence to show what the boom scale was, was ruled out on the ground that the witness under examination, who was secretary of the boom company, did not make it. *Held* erroneous, as the material question was whether or not it was the boom company's scale, and it was for the jury to determine, after finding whether the parties had agreed that the purchasers should be guided by it in receiving the logs and in making payments in their interest. *Peterson v. Anderson*, 441.

rescission of contract, set-off: CONTRACTS, 5.
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measurement of: CONTRACTS, 7.

MANDAMUS: *Defined*, 1; *Jurisdiction*, 2; *To vacate injunction*, 3; *For payment of liquor tax*, 4; *Fine*, 5; *Costs*, 6.
1. Mandamus is a prerogative writ designed to afford a summary and specific remedy where the party applying for it would otherwise be subjected to serious injustice. *Tawas etc. R. R. Co. v. Iosco Circ. Judge*, 479.
2. The jurisdiction of the Supreme Court in mandamus cases is not statutory but plenary. The Constitution gives it supervision over all inferior tribunals and enjoins the abolition as far as possible of the distinction between legal and equitable jurisdictions. The writ may therefore issue even where other remedies exist, if they are not sufficiently speedy to prevent material injury. *Id.*
3. Mandamus lies to vacate an illegal injunction where the party affected thereby would otherwise have to submit to serious injury, or to the risk of proceedings for contempt in disregarding it. *Id.*
4. Mandamus lies to compel a county treasurer to pay over to the proper local officers the amount of liquor taxes to which they are entitled by the law. *East Saginaw v. County Treasurer*, 273.
5. The provision protecting a respondent in mandamus from all farther liability on paying a fine imposed for neglect to obey the writ (Com. L. § 7111) does not apply if an order to pay such fine has been denied; and the refusal of the order is not *prima facie* evidence that he has not made himself liable for the results of his omission. *Schwab v. Coots*, 463.
6. Costs were not awarded on the denial of a writ of mandamus against an inferior court where the proceeding was brought at the respondent's request. *Granger v. Judge of Superior Court*, 384.

for county, to have embezzled taxes re-assessed: TOWNSHIPS, 4.
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MORTGAGE OF CHATTELS: *What is not*, 1; *Failure to file*, 2–5: *Mortgagee estopped*, 6; *Foreclosure*, 7; *Sale for an instalment*, 8–10.
1. A contract reciting that one of the parties holds mortgages on the lands and personalty of the other, in consideration of which the latter assigns to him the net proceeds of the farm, which he promises to apply upon the mortgages, is not itself a chattel mortgage

or similar security, and cannot be shown to be by parol evidence; but it can be shown to be fraudulent. *Haynes v. Ledyard*, 621.

2. A chattel mortgage not filed is void as against the creditors of the mortgager by the express terms of the statute, when the mortgager is left in possession as before giving it. Whether it is not also void as against one to whom the mortgager has assigned for the benefit of his creditors is left undecided by this case. *Putnam v. Reynolds*, 113.
3. A mortgager of goods who had been left in possession, and whose mortgage was not filed, made a general assignment for the benefit of his creditors. The assignee took possession and proceeded to sell the goods in execution of his trust. The mortgagee filed a bill in equity to foreclose. *Held* that as the statute declared his mortgage void as against the very parties for whom the assignee was trustee, he had no standing whatever in equity, and his bill was dismissed. If under any harsh rule of the common law he may have an advantage, he will be left to seek it at law. *Id.*
4. Where heavy merchandise, like pig iron, is mortgaged and the mortgage is not placed on file, and there is no actual delivery and apparent change of possession, there must be a sufficiently clear and unequivocal designation of the property to serve as notice of the mortgage to creditors or subsequent purchasers; and it is for the jury to decide under proper instructions what is sufficient notice thereof. *Anderson v. Brenneman*, 198.
5. Where only symbolical delivery of mortgaged chattels can be made and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors and against the mortgagee, since he could have protected himself fully by filing the mortgage. *Id.*
6. Where a mortgagee of chattels has replevied the mortgaged goods, he cannot repudiate the ownership thus asserted, in proceedings against him as garnishee. *Cummings v. Fearey*, 39.
7. B. sold some horses and took back a mortgage which he assigned to L., who seized the horses under it and re-assigned to B., who afterwards joined in a note with him for an individual debt, and to secure it gave another mortgage on the same horses. Afterwards on paying L.'s note when it was past due, B. cut his own name off and assigned the note to P. in order to keep it alive against L., and P., without B.'s knowledge, assigned it to C., but paid B. the balance due from L. B. then demanded the horses from L. under the original mortgage, and the officer seizing them took them from C., who brought trover as for their conversion. *Held* that on receiving the amount due from L., B. had a right to suppose the transaction with him ended, and that he had a right to foreclose the original mortgage; and that C., on purchasing the mutilated and past due note without making inquiry of B., could not treat him as estopped to deny the second mortgage as an existing lien, and had no claim on the property. *Corbitt v. Brong*, 150.
8. When a mortgagee of chattels has seized the property mortgaged when only one instalment was due, and sold it to a third person for the satisfaction of the whole mortgage, a subsequent tender by the mortgager of the amount of the mortgage, and demand of the property, is a mere idle ceremony, since the demand cannot be complied with. *Brink v. Freoff*, 69.
9. The mortgager under such circumstances brought suit against the mortgagee to recover the value of the property, which had been illegally sold. *Held*, that he was entitled to recover the value of the chattels which were sold after the first instalment had been satisfied, together with special damages if any were shown, but with

deduction of the amount that then remained unpaid on the mortgage. *Id.*

10. But special damages can only be recovered where they are alleged and claimed in the declaration. *Id.*

fraud against creditors of principal defendant in GARNISHMENT, 8.
partner's lien against: PARTNERSHIP, 7.

MORTGAGE OF LANDS: *Voluntary*, 1; *Record*, 2–6; *Extinguishment*, 7, 8; *Invalid stipulations*, 9, 10; *Agreement to pay*, 11, 12; *Foreclosure*, 13–19.

1. A man may give a voluntary mortgage if he chooses, and it will be good except to those who are or might be defrauded by it. But the fact that a mortgage is given without consideration may have an important bearing on any disputed question concerning its delivery or recording. *Brigham v. Brown*, 59.
2. A debtor gave a mortgage for the debt, the *bona fides* of which was not disputed, and it was at once placed on record. Subsequently it was found that another party had a mortgage from the same mortgager on the same land, purporting to be given and recorded first. This mortgage had no debt to support it, unless it was one owing to a firm of which the mortgagee was a member, and for which other mortgages for more than its amount, were in existence. The register of deeds testified that it was left with him by the mortgager, with directions not to place it upon record until further directions were given, and that he never received any such directions, but his clerk recorded it without orders. *Held*, that the spreading it upon the record book, under such circumstances, was not a recording which entitled it to priority. *Id.*
3. Where a mortgage is given, manifestly as a cover for the benefit of the mortgager, and the latter is sent with it to the registry, where he gives directions for leaving it off the record, the mortgagee will be bound by these directions, and will not be at liberty to rely, as against them, upon a false certificate of recording which he obtains. *Id.*
4. Under the statutes of Michigan a mortgage is considered as recorded when it is filed for record, and the register is required to make an entry in what is called an entry book, of the date of reception, the names of the mortgager and mortgagee, and the township in which the lands lie. *Sinclair v. Slawson*, 123.
5. The entry in the entry book, until the mortgage is copied in full into the record, constitutes the constructive notice to purchasers, and refers them to the mortgage on file for full particulars. *Id.*
6. In copying a mortgage into the record, the register omitted the name of the mortgagee. *Held*, that this error did not defeat the mortgage as to subsequent purchasers, but that as the entry book would supply the name of the mortgagee, that book and the record book together gave full information and constituted notice to all parties concerned. *Id.*
7. A mortgagee cannot remain so after acquiring the fee unless the mortgage needs to be kept alive to protect his rights. *Jackson v. Evans*, 510.
8. A son bought a farm from his mother and gave her a mortgage on it to secure part of the purchase price. They afterwards agreed that she should take back the farm, and in consideration of the wheat growing on it should endorse its value on the mortgage. *Held* (1), that the transfer of the wheat was without consideration, as the reconveyance of the farm cancelled the mortgage; (2) that the reconveyance of the farm and the transfer of the wheat, as inseparably connected with it, were void for not being in writing. *Id.*

9. Act 62 of 1843 (Comp. L. § 6263) forbids ejectment by a mortgagee before foreclosure absolute. *Held*, that this prevents a mortgagee from obtaining under his mortgage any interest beyond that of a security to be enforced only by a sale on foreclosure, and that it debars him from any right of possession. *Hazeltine v. Granger*, 503.
10. Any provision in a mortgage of lands which permits ejectment on a mere default in payment, or allows an *ex parte* order for a receiver of rents and profits, or destroys in advance the equity of redemption, is contrary to equity and a court of chancery will not enforce it. *Id.*
11. A deed expressly stipulated that the grantor should pay off a certain mortgage on the premises. *Held*, that a verbal agreement between the parties that the grantor should advance the moneys to pay it, would be inconsistent with the terms of the deed, and that the grantee could not recover upon it against the grantor. *Unger v. Smith*, 22.
12. Where the grantee of land accepts a deed binding him to pay a mortgage thereon he becomes personally liable for the debt secured thereby, and the liability may be enforced in chancery, and a personal decree obtained against him for any deficiency that may exist after the sale of the premises on foreclosure. And the grantor can compel him to pay the mortgage. *Id.*
13. Partners need not be joined as complainants in the foreclosure of a mortgage given to only one of the firm as trustee for the partnership. *Shelden v. Bennett*, 634.
14. A bill to foreclose a mortgage given to secure a joint and several note is defective for want of parties if filed against only one of the makers of the note, though the mortgage was given by him only. This is especially so where the mortgage has been assigned, and if the defense to the note could only have been enforced by a joint cross-action for damages. *Dederick v. Barber*, 19.
15. Where a debt is made payable after several years, but the interest is payable annually, a bill to foreclose the mortgage which secures it may be properly filed after the expiration of the year, if interest is in arrears. *Id.*
16. The grantee of land was allowed to withhold part of the consideration for a specified time in order to take up an outstanding title, and to secure the money withheld, he gave a mortgage. *Held*, that it was no defense to its foreclosure that to perfect his title he had paid the amount withheld to a person who claimed to have obtained a quit-claim of the outstanding title, when it was neither averred in the answer nor shown by the proofs that the latter claim was valid or truthful. *Richardson v. Tolman*, 379.
17. The defense to a foreclosure was that the mortgage was forged. But it appeared that the persons actually and nominally interested as mortgagees were both dead; that the mortgager and his wife were the only persons living who knew the real facts; that the witnesses to the acknowledgment, one of whom was the acknowledging officer, were reputable and upright men, and that their signatures were genuine; that the signature purporting to be that of the mortgager and alleged to be forged, resembled that attached by him to his answer in the foreclosure suit, and both were in an easy handwriting unlikely to be feigned; that the defendant had tried to misrepresent the spelling of his name, and his explanation of the circumstances of an alleged payment for the mortgaged land were unsatisfactory and were not corroborated, and his manner as a witness was evasive. *Held*, that in view of the facts and circumstances the defense was not sufficiently made out. *Cameron v. Culkins*, 531.

18. Where a mortgage is foreclosed for an instalment only, it remains in force as to notes secured by subsequent instalments; and indorsers of such notes may look to the security for indemnity if called on to pay them. *Bridgman v. Johnson*, 491.
19. If a mortgagee bids in the premises on foreclosure sale for an instalment due, and afterwards gives a warranty deed of the land, the warranty deed discharges the mortgage and releases indorsers of such notes as may be secured by subsequent instalments thereof. *Id.*

on leviable property, fraud: DEBTOR AND CREDITOR, 8.
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MORTGAGE INTEREST,
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affidavits when not part of record: PRACTICE, 13.
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MOTION TO QUASH.
questions considered on: CERTIORARI, 3.

MUNICIPAL CORPORATIONS.
1. The right of a city to take possession of, and improve as a public park, lands lying outside of its limits, comes only by sovereign grant, and so far as concerns the city is a public franchise. *Mayor v. Park Commissioners*, 602.
2. A city may hold and own lands for a public park, and cause them to be improved, not in its public capacity as an agency of the government, and subject to state control, but as a corporate individual having private rights which the people have a constitutional right to enjoy undisturbed. *Id.*
3. A right may be private as belonging to a municipality for the exclusive benefit of its corporators, but public in that individual citizens can have no property in it, and as being a franchise existing only by public and sovereign grant. *Id.*

approval of liquor bond, mandamus: LIQUOR LAWS, 2, 3.

MUNICIPAL COURTS.
jurisdiction in transitory actions: COURTS, 1.
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MUTUAL CLAIMS.
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NAMES.
identity of, when not proof of identity of persons, EVIDENCE, 8.
of mortgagee omitted in recording MORTGAGE OF LANDS, 6.

NAVIGABLE STREAMS.
1. It is not competent for the state to give the control of one of its navigable streams to private parties for improvement, with power to charge toll at discretion. *Semble. Nelson v. Cheboygan Nav. Co.*, 7.
2. But it is competent to authorize such parties to charge toll at rates fixed by the legislature, for the use of improvements made by them. And the provision in the Ordinance of 1787, that the navigable waters of the Northwest Territory shall be "forever free" does not

interfere with this, as the meaning of that provision is that the use of the waters in their natural condition shall be free. Benjamin v. Manistee etc. Co., 42 Mich. 628. *Id.*

3. Tolls for the use of the improvement of a navigable stream may be charged, notwithstanding the stream was capable of such use in its natural condition, provided the improvement facilitated it. *Id.*
4. The question whether a navigable stream has been dammed without permission of the board of supervisors will not be considered on error, when the record does not show it was raised in the court below. *Id.*

NAVIGABLE WATERS.

ownership of lands on: RIPARIAN RIGHTS, 4.

NAVIGATION.

right paramount but not exclusive: RIPARIAN RIGHTS, 1.

NEGLIGENCE.

1. Leaving a buggy standing at an angle to the beaten track and so near that by backing one foot it would be in the way of passing vehicles, is negligence. *Joslin v. LeBaron*, 160.
2. Where a charge is based on the theory that the question of negligence is for the jury, it is not error to omit to state that rule. *Id.*
3. Where a jury finds that a party was traveling in a beaten track there can be no finding that he was on the wrong side of the road. *Id.*
4. One who is guilty of contributory negligence cannot recover for negligent injury. *Id.*
5. There is no presumption of negligence in not turning out of the traveled track to avoid colliding with a team hitched by the roadside, but negligence must be proven. *Id.*
6. The owners of a warehouse owned a railroad track running on their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was set on fire and burned by sparks emitted by it. *Held*, that the owner had no redress against the railroad company for the burning. *Marq., H. & O. R. R. Co. v. Spear*, 169.
7. It is immaterial that the railroad company, on repeated applications made that it should repair the engine, had promised to do so "sometime," the use continuing thereafter with the knowledge of the plaintiffs, and on their own application. *Id.*
8. One who invites another to bring upon his premises for use a dangerous implement, knowing it to be such, will take upon himself the consequences which naturally follow. *Id.*
9. In an action for damages from defendant's careless driving it is not admissible on cross-examination of the plaintiff to ask him as to his own habits of running horses on the highway, or of being intoxicated while driving, if it is not pretended that he was indulging either of the habits at the time of the injury. *Hill v. Snyder*, 318.
10. The *gravamen* of an action for damages for negligent injury is that plaintiff has been damnified by the wrongful and negligent conduct of defendant without having contributed thereto by his own negligence, and as the absence of contributory negligence is part of his case, he should show that he acted with due care. But it is enough if he merely puts in evidence the facts and circumstances attending the injury, and if these show negligent conduct in the defendant from which the injury followed as a direct and proximate consequence, and do not show contributory negligence, a *prima facie* case is established. *Teipel v. Hilsendegen*, 461.

11. In an action for negligent injury, if the proofs are such that reasonable minds may differ as to the fact of contributory negligence, the case should go to the jury; its absence need not be conclusively shown. *Id.*

NEGOTIABILITY
of note, qualified by proviso: ACTION, 7.

NEGOTIABLE INSTRUMENTS: *Joint and several note,* 1; *Authority to draw post-dated bill,* 2–9; *Suit by joint maker,* 10, 11.

1. A promissory note beginning "I promise" but signed by several persons is a joint and several note, and in law may be sued against one or more of the makers. *Dederick v. Barber,* 19.
2. Where defendant in an action on a bill of exchange, drawn by his agent, pleads the general issue, and files with it an affidavit denying the execution of the bill, the plaintiff has the burden of proving that it was drawn with competent authority. *N. Y. Iron Mine v. Citizen's Bank,* 344.
3. The authority of an agent in charge of an iron mine to draw post-dated bills of exchange on his principal was not presumed from his having done so before without objection, where there was nothing to show that the party relying on his authority knew the fact, and a long interval had passed since it occurred, and the mine had meanwhile become prosperous and better supplied with ready money, and where in the former case the bills were drawn on time and were post-dated only long enough to give the drawee the benefit of the full period of discount after receiving them, while in the latter they were made payable at sight, and post-dated several weeks for the agent's private advantage. *Id.*
4. Where knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities, he must have had actual notice of such equities, or, at least, knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it an act of bad faith. *Id.*
5. Parties discounting paper drawn by an agent upon his principal, are bound to act in the light of all facts within their knowledge bearing on his authority, and cannot disregard any fact which might lead a prudent man to suspect that the agent is acting in fraud of his principal. *Id.*
6. A post-dated draft purporting to be payable at sight, is, for all the legal purposes of presentment, demand, protest and payment, a draft payable so long after date; but that authority to make time paper shall be held to cover post-dated paper, their legal effect must not only be the same, but all their incidents so far identical, that both may fairly be supposed to have been in mind when the authority was given. *Id.*
7. Authority to an agent to give unusual business paper is not to be construed on technical reasoning but on the actual intent. *Id.*
8. A post-dated bill of exchange differs from a bill made payable a corresponding period after it is drawn, in that the time bill may be sent forward meanwhile for acceptance, while the post-dated bill cannot, and the drawee cannot retain funds to meet it before its date as against other bills previously falling due. *Id.*
9. An agent's authority to draw bills of exchange payable on time or at sight, does not include authority to draw post-dated bills. *Id.*
10. A joint maker of a note, who takes it up after maturity, can sue the other joint maker as for money paid to the latter's use, and if his declaration covers the case, it is immaterial that he also declares specially on the note. *McClutchie v. Durham,* 435.

11. A surety on a joint note, whose liability is barred by the statute of limitations, can waive his privilege if he chooses and take up the note and enforce it against his principal, if the latter has kept it alive against himself. *Id.*
assignment of note as right of ACTION, 6.
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liability of managing committee: EVIDENCE, 9.

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NON-PERFORMANCE
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1. Failure to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was also involved a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance. *Moss v. Cummings*, 359.
2. Private remedies for the omission of an officer to execute legal process are not lost by the failure of statutory proceedings against him for contempt; and as the denial of the latter remedy is not a final judgment and appellate jurisdiction is not given in such cases, it would be original action for the Supreme Court to review it, whether the amount of damages could or could not be fixed with certainty. *Schwab v. Coots*, 463.

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PARTNERSHIP: *What constitutes,* 1–4; *Settlement,* 5, 6; *Partner's Lien,* 7; *Firm Contract,* 8.
1. A joint and equal interest in an enterprise does not make the holder a partner. *Edson v. Gates,* 253.
2. *It seems* that an agreement to carry on business and receive half the profits does not make one a partner. *Wilcox v. Matthews,* 192.
3. Evidence that an arrangement for carrying on business for a share of the profits was entered into under an advertisement for a partner, tends to show a partnership. *Id.*
4. Facts tending to show a partnership are for the jury in an action involving partnership liability. *Chamberlain v. Jackson,* 320.
5. Where an agreement for a settlement of partnership accounts provided that sums found due to either party should be added to, or deducted from, an agreed sum to be paid to one of them, the party claiming the benefit of any such additions or reductions has the burden of proving that the amount has been received and not accounted for, or paid out and not credited. *Lambert v. Griffith,* 65.
6. Cash book entries are not conclusive in a settlement of partnership matters if there is countervailing evidence. But if there is not, the settlement should be in accordance with the *prima facie* showing made by the books. *Id.*
7. A partner has a lien on the firm property as against a chattel mortgage given before he joined the firm. *Wilcox v. Matthews,* 192.
8. A purchase of partnership assets and assumption of responsibility to outgoing partners does not bring the purchasers into contract relations with the firm's creditors so as to enable them to take advantage of a contract partly performed by it. *Ayres v. Gallup* 13.

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1. Where a mortgager gave a note for the whole amount of his debt including sums for which he had become indebted before the mortgage was given, and which were not secured by it, and the mortgagee applied payments made to him upon the note generally, it was equivalent to an application upon the new and old indebtedness *pro rata*, and a different application could not be made where it did not satisfactorily appear to have been directed or to have been for the interest of the parties. *Shelden v. Bennett*, 634.
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of purchase price, necessary to *bona fide* purchase: DEEDS, 12.
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PLEADINGS: *Formal objections*, 1; *Order of pleadings*, 2–6; *Declaration*, 7–9; *Bill of particulars*, 10–14; *Pleadings before justices*, 15, 16.
1. An objection of form and not substance should be specially demurred to. *Mayor v. Park Commissioners*, 602.
2. A demurrer and a plea to the general issue are inconsistent, as the first admits what the last denies. *Cicotte v. Wayne County*, 173.
3. A plea to the merits excludes the right to demur and must be withdrawn if the defendant wishes to demur to the same counts. *Id.*
4. There cannot be issues of fact and of law on the record at the same time. *Id.*
5. Demurrer should be taken before going to issue on the fact. *Id.*
6. A plea to the merits filed after demurrer waives, supersedes or overrules it. *Id.*
7. A county may be sued by a declaration on the common counts. *Id.*
8. A party who has been induced to exchange a horse for another by means of a false warranty of the horse received, may sue in tort for the deception, and set out in his declaration the false warranty as the means whereby he was injured. *Carter v. Glass*, 154.
9. The fact that he sets out the warranty in his declaration, and avers its breach, does not make his declaration one in *assumpsit*, when the essentials of a declaration in case appear. *Id.*
10. A bill of particulars is not part of the declaration; though it may have the effect of a pleading in so far as it restricts the proof; its purpose is to secure such information as will enable the parties to make intelligent preparation for trial. *Cicotte v. Wayne County*, 173.
11. Pleadings are not amended by service of a bill of particulars, nor is the issue changed by amending the bill; and a plea or demurrer to it would be anomalous. *Id.*
12. A declaration on the common counts is not made demurrable by the bill of particulars. *Id.*
13. A bill of particulars that has been properly demanded is not waived by pleading or noticing the case for trial. *Peterson v. Tilden*, 168.
14. Where a plaintiff refuses to comply with a proper demand for a bill of particulars, an objection to his evidence is properly sustained. *Id.*
15. A declaration claiming to recover back as damages money which defendant had caused to be extorted from plaintiff by duress of imprisonment on criminal process procured by him for that purpose, states a lawful ground of action with sufficient precision, if not demurred to, to be sustained in justices' courts. *Holbrook v. Cooper*, 373.
16. Pleadings in justices' courts are to be liberally construed and amendments to obviate merely technical errors favored. *Snyder v. Winsor*, 140.

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1. Defects in notice are waived if no seasonable complaint is made where the party notified has already been regularly served and suit is fairly progressing. *Granger v. Judge of Superior Court*, 384.
2. The special statutory methods of obtaining jurisdiction where actual notice is not given, stand entirely on their own regularity, and if not regular, proceedings based on them are nullities. But where personal service has been had, farther proceedings are not necessarily fatally defective for all purposes, especially if rights based on them are allowed to become established by lapse of time without resorting to common law remedies to set such proceedings aside. *Id.*
3. The sheriff's certificate of service in a suit begun in the Superior

court of Detroit, stated that he served the declaration "on Edward A. Elliott *in the city of Detroit*, the defendant named in said declaration, by delivering to him *in said county of Wayne*, a true copy thereof." *Held* sufficient, as the city is within the county. Judgment would not be reversed for the irregularity in form. Comp. L. § 6051, subd. 13. *Elliott v. Preston*, 189.

4. The rule to plead should be entered before service of a copy of the declaration, but when both acts are done on the same day and within a short time, and the defendant is not misled by the omission to enter the rule until after service, he has no right to have the declaration stricken from the files. *Blanck v. Ingham Circ. Judge*, 98.
5. Where suit is begun by declaration personally served with due notice of a rule to plead which has been entered, default for not pleading may be entered without proof of default because the record shows that no plea has been filed. *Elliott v. Farwell*, 186.
6. It is enough in giving the residence of parties in a declaration to describe them as "of the city of Detroit," or otherwise. And if it were not so, a judgment on default would not be affected by the defect; as it would be cured by the statute of amendments: Comp. L., § 6051, subd. 4. *Id.*
7. Where the attorney for joint defendants has stipulated for a discontinuance as to some of them, the others, having practically acquiesced, cannot urge the non-joinder in bar of farther proceedings. *Callam v. Barnes*, 593.
8. An order refusing a petition for the punishment of a sheriff for contempt in omitting the performance of his duty, is not reviewable by the Supreme Court on *certiorari*. *Schwab v. Coots*, 463.
9. A judgment subjecting a respondent in mandamus proceedings to liability to pay money or stand imprisoned for contempt in neglecting to obey the writ, is as final as any other money or final judgment and is reviewable. *Id.*
10. The Supreme Court has power to review in some way all final judgments. *Id.*
11. It would be original action for the Supreme Court to review the action of a lower court in fixing the elements of a recovery of damages if judicial discretion in doing so is necessary, and has not been exercised. *Id.*
12. An appellate court is bound by the record, and can not take notice of allegations made by counsel on the hearing and not appearing of record. *Mich. & Ohio Plaster Co. v. White*, 25.
13. Affidavits relating to a motion, but not regarded by the court in deciding it, are not part of the record and will not be regarded on error from the order made. *Noble v. Bourke*, 193.
14. Where the evidence is not made part of a bill of exceptions, but is merely printed with it, the Supreme Court will not examine it to ascertain the facts. *People v. Cline*, 290.
15. Where the bill of exceptions does not purport to set forth all the evidence, it must be assumed that there was enough to warrant the conclusion of the court. *Id.*
16. Evidence that might have been proper must be presumed so, where the record shows nothing to the contrary. *Grosvenor v. Ellis*, 452.
17. A referee's conclusions are presumed to have been warranted by the proofs if the bill of exceptions does not contain all the evidence. *Id.*
18. Judgment will not be rendered in the Supreme Court against a security for costs where judgment for the plaintiff below has been reversed and the case sent back for new trial, and it is not shown that the security was required, and there is nothing on the face of the bond to show that it was approved. *Schuetzen Bund v. Agitations Verein*, 313.

19. Defendant in error is entitled to an attorney fee as for hearing in the Supreme Court, where, after being served with notice thereof, he appears in good faith to argue the case, and plaintiff in error neglects to file the record and fails to appear. *Clark v. Sable*, 1.
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remedy on covenants in deed to grantor: REAL PROPERTY, 5.
QUO WARRANTO.
1. Probate judges are not within the exception in Comp. L. § 7101, which permits information in the nature of *quo warranto* to be filed in the circuit court except against State officers. *Secord v. Foutch*, 89.
2. An information in the nature of a *quo warranto* is not demurrable for stating that a municipality "was and *now is possessed*" of certain premises and that respondents unlawfully hold and exercise the franchises of taking possession of them for a public park. Possession for restricted purposes would not exclude possession as an owner. *Mayor v. Park Commsissioners*, 602.

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RAILROAD COMPANIES: *Condemnation of lands*, 1–7; *Consolidation and Subscriptions*, 8–10; *Labor Debts*, 11–13; *Payment in Township Aid Bonds*, 14, 15; *Fraud by Director*, 16.
1. The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed on by the inferior tribunals for assessing damages in condemning lands and cannot therefore be considered on *certiorari* to review their action. *Schroeder v. Detroit, Grand Haven & Milwaukee Ry Co.*
2. Where a jury is required merely to determine the damages or compensation for taking property for a railroad company, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. And, unless there are indications to the contrary, the presumption is that all evident facts bearing on the amount of damages were taken into account. *Michigan Air Line R'y v. Barnes*, 223.
3. A description in an award condemning lands for railway purposes allowed a strip 30 feet wide on each side of a given line across

the entire premises except that in crossing a specified parcel a strip only 25 feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former, and by giving the courses and distances. *Held* sufficient. *Id.*

4. An award of damages for land condemned for railway uses was sustained where it expressed the gross sum allowed to all joint claimants and specified how much of it was for each of those interested as mortgagees. *Id.*
5. Whether questions on appeal under the railroad law can be brought up by bill of exceptions—Q. *Id.*
6. An inquest of damages for land condemned for railway uses may be conducted by a jury without legal assistance, and liberal practice in the admission or rejection of testimony is allowable; and the conclusions of the jury thereon will not be disturbed except for rulings that were manifestly inaccurate and did substantial injustice. *Id.*
7. The value of land for farm use is a proper subject of inquiry in proceedings to condemn it for railway purposes. *Id.*
8. In an action brought by the assignee of a subscription for railroad stock, to recover the amount of the subscription, the declaration alleged the consolidation of the company in which the stock was taken, and the plaintiff sought to introduce in evidence the articles of the original and the consolidated companies. *Held* that the objection that they were "incompetent, irrelevant and immaterial" was not sufficiently specific. *Rodgers v. Wells.* 411.
9. A plaintiff who declares upon an assignment of his claim to him by a consolidated railroad company, must fail if he does not show that the statutory conditions to consolidation were substantially observed. *Id.*
10. Whether subscriptions to the stock of one railroad company are assignable by another company into which it has been merged by consolidation—Q. *Id.*
11. A suit against a railroad corporation for a labor debt is to fix it with a liability resulting from its ownership of the road, and will not admit of the theory that defendant is merely an agent of the owner. *Chicago & North Eastern R. R. Co. v. Sturgis,* 538.
12. In suing a railroad company for a labor debt under Comp. L. §§ 2393-5, a declaration on the common counts in *assumpsit* with mere allusions to the statute and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred. *Id.*
13. Where a railroad contractor has assigned his contract to the superintendent of the company and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt does not rest on Comp. L., §§ 2393-5, but is at common law on a special contract; and the declaration must so aver the cause of action. *Bottomley v. Port H. & N. W. Ry. Co.,* 542.
14. Township aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so, *Held,* on a bill for an accounting, that he should be charged with the bonds. *Mich. Air Line Ry. Co. Mellen,* 321.
15. Where several persons either as co-partners or joint contractors had done work under an agreement with a railway company, a payment made to one of them in township aid bonds binds the rests if with full knowledge of the facts they decline to repudiate the payment and make a distinct claim upon the company. *Id.*
16. It is a fraud upon the rights of a railway corporation if a director who buys lands for the use and benefit of the company and pays

for them with its funds, takes the title in his own name or jointly with others; and the nominal grantees would hold in trust for the company. *Id.*

fire from locomotive sparks: NEGLIGENCE, 6, 7.

injunction restraining use of road-bed: EQUITY, 20.

liability for labor debt: CORPORATIONS, 8–11.

unwritten promise to contractors' laborers: ACTION, 4.

RATIFICATION

by principals of agent's CONTRACTS, 3.

of consolidation agreement, meeting for: CORPORATIONS, 6.

REAL AND PERSONAL ESTATE.

insurance policy on, held not divisible: INSURANCE, 1.

REAL PROPERTY: *Possession*, 1, 2; *Interests of devisees*, 3; *Estoppel by covenant*, 4; *Remedy under covenants*, 5; *Parol trusts*, 6–8; *Sale of*, 9, 11; *Rights of execution purchasers*, 12, 13.

1. Constructive possession is co-extensive with the title which creates it, and actual possession is limited by the occupant's title. *Campau v. Campau*, 31.
2. "Possessed" is a variable term in law; it may imply a temporary interest in lands, or a corporal having; or merely property as owner, in which sense it may be used even though an intruder has excluded the owner for the time; it may also be used when the intruder's possession is apparently subordinate to that of the general owner. *Mayor v. Park Commissioners*, 602.
3. Each of several devisees, standing in the same relation to the devisor, is presumed to hold an equal interest with each of the others if his interest is not expressed. *Eberts v. Fisher*, 551.
4. Where a grantor assumes by his deed to convey a title, and by any form of assurance, whether it be by covenant of seizin and title or by that of quiet enjoyment, obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he is estopped from afterwards acquiring or asserting a title and leaving the grantee to sue upon the covenants for redress. *Smith v. Williams*, 240.
5. In a suit growing out of an exchange of property, defendant claimed as off-set the amount which had been paid to perfect title to the property, which plaintiff had conveyed to him with covenants of warranty. But it appeared that he had himself quit-claimed the property to his son, against whom judgment had been recovered in ejectment. On the trial his grantee had surrendered back the property. *Held* (1) that defendant, having conveyed by quit-claim, was not liable to his grantee, and that it was the latter, if any one, who had any remedy against the plaintiff upon the covenants of plaintiff's deed; (2) that defendant had no claim against the plaintiff for the amount expended in perfecting title, and the surrender of the property to him could not change the rights of the parties to that action; (3) that as defendant and his grantee had derived some benefit from the property, the consideration for the conveyance would not necessarily be the measure of damages for a breach of covenant, and as the damages would be unliquidated, they could not be the subject of set-off. *Hunt v. Middlesworth*, 448.
6. Although by statute a parol trust in lands is void, the trustee may recognize it, and other persons, whose equities are not affected thereby, can not interfere. *Patton v. Chamberlain*, 5.
7. Lands held in parol trust, by a father for his daughter, were exchanged for others, which he conveyed to his brother, on like trust. Creditors of the father sought to reach it. *Held*, that the equities of the daughter were equal to those of the creditors, and she would be protected as against their claims. *Id.*
8. The admission of the trust by the brother, in answer in chancery,

is sufficient declaration of the trust in writing to answer the requirements of the statute of frauds. *Id.*

9. An unwritten agreement to pay for work by giving a conveyance of land is void under the statute of frauds, and cannot be considered in measuring damages, or for other purposes. *Sutton v. Rowley*, 112.

10. A sale of land is not made out by an entry on the books of the vendors and by their receipts for purchase money, where the land was not fully described and did not belong to them, and the actual owners only assented to the sale verbally. *Ayres v. Gallup*, 13.

11. A written contract was supplemented by an oral agreement whereby one of the parties was to advance money and use it in buying an interest in land for the other. *Held* that under the statute of frauds the arrangement had no force (Comp. L., § 4692), and that as the obligation to buy could not bind the other party, he could not be charged with the cost of executing such obligation. *Wetmore v. Neuberger*, 362.

12. Execution purchasers of real estate can sue as if they were absolute owners for any injury done the property (Comp. L. §§ 4657–8), as for timber wrongfully severed from the freehold. *Marq. H. & O. R. R. Co. v. Atkinson*, 166,

13. Where the same person owns a parcel of land in part by original title and in part by purchase under an execution, and sues for the removal of timber, he is not bound to show from which portion the timber was taken. *Id.*

condemning lands: EMINENT DOMAIN, 1–3; RAILROAD COMPANIES, 2–7.
contract right to land: EQUITY, 17; LAND CONTRACTS, 1–3.
dedication of lands: see DEDICATION, 1–5.
equalizing valuation of: TAXATION, 17.
certificate as to valuation: TAXATION, 13.
heirs' right of possession: ESTATES ETC., 3, 4.
liability to creditors' claims: ESTATES OF DECEDENTS, 11.
ownership of lands on navigable waters: RIPARIAN RIGHTS, 4.
parol contract validated by part performance: LAND CONTRACTS, 7.
parol contract, when enforced: LAND CONTRACTS, 6.
parol transfer void: MORTGAGE OF LANDS, 8.
partition of: EQUITY, 26–32.
presumption as to equality of interests: DEEDS, 8; TENANTS IN COMMON, 2.
quieting title: EQUITY, 24, 25.
receiver not appointed under MORTGAGE OF LANDS, 9, 10; EQUITY 33.
requisites of possession to establish title by ADVERSE POSSESSION, 2.
right of HOMESTEAD, 1.
sale on EXECUTIONS, 4, 5.
title by ADVERSE POSSESSION, 1.

REASONABLE DOUBT
is what: CRIMINAL LAW, 6.

REASONABLE TIME.
acceptance of common law DEDICATION, 2.

REBUTTAL.
evidence in, by debtor in trover: TRIAL, 7.

RECEIPTS
for purchase money not proof of land sale: REAL PROPERTY, 10.
of money by successor of town treasurer: TOWNSHIPS, 1.
of fees on appeal bind JUSTICES OF THE PEACE, 9.

RECEIVERS.
jurisdiction of EQUITY, 473.
no *ex parte* receivership: EQUITY, 33; MORTGAGE OF LANDS, 10.

RECOGNITION
of parol trust in lands: REAL PROPERTY, 6–8.
RECOGNIZANCE.
1. *It seems* that in an action on a recognizance given on appeal from a justice's court, the surety therein is not estopped from showing that there is no valid judgment in force against his principal. *People v. Carroll*, 371.
2. A recognizance on an appeal from a justice's court cannot be said to have been given voluntarily when the judgment is void. *Id.*
RECOMMENDATIONS TO MERCY
in verdict: CRIMINAL LAW, 9, 10.
RECONVEYANCE
cancels MORTGAGE OF LANDS, 8.
void as not in writing: MORTGAGE OF LANDS, 8.
RECORD.
affidavits when not part of: PRACTICE, 13.
and briefs, printing of: COSTS, 10.
binds an appellate court: PRACTICE, 12.
must show jurisdictional fact of notice: HIGHWAYS, 4.
neglect to file, costs on continuance: PRACTICE, 19.
objections not shown in, not noticed: NAVIGABLE STREAMS, 4.
strangers to, not affected by decree: ESTATES ETC., 1.
RECORDING LAWS.
When a paper is left with the register with the understanding that it is not to go upon record until further directions, the register, when he receives such directions, must record it as of that time, and not as of the time when it was left with him. *Brigham v. Brown*, 59.
effect of want of consideration for MORTGAGE OF LANDS, 1.
record not entitling to priority: MORTGAGE OF LANDS, 2.
mortgagee bound by directions to register: MORTGAGE OF LANDS, 2.
record entry: MORTGAGE OF LANDS, 4, 5.
omission of mortgagee's name: MORTGAGE OF LANDS, 6.
omission to record DEEDS, 9–12.
improbability of fraudulent record: EQUITY, 22.
failure to record: DEDICATION, 1.
RECOUPMENT.
Parties jointly interested with others in the purchase and lumbering of lands, sold to the others their joint interest before the undertaking was completed, and the latter agreed to pay them certain sums at fixed times, provided these sums did not exceed the investment made by the vendors in the first purchase, the amount of which was unknown at the time of the sale. *Held*, in an action by the vendors against the purchasers, that the latter were entitled to retain what they had paid beyond their own proportion, and also what the vendors would have been liable for in the joint dealings of the two with third parties, and the purchasers continued liable for after the dissolution of their relations. *Edson v. Gates*, 253.
REDEEMABLE TAX LEASE.
holder of as party in partition: EQUITY, 22.
REFEREE.
conclusion when presumed warranted: PRACTICE, 17.
REGISTER
fees of, when to be itemized: COSTS, 11.
REGISTER OF DEEDS.
directions to, mortgagee bound: MORTGAGE OF LANDS, 3.
record by clerk without orders: MORTGAGE OF LANDS, 2.
record entry of MORTGAGE OF LANDS, 4, 5.
omitting name of mortgagee: MORTGAGE OF LANDS, 6.
time to record papers: RECORDING LAWS, 1.

REINSTATEMENT
of members in masonic lodge: ASSOCIATIONS, 1.
RELATION BACK
of officers' acts or omissions: ATTACHMENT, 7.
of probate of WILLS, 6.
of taxation of COSTS, 9.
RELATIONSHIP
disqualifying prosecuting attorney: CRIMINAL LAW, 30.
RELATOR
for mandamus: BASTARDY, 2.
RELEASE
of indorser: MORTGAGE OF LANDS, 19.
of tax lien by state: STATE LANDS, 2.
REMEDIAL STATUTES.
when to be followed strictly: ACTION, 5.
REMEDY.
action at law not sufficient: EQUITY, 4, 5.
against an award: ARBITRATION AND AWARD, 3.
against executor: ESTATES OF DECEDENTS, 11.
existence of other remedies may not prevent MANDAMUS, 2.
for illegalities in tax sales: TAXATION, 27.
for failure to execute process: OFFICERS, 2.
in equity, effect on common law jurisdiction: COURTS, 3.
of county for taxes embezzled by town treasurer: TOWNSHIPS, 4.
of creditors of ESTATES ETC., 10.
on residuary legatee's bond: ESTATES ETC., 22, 23.
removal of building from thoroughfare: INJUNCTIONS, 1
strict following of statute: ACTION, 5.
to obtain specific chattels, is: REPLEVIN, 1.
who has, upon covenants in deed: REAL PROPERTY, 5.
REMOVAL
of building closing thoroughfare: INJUNCTIONS, 1.
REMOVAL OF CAUSES.
showing for: see COURTS, 4, 5.
REMOVAL OF CROP.
rights of heir: ESTATES ETC., 3, 4.
REMOVAL OF TIMBER.
right of action under execution purchase: REAL PROPERTY, 12, 13.
suit for evidence: REAL PROPERTY, 13.
who can bring TRESPASS, 2, 3.
RENEWAL RECEIPT.
payment of premium: INSURANCE, 3.
RENT.
evidence to show title to, excluded: RES JUDICATA, 3.
RENTS AND PROFITS.
receiver, provision for in MORTGAGE OF LANDS, 10.
REPEALS
by implication, not favored: STATUTES, 5.

REPLEVIN.

1. Replevin is the only remedy for getting specific chattels. *Corbitt v. Brong*, 150.
2. Replevin will lie in a state court against a United States marshal to recover goods seized by him on final process issued from a Federal court, where the goods belong to some other person than the defendant named in the writ. *Heyman v. Covell*, 332.
3. A purchaser of goods replevied them from a constable who justified under an execution against the vendor, but it was found that the judgment supporting the execution was invalid. *Held*, that

there was no basis for a showing that the sale to plaintiff was fraudulent. *Wilson v. Martin*, 509.
prevents mortgagee from repudiating ownership: MORTGAGE OF CHATTELS, 6.
REPORT
of equalization, need not be written: TAXATION, 16.
REPUDIATION
of contract must be entire: CONTRACTS, 3.
mortgagee, estopped from: MORTGAGE OF CHATTELS, 6.
of deed to agent, laches: EQUITY, 21.
REPUTATION
as to ownership of land: EJECTMENT, 6.
RE-SALE.
exercise of right of: SALE, 5.
damages on: SALE, 6.
RESCISSION.
excluding evidence of profits: SALE, 8.
of land-contract, recovery: LAND CONTRACTS, 8–10.
of logging contract, set-off: CONTRACTS, 5.
RESERVATION.
effect of, in deed: DEDICATION, 3.
RES GESTÆ.
admissions as part of: EVIDENCE, 1.
on trial for larceny: CRIMINAL LAW, 33.
wife's admissions against husband: EVIDENCE, 2.
RESIDENCE.
effect of identity of: EVIDENCE, 270.
on particular lot, question of HOMESTEAD, 1.
of parties in declaration: PRACTICE, 6.
RESIDUARY CLAIM.
construction of: WILLS, 5.
RESIDUARY LEGATEE.
not called on to account in equity: ESTATES ETC., 22, 23.

RES JUDICATA.

1. If one sues in assumpsit for the value of chattels, where by strict rules only an action of tort would lie, and obtains judgment, the judgment will determine the matters in issue as conclusively as though the proper action had been brought. *Jennings v. Sheldon*, 92.
2. Judgment for defendant for costs, on the ground that the claim sued was not yet due, is no bar to a new suit. *Franks v. Fecheimer*, 177.
3. On exchanging real estate one of the parties gave notes secured by a mortgage upon that which he received, but afterwards, being unable to pay them, reconveyed the property on an oral agreement that the other party should sell it, satisfy the mortgage from the proceeds, and pay him the surplus. The latter sold the property but did not pay over the surplus, and the former recovered judgment for it in another state, on which judgment he afterwards brought suit in this state. *Held* (1) that the plaintiff's right to recover in the former suit was based on the fact that the reconveyance was meant only as a mortgage; (2) that defendant's offer in the latter suit to show how the property was paid for when first conveyed, was rendered immaterial by the judgment; (3) that in the later suit the defendant's offer of the reconveyance to show that he was entitled to wheat growing on the land and to the rent of the premises to the date of their sale, the plaintiff having kept possession, was properly rejected, it having been adjudged that the conveyance was only a mortgage and that the mortgagee had received the full amount of his debt. *Hunt v. Middlesworth*, 448.

RETURN
as to drain commissioner's notice: DRAINS, 2.
as to security for costs: CERTIORARI, 1.
as to service of summons: JUSTICES OF THE PEACE, 3.
motion for farther return: JUSTICES OF THE PEACE, 7.
neglect of justice, remedy on appeal bond: JUSTICES OF THE PEACE, 11.
of summons, time: JUSTICES OF THE PEACE, 2½.
of service of justice's ATTACHMENT, 2.
to appeal, required of JUSTICES OF THE PEACE, 9.
of wife, as preventing DIVORCE, 4.
REVERSAL for improper allowance of fees: JUSTICES OF THE PEACE, 6.
REVIEW.
final judgments are subject to: PRACTICE, 10.
of appellee's objections: ACCOUNTING, 3, 4.
of award: ARBITRATION AND AWARD, 3.
of corporate rights on *certiorari*: RAILROAD COMPANIES, 1.
of order refusing to inflict penalty: OFFICERS, 2; PRACTICE, 8.
what orders and judgments are final: PRACTICE, 8, 9.
REVIVOR of surrendered insurance policy: INSURANCE, 2; EQUITY, 18.
REVOCATION. Agreement for right of flowage: LICENSE, 1.
RIGHT OF FLOWAGE.
effect of written agreement for: LICENSE, 1.
damages for, proper subject of ARBITRATION AND AWARD, 1.
RIPARIAN RIGHTS.
1. The right of navigation, though paramount, is not exclusive, and cannot be so exercised as to wantonly destroy private rights or property that can be enjoyed consistently with it; such as the rights to maintain ice fields or stake-nets, or to run logs, or establish boom limits and dock lines. *People's Ice Co. v. Steamer Excelsior*, 229.
2. A lessee of riparian rights may enclose and store ice for his own use and profit, within the limits embraced in his lease, if he does not thereby interfere with the right of navigation, or with the proper use of the stream by other people. *Id.*
3. A steamer was run back and forth unnecessarily near a boom enclosing a field of ice that was to be stored for the market, and the ice field was thereby destroyed. *Held*, that an action for damages would lie therefor. *Id.*
4. Private ownership of lands bounded on navigable fresh waters is not restricted to the meander line; and even if the owner of the bank did not also own land made within the meander line, it would not belong to the United States, but to the state, which always concedes the right of the owner to the shore. *Pere Marquette Boom Co. v. Adams*, 403.

destruction of ice-field: DAMAGES, 2, 3.
irrevocable agreement for flowage: LICENSE, 1.
damages for: ARBITRATION AND AWARD, 1.
ROBBERY.
child's testimony admitted: CRIMINAL LAW, 36.
contradiction of child's testimony: CRIMINAL LAW, 37.
recognition of assailant; CRIMINAL LAW, 37.
RULE TO PLEAD.
entry of: PRACTICE, 4.
short notice of, default after: JUDGMENTS, 4.
waiver of defects in notice: PRACTICE, 1.
RULES.
Circuit Court Rule 16: Rule to plead, 385.
Chancery Rule 26: Leave to answer on payment of costs, 555.

SALE: *Salability*, 1; *Consideration*, 2; *Affirmance*, 3; *Waiver*, 4; *Re-sale*, 5, 6; *Inspection for acceptance*, 7; *Notice of*, 8.

1. An article that has a market value is presumably salable. *Grosvenor v. Ellis*, 452.
2. Where the only question at issue is, whether property was transferred under one contract or another, and no question of fraud is raised, there is no ground for cross-examining a party as to the value of the consideration. *Leavitt v. Stansell*, 424.
3. An action by the vendor for payment is in affirmance of the sale, and precludes him from denying it. *Beurmann v. Van Buren*, 496.
4. A contract purchaser can waive his claim to a specific lot of merchandise by consenting that it be sold to some other person, or pledged or mortgaged to a creditor as the vendor's property, to revert to the vendor; and if he does so, his ownership ceases, and the merchandise must be regarded as the property of the vendor, and liable to execution against him, subject to the rights of the later purchaser or pledgee. *Anderson v. Brenneman*, 198.
5. A vendor's right of resale must be exercised in good faith and at such time, by such methods and under such circumstances as are most likely to produce the fair value of the property; and he has the burden of showing that it was so exercised. *Brownlee v. Bolton*, 218.
6. The usual measure of damages where merchandise has to be resold, on the failure of the contract purchaser to take it, is the difference between its contract price and its market value at the time and place fixed by the contract for delivery; but if the contract fixes the time for full payment, and the vendor elects to rest upon his right as an unpaid vendor and not to hold the merchandise for delivery as the purchaser may require it, the time of default in payment is the proper one for fixing the difference between the contract price and the market price. *Id.*
7. A contract for delivery of timber "on the rail" of a vessel does not, in the absence of express provision, contemplate that it shall be inspected for acceptance at any later stage. *Id.*
8. S. sold D. as much timber as D. should take away before a certain date, but before that time sold the land without reservation to M., and agreed to settle with D. who presented a claim for the amount he had paid and for getting out the timber. S. did not pay, however, and D. sued him. *Held* (1), that the action was not based on the contract of sale, but the later transactions, to which the contract and the deed to M were mere matters of inducement, and it was for the jury to determine whether D.'s claim was well founded; (2), that it was not material whether or not he had notice of the sale; (3), that as D. recalled the price he had paid and claimed payment for his outlays, he could not show what profits he might have made. *Drysdall v. Smith*, 119.

affirmance by action at law: EQUITY, 21.
at one time, under several levies: EXECUTIONS, 4.
of premises as one parcel: EXECUTIONS, 5.
by donee: GIFTS, 1.
corporate deeds as evidence of: CORPORATIONS, 4.
evidence of land sale: REAL PROPERTY, 10.
for single instalment: MORTGAGE OF CHATTELS, 8, 9.
for taxes; see TAXATION.
of animals; needs no writing: ANIMALS, 1.
of intestate's estate for debts: ESTATES ETC., 3.
of liquors, when forbidden: LIQUOR LAWS, 4.
oral land contract validated by part performance: LAND CONTRACTS, 7.
parol agreement partly performed, as a LICENSE, 2.
to a creditor: DEBTOR AND CREDITOR, 9, 10.
to fiduciary agent: EQUITY, 21.
when cannot be shown fraudulent: REPLEVIN, 3.

SALOONS
to be closed on Christmas: LIQUOR LAWS, 6.
right of action against keeper: LIQUOR LAWS, 1.
SCHOOLS.
1. The trustees of graded public schools can make binding contracts for teaching; and the provisions in the primary school law whereby the voters and the district board shall have full control of the schools during the entire school year, do not apply to graded schools and cannot affect any contract for teaching made by the trustees before the year opened. *Tappan v. School District No. 1 of Carrollton*, 500.
SCINTILLA OF EVIDENCE
gives the case to the jury: TRIAL, 12.
SECURITY.
agreement to pay proceeds of farm to mortgagee, held not to be: MORTGAGE OF CHATTELS, 1.
holder impleaded in creditor's bill: COSTS, 4; EQUITY, 39.
SELECTION OF EXEMPT PROPERTY
by officer for individual partners: EXECUTIONS, 2.
SENTENCE
alternative, void: CRIMINAL LAW, 12.
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SETTING ASIDE DEED
against fiduciary agent: EQUITY, 21.
SETTLEMENT
of mutual claims, constructive parties: CONTRACTS, 1.
SETTLEMENT OF ACCOUNTS
of PARTNERSHIP, 5, 6.
examination of executor under oath: ESTATES ETC., 21.
SETTLEMENT OF ESTATE; see ESTATE OF DECEDENTS.
SET-OFF.
assignee's claim against: ACTION, 6.
claim of in plea cannot establish CONTRACTS, 2.
of damages from delay, interest: DAMAGES, 4.
of payments made to perfect title: REAL PROPERTY, 5.
unliquidated damages not subject of: REAL PROPERTY, 5.
claimed as part of rescission: CONTRACTS, 5.
SEIZURE
of goods of assignee for creditors: BANKRUPTCY, 1–4.
SERVICE
of declaration, certificate of: PRACTICE, 3.
of justice's attachment, return: ATTACHMENT, 2.
omission of, damages are unliquidated: DAMAGES, 6.
omissions of officer, trespass: ATTACHMENT, 7.
personal, when saves irregularities: PRACTICE, 1, 2.
substituted, jurisdiction of JUSTICE OF THE PEACE, 3.
when necessary to sustain JUDGMENTS, 3.
SHERIFFS
1. The sheriff elect entered into a bond, with sureties, which was intended for his official bond as sheriff, and was in all respects correct except that the county was named as obligee therein when the statute required the bond to be given to the people. The board of supervisors approved of the bond as sufficient. *Held*, that as the statute empowered and required the supervisors to examine and approve the bond and the sureties therein, this approval was final and the bond a valid official bond. *Bay County v. Brock*, 45.
2. As the obligee named in such a bond has no active duty to perform, and no voice in taking or approving of the bond, or in bringing suit upon it, and there is no importance in the people being named as obligee rather than the county, it being important only that some

party shall be named as promisee in whose name suits may be brought, the provision for naming the people may be treated as directory merely, and a bond sufficient in substance, which parties have given for the statutory purpose, which has had the statutory approval, and on which the public have relied, will be held sufficient to give the intended security. *Id.*

certificate of service of declaration: PRACTICE, 3.
mandamus to, for imprisonment: BASTARDY, 2.
omission to serve process: DAMAGES, 6.
refusal to punish for contempt, no review: PRACTICE, 8.
sale by under EXECUTIONS, 4.

SHERIFF'S BOND; see SHERIFFS, 1, 2.

SHORE.
right of owner to: RIPARIAN RIGHTS, 4.

SIGNATURE,
proof by comparison: CRIMINAL LAW, 25.

SOCIETY
for unlawful purposes cannot sue as CORPORATION, 1.

SPECIAL APPEARANCE
not a submission to jurisdiction: JUSTICES OF THE PEACE, 1.

SPECIAL DAMAGES
for illegal sale: MORTGAGE OF CHATTELS, 9.
must be alleged and claimed: MORTGAGE OF CHATTELS, 10.

SPECIFIC PERFORMANCE.
when not matter of law: LAND CONTRACTS, 5.

STALE CLAIMS.
purchase of: EQUITY, 4.

STATE OF MICHIGAN.
question of fraud in obtaining STATE LANDS, 1.
recognize owner's right to shore: RIPARIAN RIGHTS, 4.

STATE LANDS.

1. A bill was filed to compel the re-assignment of primary school land certificates wrongfully withheld, and it was claimed in defense that as complainants had obtained these lands from the State by fraud, in filing an affidavit that they were chiefly valuable for agricultural purposes, when they were really valuable for pine timber, they were not entitled to relief. *Held*, that defendants could not avail themselves of such an objection; the question of value only concerned the State, which appeared to be abundantly secured. *Spoon v. Gilbert*, 535.
2. A purchaser of State swamp lands bought when the conditions entitling him to a deed were that he should pay one-fourth down, and the rest, with interest, at any time thereafter. A subsequent statute added the condition to such sales that the taxes should also be paid. The purchaser afterward assigned his certificates of purchase, and the assignee, after paying the rest of the purchase price and the interest, demanded from the commissioner of the land office a certificate entitling him to his deed. The commissioner refused because the taxes had not been paid. Mandamus was granted to compel him to issue the certificate, but it was also *held* that the State did not release any tax lien on the land by giving a deed, and that this would not govern a case where the certificate of purchase had been issued after the passage of the statute. *Robertson v. Land Com'r*, 274.

STATE OFFICERS.
probate judges not, Comp. L., § 7101: QUO WARRANTO, 1.

STATUTE OF AMENDMENTS
saving judgment by default: PRACTICE, 6.

STATUTE OF DESCENTS
applies only to property not devised: ESTATES ETC., 1.

STATUTE OF FRAUDS.
avoiding oral agreements, as to REAL PROPERTY, 9, 11.
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1. Suit was brought on a promissory note which was payable one day after date, and had run eight years. The defendant pleaded *non assumpsit* within six years when he should have pleaded *actio non accrevit* within six years. The error being pointed out, he asked leave to amend, but the justice refused it. *Held*, that the plea as it stood fairly apprised the plaintiff of the defense relied upon, namely, the statute of limitations, and the justice should have allowed the defendant the benefit of it, either with or without the amendment. *Snyder v. Winsor*, 140.
2. A note purporting on its face to be eight years overdue had upon it two indorsements, dated within six years of the time of bringing suit upon it. The only proof offered by the plaintiff in the case was that no *other* payments than those indorsed had been made. *Held*, that this did not prove or tend to prove the indorsed payments. *Id.*

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1. The wisdom or policy of a statute is not a question for the courts so long as it is valid. *Reithmiller v. People*, 280.
2. Acts relating to the same subject and *in pari materia* are to be construed together, and, as the title of an act must express its purpose, the act may be construed in the light of its title if they are not incompatible. *Id.*
3. Where a statute, after enumerating specific cases, uses a general term to cover others, the latter are understood to be of the same general character, sort or kind with those specified. *Brooks v. Cook*, 617.
4. The constitutional provision requiring amended sections of the laws to be enacted in full (Const., art. iv., § 25) does not give the amendment any greater effect upon other portions of the section than it would have if only the actual changes in it were indicated; the nominal re-enactment of other portions of the section does not affect its existing relations to statutes *in pari materia* unless that intention clearly appears. *Gordon v. People*, 485.
5. Repeals by implication should not be established without satisfactory reason to believe the Legislature intended them. *Id.*

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2. Sureties execute a bond in view of its recitals, and their liability cannot be enlarged by contradicting the recitals and showing facts which they cannot be assumed to have known of. *Gunn v. Geary*, 615.
3. No recovery can be had against the sureties on a bond for the jail limits, where the bond recites that the principal is in custody by virtue of a *capias ad respondendum* and the evidence shows it to be under a *capias ad satisfaciendum*, the measure of damages in the first instance being the actual damages sustained by the plaintiff, while in the second, it is the amount of the execution. Comp. L. § 7351. *Id.*
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1. No property is beyond the reach of the taxing power of the State unless designedly put beyond it by an unequivocal act of the sovereign power. *Robertson v. Land Commissioner*, 274.
2. The mere omission to exercise the taxing power in particular instances does not establish an exemption therefrom, but is a mere favor which may be recalled at any time without violating the public faith. *Id.*
3. A contract made by the state cannot be altered by the state except with the consent of the other party; but the state as a sovereign may subject the interest acquired thereby to the taxing and police power, but only as it might so subject to these powers the interest in any contract between individuals. *Id.*
4. The state has power to provide methods for collecting its revenues, and so long as they are general and impartial the courts will not be disposed to limit the exercise of the power merely because they seem harsh, unreasonable and arbitrary. *Id.*
5. The interest acquired under a certificate of purchase of state swamp lands is part of the purchaser's individual property, and is subject to the state's taxing power. *Id.*
6. The Constitution (Art. xiv, § 14), requires every tax law to distinctly state the tax and the object to which it should be applied, and declares that it shall not be sufficient to refer to any other law to fix such tax or object. *Held* that act 268 of 1879, to "provide for the taxation of the business of manufacturing and selling spirituous and intoxicating malt, brewed, or fermented liquors," and to repeal act 228 of 1875, as amended by act 197 of 1877, in directing the tax to be placed to the credit of the contingent fund of the township, city or village from which it is collected, and paid over to the proper local officer to be used for the purposes of that fund, is sufficiently specific. *Westinghausen v. People*, 269.
7. The tax laws of Michigan contemplate that the interest held by a purchaser of primary school or swamp lands shall be assessed as personalty, but that the assessment is to be separate from the general valuation of his personal property and must be made in the township where the land lies, irrespective of the owner's residence, and that if the tax cannot be collected by the customary process, his interest in the land shall be forfeited to the state. *Robertson v. Land Commissioner*, 274.
8. The failure to list property for taxation in accordance with law cannot constitute a wrong to an individual unless he can show that his individual assessments are thereby made a larger proportion of the aggregate taxable property than they should have been. The collection of the tax levy may be restrained in such a case so far as it is excessive. *Moss v. Cummings*, 359.
9. The wrong involved in an assessment of taxes by a supervisor on a false valuation is a public wrong and should be redressed by public prosecution. *Id.*
10. Action lies to recover back moneys paid under tax proceedings that on their face are fatally defective. *Id.*
11. A tax assessment is in the nature of a judgment, and cannot be assailed for fraud or irregularity in a suit against an officer who enforces it under process which on its face is valid. *Id.*
12. It seems that an individual taxpayer has no right of action against a supervisor for assessing property on a false valuation except on the ground of fraud or malice. *Id.*
13. A tax is invalid if the supervisor's certificate to the assessment roll in stating that he has estimated the real estate set down therein at

what he believed to be the true cash value thereof does not add in effect, "and not at the price it would sell for at a forced or auction sale." *Silsbee v. Stockle*, 561.

14. The constitutional requirement that property shall be assessed at its cash value (Const., Art. xiv § 12) is as much designed for securing against over-valuation as under-valuation. *Avery v. E. Saginaw*, 587.
15. A tax payer's assessment cannot be raised by a city board of review without such notice to him as will enable him to appear and object to the valuation on which it rests; if raised without such notice he is only liable upon the former assessment, and if he pays the whole under protest he can recover back the excess in an action against the city therefor. *Id.*
16. The equalization of assessment rolls by the board of supervisors is not defeated by the fact that the report of equalization was not in writing and that there was no written resolution adopting it. *Silsbee v. Stockle*, 561.
17. A board of supervisors in equalizing assessment rolls, determines whether the relative valuations of real property are disproportionate, and makes the necessary additions or deductions to or from the whole taxable property of the township. *Id.*
18. Omission to equalize the assessment rolls at the October session of the board of supervisors as required by Comp. L. § 993 did not defeat a tax where the same board had already made at its June session the equalization required every fifth year by Comp. L. § 303. *Id.*
19. A township tax levy for highway purposes is properly included with the regular highway tax when spread upon the assessment rolls, and need not be placed in the column for township taxes. *Id.*
20. Where a general levy for highway purposes exceeds five mills per cent. on the township valuation, it will defeat any tax sale made for an aggregate of taxes of which it forms a part. *Id.*
21. A township tax exceeding the amount voted by the township may be sustained on the presumption that the township board had exercised its statutory right to increase the amount, if there is no showing to the contrary. *Id.*
22. A county tax is not defeated for want of proper action by the board of supervisors in determining the amount of money to be raised, where the record of the clerk of the board shows the acceptance of a report of the finance committee and the adoption of a resolution to raise the sums reported. *Id.*
23. Where the validity of a tax in aid of a county agricultural society depended on whether or not a certificate by its officers that the society had raised $100 for the year had been presented to the board of supervisors, and the county clerk could find no such certificate in his office, it was *held* presumable that the proper certificate had been presented; and that the presumption could not be rebutted by the testimony of a supervisor that he had no recollection whether it had been or not. *Id.*
24. A surveyor's tax included in a levy is presumably lawful, as such a burden upon particular parcels of land is allowed in some cases to meet the cost of their survey. Comp. L. § 595. *Id.*
25. The statutory provisions that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown (Comp. L., § 1129), are unconstitutional so far as they sustain sales for taxes which are in part illegal. *Id.*
26. It is a presumption of law that the land demanded for a delinquent

tax bears some proportion to the sum to be paid, and that if the tax is in part illegal, some portion of the land sold to pay it is taken to satisfy an illegal demand. *Id.*

27. Tax sales are made in Michigan by the county treasurer, but in most cases he is in no way connected with irregularities; where he has received from the auditor-general a list of the lands with the charges upon them, and has made the sale and accounted for the moneys to the authorities apparently entitled to them, he cannot be held liable for illegalities not chargeable to himself; and there can especially be no remedy against him where the lands are struck off to the State for want of bidders, for no money passes through his hands on State bids. The remedy, if any, is in following the illegal levy and finding the person, officer or municipality finally appropriating the money thereby obtained. *Id.*

28. Penalties for the non-payment of taxes within a fixed time, cannot lawfully exceed legal interest. *Id.*

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1. Tenancy in common extends to the entire premises, but sole possession by any one tenant is not presumed adverse as against the rest, and does not affect their rights, unless held under a claim of exclusive right whereof they have express or implied notice. *Campau v. Campau*, 31.

2. There is no presumption that the interests of tenants in common are equal. *Id.*

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TOWNSHIP BOARD.
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TOWNSHIP CLERK.
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TOWNSHIPS.
1. An entry by a town clerk carrying an apparent balance over from the account of one town treasurer to his successor, is no evidence of the actual receipt of the money by the latter even though his deputy had without his knowledge settled the account of the office accordingly. *Rice v. Sidney Township*, 37.
2. A township treasurer's sureties cannot be bound by a false settlement of his accounts. *Id.*
3. If a township treasurer's liability for funds in his hands, can be discharged by anything but payment, there must at least be an intentional acceptance of another's responsibility instead. *Id.*
4. A county cannot sue a township at common law for the amount of taxes which the township treasurer should have paid into the county treasury, but has embezzled. But it has a statutory right of action upon the township treasurer's bond, or it can enforce by mandamus against the township authorities its statutory right to

have the amount of taxes re-assessed against the township. Comp. L. § 1105. And the failure of the suit on the bond does not bar the remedy against the township itself. *Hart Township v. Oceana County*, 417.
right of board to increase amount voted for TAXATION, 22.
suit in name of, for not killing dog: ACTION, 2.
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TRESPASS: *When lies*, 1; *For cutting timber*, 2, 3; *Evidence*, 4, 5.
1. Trespass does not lie for eating a portion of some meat furnished by a dealer but not paid for, and returned, so far as unimpaired, on account of a disagreement as to the price. *Finch v. Brian*, 517.
2. One in possession, under claim and color of title, can maintain an action for cutting timber and removing it from the land. *Hoffman v. Harrington*, 183.
3. Plaintiff in trespass for cutting and removing timber claimed to have constructive possession under certain probate proceedings; and defendant asked a charge that to entitle him to recover he must show title. *Held*, that a charge that "plaintiff's title, or color of title and possession and occupation were sufficient to entitle him to maintain the action" did not take from the jury the question whether the title was valid or not. *Id.*
4. It is not necessary in an action of trespass to produce a map to enable a witness to point out the locality of the offense. *Id.*
5. In an action before a justice against the owner of a dog for injury done by the dog to a quantity of meat, it was not improper to receive testimony as to the dog's vicious character and roving propensities, as having some bearing on the probabilities. *Cheney v. Russell*, 620.
by heir, removal of crop: ESTATES ETC., 3.
injunction dismissed for want of EQUITY, 22.
in serving writ, liability: ATTACHMENT, 7.
wrong-doer liable for natural results of: DAMAGES, 1.
TRIAL: *Order of Proof*, 1, 2; *Striking out evidence*, 3; *Admissibility*, 4; *Examination*, 5; *Contradiction*, 6; *Rebuttal*, 7; *Charge of court*, 8–11; *Case for jury*, 12, 13; *Verdict*, 14.
1. The order of introducing proof is not subject to review on error unless the discretion exercised by the trial judge in controlling it, is plainly abused. *Hoffman v. Harrington*, 183.
2. It is not necessarily error for a trial court to permit questions to be asked before facts thereby assumed are in evidence. *Id.*
3. A motion to strike out evidence is properly denied if it covers any that is competent. *People v. Dowd*, 488.

4. The effect of excluding testimony bears on the question whether it is admissible. *McGuire v. People*, 286.
5. Where a witness not familiar with the full bearing of questions put to him gives answers that seem ambiguous, or raise suspicions of collusion, it is not improper to show what the facts are. *Id.*
6. An answer by a witness to a question that is purely collateral and cannot arise under any issue raised in the case is not open to contradiction. *Leavitt v. Stunsell*, 424.
7. In trover for goods seized on attachment the defense gave evidence as to the state of the debtor's bank account. *Held*, that on rebuttal the debtor could be asked how much he had checked out of the bank within the period under examination, as it was pertinent to a portion of his affairs examined into by the defense. *Beurmann v. Van Buren*, 496.
8. There is no error in refusing to charge on specific points that are practically covered by other instructions. *Joslin v. Le Baron*, 160.
9. It is proper to direct the jury's attention to important evidence in such terms as to explain the case and aid them to give their attention to essential points, if it is done without misleading them or withdrawing their attention from other important evidence. But when the question is one of fact, and is therefore for the jury alone, it is not error to refuse instructions singling out particular facts and expressing the opinion that if they should be proved, they would decide the issue. *Beurmann v. Van Buren*, 496.
10. A trial judge has a right to introduce into his charge the remarks of the appellate court or other authority or author as to the value of expert evidence, and to read them to the jury. *People v. Niles*, 606.
11. The charge of the trial judge so far as given in the bill of exceptions must be assumed to be correctly reported, but if only part of it is given, it must be closely scrutinized to determine whether injury is done by the instructions when considered together. *Id.*
12. A *scintilla* of evidence gives the case to the jury. *Rosie v. Willard*, 382.
13. A case can be taken from the jury on the facts only when it is susceptible of but one just opinion. *Teipel v. Hilsendegen*, 461.
14. It cannot be assumed that a jury found a false verdict and compromised against conscience. *People v. Long*, 296.

case not to be taken from jury: EJECTMENT, 3.
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conversion of wheat, measure of DAMAGES, 5.
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UNITED STATES
do not own land within meander line: RIPARIAN RIGHTS, 4.
UNITED STATES COURTS.
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USAGE.
1. Local usage can affect the general rules of mercantile and banking law only to a very limited extent, and under circumstances in which it must be considered as made by a party a part of his contract. *N. Y. Iron Mining Co. v. Citizens' Bank,* 344.
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cannot sue for penalty for not killing biting dogs: ACTION, 2.
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judgment under, jurisdiction: COURTS, 2.
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WARRANTY.
1. One who sells chattels with warranty of title, and who, when his vendee is sued for their value by the real owner, takes upon himself the defense of the suit, is bound by the result, whatever may have been the form of action. *Jennings v. Sheldon*, 92.
2. A purchaser with warranty of title need not await the result of a suit by an adverse claimant, before bringing action against the warrantor, though if he does not, he takes upon himself the burden of showing the breach which a judgment in a suit defended by the warrantor might have established. *Id.*

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1. A testator's intent is to be determined from the whole will which is to be given effect as far as it may lawfully be done. *Tewksbury v. French*, 100.
2. A man devised to one of his daughters the s. ¼ of the s. ½ of the s. ¼ of a specified quarter section, and farther described it as containing 15 acres, and as being 15 rods wide by 160 long. There was a similar devise to another daughter, and another was to have a strip 12½ rods wide, and containing 12½ acres. There were three remaining daughters who were to receive the residue share and share alike. The actual quantity in each of the first devises, according to the first clause in the descriptions, would be 30 acres, but if they were construed as giving 30 acres each, there would have been no residue for the last three devisees. *Held*, that they covered only 15 acres. *Id.*
3. A clause in a will described certain property as "being the same land on which the said Sidney Tewksbury now lives." *It seems* that such a description does not necessarily cover the entire tract within the enclosure. *Id.*
4. A man devised certain real estate to two nephews, to be sold when they became of age, and the proceeds to be equally divided between them; but he also provided that his wife was to have control of the property until they became of age. *Held*, that she was to have meanwhile the exclusive and beneficial right of enjoyment. *Hogan v. Hogan*, 147.
5. A testator devised *all* his property to his wife, who was to pay his debts. The next clause was as follows: "The half of the residue after her decease *to be paid* to my two sisters in Scotland share and share alike; if either should die before my wife's death, then the other to have the full half; if both should be dead, then let it be divided between their nearest heirs; the other half to be disposed of as my wife may direct." *Held*, that the widow took the entire estate; and that the will contemplated that if she sold it and did not use all the proceeds during her life, one half of the residue should be paid to his sisters, or their heirs, and the other should be disposed of as the widow should direct. *Weir v. Mich. Stove Co.*, 506.
6. Probate of a will for all purposes relating to the existence and transfer of title, relates back to the death of the testator. *Richards v. Pierce*, 444.

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